

No. 20-1507

**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*

**BRIEF OF ARIZONA, LOUISIANA, AND
TWENTY-TWO OTHER STATES AS *AMICI
CURIAE* IN SUPPORT OF PETITIONERS**

JEFF LANDRY
*Louisiana Attorney
General*

ELIZABETH B. MURRILL
Solicitor General

JOSIAH KOLLMAYER
*Assistant Solicitor
General*

LOUISIANA DEPARTMENT
OF JUSTICE
1885 N. Third St.
Baton Rouge, LA 70804
(225) 205-8009

MARK BRNOVICH
Arizona Attorney General

JOSEPH A. KANEFIELD
*Chief Deputy and
Chief of Staff*

BRUNN W. ROYSDEN III
Solicitor General

MICHAEL S. CATLETT
*Deputy Solicitor General
Counsel of Record*

KATE B. SAWYER
Assistant Solicitor General

OFFICE OF THE ARIZONA
ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025
michael.catlett@azag.gov

*Counsel for Amici Curiae
(Additional Counsel listed on Inside Cover)*

STEVE MARSHALL
*Attorney General
of Alabama*

TREG TAYLOR
*Attorney General
of Alaska*

LESLIE RUTLEDGE
*Attorney General
of Arkansas*

CHRISTOPHER M. CARR
*Attorney General
of Georgia*

LAWRENCE G. WASDEN
*Attorney General
of Idaho*

THEODORE E. ROKITA
*Attorney General
of Indiana*

DEREK SCHMIDT
*Attorney General
of Kansas*

DANIEL CAMERON
*Attorney General
of Kentucky*

LYNN FITCH
*Attorney General
of Mississippi*

AUSTIN KNUDSEN
*Attorney General
of Montana*

ERIC S. SCHMITT
*Attorney General
of Missouri*

DOUGLAS J. PETERSON
*Attorney General
of Nebraska*

WAYNE STENEHJEM
*Attorney General
of North Dakota*

DAVE YOST
*Attorney General
of Ohio*

MIKE HUNTER
*Attorney General
of Oklahoma*

ALAN WILSON
*Attorney General
of South Carolina*

JASON R. RAVNSBORG
*Attorney General
of South Dakota*

HERBERT H. SLATERY III
*Attorney General and
Reporter of Tennessee*

KEN PAXTON
*Attorney General
of Texas*

SEAN D. REYES
*Attorney General
of Utah*

PATRICK MORRISEY
*Attorney General
of West Virginia*

BRIDGET HILL
*Attorney General
of Wyoming*

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INTEREST OF AMICI CURIAE

Amici Curiae—the States of Arizona, Louisiana, Alabama, Alaska, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming (the “Amici States”)—file this brief in support of Petitioners.¹ The undersigned are their respective states’ chief law enforcement or chief legal officers and have authority to file briefs on behalf of the states they represent.

The Attorneys General have experience protecting public safety and citizen interests in states where magazines capable of holding more than ten rounds are lawfully possessed and used. The Amici States the Attorneys General serve are among the forty-three states that permit the standard, eleven-plus capacity magazines that New Jersey has banned (the “Affected Magazines”) and have advanced their compelling interests in promoting public safety, preventing crime, and reducing criminal firearm violence without a magazine ban such as the one here.

The experience in other states shows that the Affected Magazines are common to the point of ubiquity among law-abiding gun owners and their use promotes public safety. Calling the Affected

¹ Pursuant to Rule 37.6, the undersigned certifies that no party’s counsel authored this brief, and only Amici States made a monetary contribution to this brief’s preparation and submission. Counsel of record for all parties received notice of Amici States’ intent to file at least ten days prior to this brief’s due date. *See* Sup. Ct. R. 37.2(a).

Magazines “large-capacity” is a misnomer—they often hold only in the range of eleven to fifteen rounds (in no way a large absolute number) and come standard with many of the most popular firearms. There is nothing sinister about citizens bearing the Affected Magazines. Law-abiding citizens bearing the Affected Magazines with lawful firearms benefit public safety, counter-balance the threat of illegal gun violence, and help make our streets safer.

The Amici States believe that in upholding Assembly Bill No. 2761 (codified at N.J. Stat. Ann. § 2C:39-1(y), 2C:39-3(j)) (“the Act”), the Third Circuit utilized an erroneous construction of the U.S. Constitution, thereby allowing the Second Amendment rights of millions of citizens to be compromised. The Attorneys General submit this brief on behalf of the Amici States they serve to provide their unique perspective on these constitutional questions and protect the critical rights at issue, including the rights and interests of their own citizens.

