No. 22-1478

In the United States Court of Appeals for the First Circuit

STEFANO GRANATA, et al.,

Plaintiffs–Appellants,

v.

MAURA HEALEY, et al.,

Defendants–Appellees.

Appeal from the United States District Court
for the District of Massachusetts
The Honorable Rya W. Zobel
Case No. 1:21-CV-10960-RWZ

PLAINTIFFS' MOTION FOR VACATUR AND REMAND

RAYMOND M. DIGUISEPPE
THE DIGUISEPPE LAW FIRM, P.C.
4320 Southport-Supply Road
Suite 300
Southport, NC 28461
910-713-8804
law.rmd@gmail.com

Counsel for Plaintiffs–Appellants

CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants submit this corporate disclosure and financial interest statement pursuant to Federal Rule of Appellate Procedure 26.1.

Firearms Policy Coalition, Inc., has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

/s/ *Raymond M. DiGuiseppe*
Counsel for Appellants

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

Under Rule 27 of the Federal Rules of Appellate Procedure and the Rulebook of the United States Court of Appeals for the First Circuit, Plaintiffs-Appellants hereby respectfully request that this Court vacate the district court's judgment and remand the matter for further proceedings consistent with the Supreme Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022) ("*Bruen*").

I. Background

Plaintiffs are pursuing a Second Amendment challenge to the constitutionality of Massachusetts's "Approved Firearms Roster" and related regulations, under which the Commonwealth broadly prohibits the commercial sale and transfer of numerous handguns otherwise in common use and widely available for purchase throughout the country based on its own legislative judgment that these arms should be deemed unsafe and thus broadly prohibited from sale or transfer to the ordinary, law-abiding citizens of Massachusetts (the "challenged regulations").

On August 20, 2021, Defendants moved to dismiss Plaintiffs' complaint for failure to state a claim for relief under rule 12(b)(6) of the

Federal Rules of Civil Procedure ("Rule 12(b)(6)"). Dkt. Nos. 14 & 15. Plaintiffs filed their opposition on September 17, 2021, Dkt. No. 18, and Defendants filed their reply on November 3, 2021, Dkt. No. 22. On May 19, 2022, the district court granted the motion, Dkt. No. 24 (Exhibit A), dismissing the complaint, Dkt. 25. Plaintiffs filed their notice of appeal on June 15, 2022. Dkt. No. 26. Eight days later, on June 23, 2022, the Supreme Court issued *Bruen*, which squarely rejected the prevailing "two-step" test for deciding Second Amendment claims—the test that had driven the parties' litigation over the motion to dismiss and the district court's decision to grant it—and supplanted it with a very different test.

Plaintiffs' opening brief on the merits is currently due on September 12, 2022.[1] For the following reasons, vacatur of the district court's judgment and remand for further proceedings in light of *Bruen*, so that the district court adjudicates Plaintiffs' Second Amendment claim under the *Bruen* test in the first instance, is not only appropriate but the most judicious course of action at this time.

[1] Plaintiffs will be seeking an extension of time for the opening brief by separate motion so as to ensure sufficient time for a ruling on this motion before the brief is due, among other reasons.

II. The Wake of *Bruen*

Since *Bruen* was published, federal circuit courts of appeal have summarily vacated a litany of district court judgments rendered in Second Amendments cases before *Bruen* was decided, remanding them for further proceedings in light of *Bruen*. *See e.g.*, *Rupp v. Bonta*, No. 19-56004 (June 28, 2022) (9th Cir. Dkt. 71), 2022 WL 2382319; *McDougall v. Cty. of Ventura*, No. 20-56220 (June 29, 2022) (en banc) (9th Cir. Dkt. 55), 38 F.4th 1162; *Martinez v. Villanueva*, No. 20-56233 (July 6, 2022) (9th Cir. Dkt. 45), 2022 WL 2452308; *Taveras v. New York City*, 2022 WL 2678719 (2d Cir. July 12, 2022); *Sibley v. Watches*, 2022 WL 2824268 (2d Cir. July 20, 2022); *Miller v. Bonta*, No. 21-55608 (Aug. 1, 2022) (9th Cir. Dkt. 27), 2022 WL 3095986; *Oakland Tactical Supply, LLC v. Howell Twp.*, 2022 WL 3137711 (6th Cir. Aug. 5, 2022); *Young v. Hawaii*, No. 12-17808 (Aug. 19, 2022) (en banc) (9th Cir. Dkt. 329), 2022 WL 3570610; *Cupp v. Bonta*, No. 21-16809 (Aug. 19, 2022) (9th Cir Dkt. 23); *New Jersey Rifle & Pistol Clubs Inc. v. Attorney General New Jersey* (*ANJRPC*), No. 19-3142 (Aug. 25, 2022) (3d Cir. Dkt. 147-1).

This is fully consistent with the practice of reversing and remanding for reconsideration by the district court in the first instance when

intervening Supreme Court authority materially alters the legal standards of the issues on appeal. *See U.S. v. Bradley*, 426 