The Amici States join together on this brief not merely because they disagree with New Jersey’s policy choice, but because the challenged law represents a policy choice that is foreclosed by the Second Amendment. States may enact reasonable firearm regulations that do not categorically ban common arms core to the Second Amendment, but the challenged law fails as it is prohibitive rather than regulatory. New Jersey should not be allowed to invade its own citizens’ constitutional rights, and the Third Circuit should not imperil the rights of citizens in other states with its analysis.

SUMMARY OF ARGUMENT

The Amici States urge the Court to grant certiorari and reverse the Third Circuit’s decision that New Jersey’s ban of the Affected Magazines does not violate the Second Amendment—a decision that conflicts with this Court’s opinions in *Heller*, *McDonald*, and *Caetano*.

In *Heller*, this Court rejected a balancing approach to determine the constitutionality on an outright ban of firearms protected under the Second Amendment. Instead, the Court held that a ban on firearms protected under the Second Amendment was unconstitutional without utilizing any balancing framework. Under *Heller*’s guidance, courts should therefore ask only whether government has *banned arms commonly used by law abiding citizens for lawful purposes*. If so (as in *Heller*, *McDonald*, and *Caetano*), the government has violated the Second Amendment.

The Third Circuit was wrong to apply a “severity of burden and interest balancing test,” especially given that the government here imposed a categorical ban on the Affected Magazines. Using a balancing approach—like strict scrutiny or intermediate scrutiny—on a ban on arms commonly used by law abiding citizens for lawful purposes is inconsistent with this Court’s precedent. Moreover, application of a balancing approach to a ban on protected firearms has understandably been the subject of immense criticism from at least four Justices and numerous court of appeals judges. Application of a balancing test to a categorical ban on protected firearms also reduces clarity in the law and promotes subjectivity.

The enumerated right to bear arms reflected in the Second Amendment is fundamental and predates the Bill of Rights. The right is important to millions of Americans, including many citizens living in disadvantaged communities. The arms at issue in these proceedings are commonly used by millions of law-abiding citizens for a myriad of lawful purposes. New Jersey’s law criminalizes mere possession of commonly-used arms even in the home for self-defense, and therefore the law strikes at the core of the Second Amendment. New Jersey’s outright ban on the Affected Magazines is inconsistent with the Second Amendment, and the Third Circuit erred by concluding otherwise.

ARGUMENT

I. **The Third Circuit’s Interest-Balancing Test Contravenes this Court’s Precedent.**

The Third Circuit erroneously applied an interest-balancing test—an approach this Court already rejected—when considering whether New Jersey’s ban of the Affected Magazines violates the Second Amendment. This approach is not only inconsistent with *Heller* and its progeny, but such an approach also reduces clarity in the law and allows for subjectivity.

A. **The Correct Test Under *Heller*.**

The Second Amendment states that “the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II. This Court made clear over a decade ago that the Second Amendment protects an individual right that “belongs to all Americans,” except those subject to certain “longstanding prohibitions” on the exercise of that

right, such as “felons and the mentally ill.” *District of Columbia v. Heller*, 554 U.S. 570, 581, 622, 626-27 (2008); see *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (incorporating the Second Amendment against the states). The Second Amendment right, therefore, belongs to all “law-abiding, responsible citizens.” *Heller*, 554 U.S. at 635. In *Heller*, the Court created a simple test for those “Arms” that enjoy the Constitution’s protections: the Second Amendment protects a right to possess “Arms” that are “typically possessed by law-abiding citizens.” *Id.* at 624-25. With this formulation, the Court provided an easily understood and applied test.

Thus, when a law bans possession of an item, under *Heller*, courts should first ask whether the banned item qualifies as “Arms” under the Second Amendment. If so, courts should ask only whether the banned “Arms” are (1) commonly used, (2) by law abiding citizens, (3) for lawful purposes, including for self-defense or defense of “hearth and home.” See *Heller*, 554 U.S. at 624, 635. If so, then the banned item is categorically protected under the Second Amendment and no further analysis is needed. *Id.* at 634-35. This test closely tracks the text of the Second Amendment, and is consistent with the history of gun ownership for self-defense as a key component of the American understanding of ordered liberty. See *id.* at 628-29.

B. The Third Circuit’s Interest-Balancing Approach Is Inconsistent With *Heller* And Its Progeny.

In the aftermath of *Heller*, lower courts, starting with the Third Circuit, strayed from the test the Court set forth in *Heller*. Instead of asking whether the item banned is commonly used by law-abiding citizens for lawful purposes, the Third Circuit created an indeterminate and value-laden balancing test. *See United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010). Under that test, the Court first makes a value judgment about whether the laws or regulations at issue, even categorical bans, “severely limit the possession of firearms.” *See id.* Even those that do still may survive under strict scrutiny. *See id.* Those that do not are subject to intermediate scrutiny, which requires a “‘significant,’ ‘substantial,’ or ‘important’” government interest and a “reasonable fit” that does not burden more conduct than is “reasonably necessary[.]” *See id.* at 97-98.

Applying an interest-balancing test to a ban on firearms commonly used by law-abiding citizens for lawful purposes is inconsistent with *Heller* and its progeny. One of the dissents in *Heller* argued that the Court should adopt an “interest-balancing inquiry” that “asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.” 554 U.S. at 689-90 (Breyer, J., dissenting). The majority rejected such an inquiry, explaining that the Second Amendment “takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is

really worth insisting upon.” *Id.* at 634. The Second Amendment “elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” *Id.* at 635.

Just two years later, in *McDonald*, the dissenting opinion again questioned the propriety of incorporating the Second Amendment against the states when doing so would require judges to make difficult empirical judgments. 561 U.S. at 922-25. Justice Alito’s controlling opinion for the Court rejected the suggestion that a balancing test would apply: “As we have noted, while the [dissenting opinion] in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion.” *Id.* at 791; *see id.* at 811 (Thomas, J., concurring) (discussing the phrase “deeply rooted in this Nation’s history and tradition” as a key component of the correct test).

Similarly, in *Caetano v. Massachusetts*, the Court, without employing a balancing test, rejected a decision from the Supreme Judicial Court of Massachusetts upholding a ban on the possession of stun guns.² 577 U.S. 411, 411-12 (2016); *see id.* at 418 (Alito, J., concurring) (“[T]he relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes.”).

² On remand, the Supreme Judicial Court overturned the ban, reasoning that “we now conclude that stun guns are ‘arms’ within the protection of the Second Amendment. Therefore, under the Second Amendment, the possession of stun guns may be regulated, but not absolutely banned.” *Ramirez v. Massachusetts*, 94 N.E.3d 809, 815 (Mass. 2018).

Several members of the Court have expressed concern that the lower courts are misapplying *Heller* in a manner inconsistent with the Second Amendment. See *N.Y. State Rifle & Pistol Ass’n, Inc. v. City of New York*, 140 S. Ct. 1525, 1527 (2020) (Kavanaugh, J., concurring) (“I share Justice ALITO’s concern that some federal and state courts may not be properly applying *Heller* and *McDonald*.”); *id.* at 1544 (Alito, J. dissenting joined by Thomas and Gorsuch, JJ.) (“We are told that the mode of review in this case is representative of the way *Heller* has been treated in the lower courts. If that is true, there is cause for concern.”); *Rogers v. Grewal*, 140 S. Ct. 1865, 1866 (2020) (Thomas, J., joined by Kavanaugh, J., dissenting from the denial of certiorari) (“But, as I have noted before, many courts have resisted our decisions in *Heller* and *McDonald*.”); *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from the denial of certiorari) (“The Court’s decision to deny certiorari in this case reflects a distressing trend: the treatment of the Second Amendment as a disfavored right.”); *Jackson v. City & County of San Francisco*, 135 S. Ct. 2799, 2802 (2015) (Thomas, J., joined by Scalia, J., dissenting from the denial of certiorari) (“The Court should have granted a writ of certiorari ... to reiterate that courts may not engage in this sort of judicial assessment as to the severity of a burden imposed on core Second Amendment rights.”).

Numerous circuit judges have expressed concern about the conflict between an intermediate scrutiny or interest-balancing test and the test announced in *Heller*. See, e.g., *Heller v. District of Columbia*

(*Heller II*), 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (“In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.”); *Ass’n of N.J. Rifle & Pistol Clubs Inc. v. Att’y Gen. of N.J.*, 974 F.3d 237, 262 (3d Cir. 2020) (Matey, J., dissenting) (expressing “serious doubts” that the Court’s test “can be squared with *Heller*”); *Ass’n of N.J. Rifle & Pistol Clubs Inc. v. Att’y Gen. of N.J.*, 910 F.3d 106, 128-29 (3d Cir. 2018) (Bibas, J., dissenting) (criticizing the majority’s “balancing approach” because “the *Heller* majority rejected it”); *Binderup v. Att’y Gen. of the U.S.*, 836 F.3d 336, 378 (3d Cir. 2016) (en banc) (Hardiman, J., concurring in part) (“Applying some form of means-end scrutiny in an as-applied challenge against an absolute ban ... eviscerates that right [to keep and bear arms] via judicial interest balancing in direct contravention of *Heller*.”); *Mance v. Sessions*, 896 F.3d 390, 394 (5th Cir. 2018) (Elrod, J., dissenting from denial of en banc rehearing) (“Simply put, unless the Supreme Court instructs us otherwise, we should apply a test rooted in the Second Amendment’s text and history—as required under *Heller* and *McDonald*—rather than a balancing test like strict or intermediate scrutiny.”); *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 837 F.3d 678, 702-03 (6th Cir. 2016) (Batchelder, J., concurring) (“The Supreme Court has at every turn rejected the use of interest balancing in adjudicating Second Amendment cases.”).

These numerous judges are correct. The Third Circuit is not the only circuit to have strayed and

employed a balancing test to govern cases such as this one. See, e.g., *Worman v. Healey*, 922 F.3d 26, 37-38 (1st Cir. 2019), cert. denied, 141 S. Ct. 109 (2020); *Friedman v. City of Highland Park*, 784 F.3d 406, 414-15 (7th Cir. 2015); *Kachalsky v. County of Westchester*, 701 F.3d 81, 89 n.9 (2d Cir. 2012). Those circuits also erred, misreading the Court’s precedent. Again, the Second Amendment “takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon.” *Heller*, 554 U.S. at 634. The *Heller* test provides the appropriate framework for analyzing the fundamental rights protected in the Second Amendment. The Court should grant certiorari to make clear to lower courts, yet again, that the analytical framework in *Heller*, and not a balancing test, must be applied to determine the constitutionality of restrictions on the right to keep and bear arms.

C. An Interest Balancing Approach Reduces Clarity In The Law And Promotes Subjectivity.

American citizens and state legislatures deserve a clear standard they can utilize to readily determine the line that government cannot cross when regulating “arms,” as well as the materials required for “arms” to function, such as the Affected Magazines. A balancing approach becomes “an overly complex analysis that people of ordinary intelligence cannot be expected to understand”—a test that “obfuscates” more than aids understanding. *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1117-18 (S.D. Cal. 2017). The *Heller* test, by contrast, is rooted in objective

historical and current evidence of the prevalence of “arms” and their use by law-abiding citizens in America, as well as the plain text of the Second Amendment, making for “a test that anyone can figure out.” *Id.* at 1117.

While some may write the Second Amendment off as a relic of a bygone era, in reality, the ability to defend one’s self remains essential to millions of Americans. As the Ninth Circuit recently explained, “[o]ur country’s history has shown that communities of color have a particularly compelling interest in exercising their Second Amendment rights.” *Duncan v. Becerra*, 970 F.3d 1133, 1155 (9th Cir. 2020), *reh’g en banc granted, opinion vacated*, 988 F.3d 1209 (9th Cir. 2021). The same is true for women; guns can allow women to protect themselves more effectively against “abusers and assailants.” *Id.*; *see also* Daniel Peabody, *Target Discrimination: Protecting the Second Amendment Rights of Women and Minorities*, 48 *Ariz. St. L.J.* 883, 910-13 (2016). Similarly, those in high-crime communities where law enforcement is stretched thin often cannot rely on the government for prompt protection against criminals and so highly value the right to own weapons for self-defense. *Duncan*, 970 F.3d at 1161; *see also McDonald*, 561 U.S. at 790 (“If [petitioners are correct], the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials.”).

“A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.” *Heller*, 554 U.S. at 634. To fully protect fundamental constitutional rights, a total ban on their exercise, like that New

Jersey has imposed here, must not be subjected to imprecise balancing tests based on “a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor.” *McDonald*, 561 U.S. at 804 (Scalia, J., concurring). Allowing a ban on the exercise of a fundamental right to rise and fall based on the policy assessment of judges—even when those judges are wise and well-meaning—runs counter to the basic idea of the Bills of Rights and needlessly injects greater uncertainty. See *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (“These [tiers of scrutiny] are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to [the Supreme Court] which test will be applied in each case.”).

Applying an “intermediate scrutiny” or even a “strict scrutiny” test is particularly inapt in the case of a *ban* on a class of “Arms” protected under the Second Amendment. Applying typical safety concerns to such a ban could easily result in a “balancing test” that leads to the conclusion that banning otherwise protected firearms is acceptable. But, as explained above, the Supreme Court flatly rejected such a conclusion in both *Heller* and *McDonald*. As Justice Alito later explained, this is because “the relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes.” See *Caetano*, 577 U.S. at 418 (Alito, J., concurring). In other words, the Founders already performed the balancing of interests and concluded that the need for self-defense, against both criminals and potential

tyranny, outweighs the safety risk of firearms commonly possessed by law-abiding citizens. *Heller*, 554 U.S. at 635. The Court should grant certiorari and reject the Third Circuit's disregard of the Founders' conclusion enshrined in the Second Amendment.

II. New Jersey's Magazine Ban Is Unconstitutional Because It Is A Categorical Ban On "Arms" Commonly Used By Law-Abiding Citizens For Lawful Purposes.

State legislatures have broad discretion in crafting policy, but not in conflict with the text of the Constitution. New Jersey's outright ban on Affected Magazines strikes at the core of the Second Amendment. The Third Circuit below correctly held that the Affected Magazines are "Arms" under the Second Amendment. 910 F.3d at 116. The Affected Magazines are also commonly used by law-abiding citizens for lawful purposes, including in defense of hearth and home.

Thus, when New Jersey enacted such a statewide and retroactive ban on the mere possession of the Affected Magazines, it destroyed the core of the Second Amendment right. And when such destruction occurs, interests should not be balanced.³ *See Heller*, 554 U.S. at 634 ("We know of no other enumerated constitutional right whose core

³ This, of course, does not mean that New Jersey cannot regulate the possession or use of Affected Magazines if such regulations are consistent with prior longstanding regulations on the right to keep and bear arms.

protection has been subjected to a freestanding ‘interest-balancing’ approach.”).

Possessing Affected Magazines is an integral aspect of the right to “keep and bear arms” and regulating their possession implicates the core of the Second Amendment. *See Luis v. United States*, 136 S. Ct. 1083, 1097 (2016) (Thomas, J., concurring) (“The right to keep and bear arms ... implies a corresponding right to obtain the bullets necessary to use them.”); *see also Fyock v. City of Sunnyvale*, 779 F.3d 991, 999 (9th Cir. 2015) (“Because Measure C restricts the ability of law-abiding citizens to possess large-capacity magazines within their homes for the purpose of self-defense, we agree with the district court that Measure C may implicate the core of the Second Amendment.”); *cf. Heller*, 554 U.S. at 630, (holding that “the District’s requirement (as applied to respondent’s handgun) that firearms in the home be rendered and kept inoperable at all times ... makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional”). Indeed, *Heller* did not differentiate between regulations governing ammunition and regulations governing firearms themselves. *See* 554 U.S. at 632; *see also United States v. Miller*, 307 U.S. 174, 179-80 (1939) (citing 1 Herbert L. Osgood, *The American Colonies in the 17th Century* 499 (1904) (discussing the implicit right to possess ammunition)).

Lower courts have correctly rejected any illusory distinction between firearms and ammunition, noting that a regulation on the latter does not fall “outside the historical scope of the Second Amendment.” *Jackson v. City & County of San*

Francisco, 746 F.3d 953, 967-68 (9th Cir. 2014) (“[R]estrictions on ammunition may burden the core Second Amendment right of self-defense.”); *Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1276 (N.D. Cal. 2014), *aff’d*, 779 F.3d 991 (9th Cir. 2015) (collecting cases). Thus, that New Jersey has banned magazines, and not the firearms for which they are needed, does not alter the constitutional analysis.

As for commonality, the Affected Magazines are essential to “bear[ing] arms” in that they are standard and integral to some of the most popular firearms in America. *See Ass’n of N.J. Rifle & Pistol Clubs*, 974 F.3d at 256 (Matey, J., dissenting) (collecting sources demonstrating the popularity and ubiquity of the Affected Magazines). The Affected Magazines are commonly used in many handguns, which the Supreme Court has recognized as the “quintessential self-defense weapon.” *Heller*, 554 U.S. at 629. “[N]early half of all magazines in the United States today hold more than ten rounds of ammunition.” *Duncan*, 970 F.3d at 1147; *see Heller II*, 670 F.3d at 1261 (“We think it clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in ‘common use,’ as the plaintiffs contend” because “fully 18 percent of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten rounds, and approximately 4.7 million more such magazines were imported into the United States between 1995 and 2000.”). By banning the mere possession of magazines necessary to operate millions of guns, including some of the most widely-used guns in America, New Jersey has also banned

use of those guns, including in the home for self-defense.

Moreover, use of Affected Magazines is not a new phenomenon; magazines holding more than ten rounds have existed for centuries. *See Ass'n of N.J. Rifle & Pistol Clubs*, 974 F.3d at 257-58 (Matey, J., dissenting) (analyzing the history of regulations on the Affected Magazines and concluding that it “reveals a long gap between the development and commercial distribution of magazines, on the one hand, and limiting regulations, on the other hand”); *see also Duncan*, 970 F.3d at 1147 (“Firearms or magazines holding more than ten rounds have been in existence—and owned by American citizens—for centuries.”); *id.* at 1147-48 (detailing the long history of arms equipped with multi-round capabilities). And government regulation of large capacity magazines is of relatively recent vintage. *See Ass'n of N.J. Rifle & Pistol Clubs*, 974 F.3d at 258 (Matey, J., dissenting) (“Yet regulations did not grow until the 1990s and 2000s, and even today, only a handful of states limit magazine capacity.”); *see also Duncan*, 970 F.3d at 1151 (“Modern [large capacity magazine] restrictions are of an even younger vintage, only enacted within the last three decades.”).

It is evident, therefore, that the Act fails under the Second Amendment because it is a categorical ban on the possession of Affected Magazines, which are “Arms.” Here, like in *Heller*, the state has outlawed a class of arms “overwhelmingly chosen by American society for [the] lawful purpose [of self-defense].” *Heller*, 554 U.S. at 628. Moreover, New Jersey’s ban reaches into the home, where “Second Amendment guarantees are at their zenith.” *Kachalsky*, 701 F.3d

at 89; *see also McDonald*, 561 U.S. at 780 (right to keep and bear arms applied “most notably for self-defense within the home”). The Court should grant certiorari to make clear that an outright ban on arms commonly used by law-abiding citizens, like New Jersey’s here, is unconstitutional.⁴

CONCLUSION

For the foregoing reasons, Amici States respectfully request that the Court grant certiorari and reverse the decision below.

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JEFF LANDRY
*Louisiana Attorney
General*
ELIZABETH B. MURRILL
Solicitor General
JOSIAH KOLLMEYER
*Assistant Solicitor
General*

LOUISIANA DEPARTMENT
OF JUSTICE
1885 N. Third St.
Baton Rouge, LA 70804
(225) 205-8009

Respectfully submitted,

MARK BRNOVICH
Arizona Attorney General
JOSEPH A. KANEFIELD
*Chief Deputy and
Chief of Staff*
BRUNN W. ROYSDEN III
Solicitor General
MICHAEL S. CATLETT
*Deputy Solicitor General
Counsel of Record*
KATE B. SAWYER
Assistant Solicitor General
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025
michael.catlett@azag.gov

*Counsel for Amici Curiae
(Additional Counsel listed below)*

⁴ An outright ban such as that New Jersey adopted also fails under an intermediate or strict scrutiny test. An outright ban is the antithesis of tailoring.

STEVE MARSHALL
*Attorney General
of Alabama*

TREG TAYLOR
*Attorney General
of Alaska*

LESLIE RUTLEDGE
*Attorney General
of Arkansas*

CHRISTOPHER M. CARR
*Attorney General
of Georgia*

LAWRENCE G. WASDEN
*Attorney General
of Idaho*

THEODORE E. ROKITA
*Attorney General
of Indiana*

DEREK SCHMIDT
*Attorney General
of Kansas*

DANIEL CAMERON
*Attorney General
of Kentucky*

LYNN FITCH
*Attorney General
of Mississippi*

AUSTIN KNUDSEN
*Attorney General
of Montana*

ERIC S. SCHMITT
*Attorney General
of Missouri*

DOUGLAS J. PETERSON
*Attorney General
of Nebraska*

WAYNE STENEHJEM
*Attorney General
of North Dakota*

DAVE YOST
*Attorney General
of Ohio*

MIKE HUNTER
*Attorney General
of Oklahoma*

ALAN WILSON
*Attorney General
of South Carolina*

JASON R. RAVNSBORG
*Attorney General
of South Dakota*

HERBERT H. SLATERY III
*Attorney General and
Reporter of Tennessee*

KEN PAXTON
*Attorney General
of Texas*

SEAN D. REYES
*Attorney General
of Utah*

PATRICK MORRISEY
*Attorney General
of West Virginia*

BRIDGET HILL
*Attorney General
of Wyoming*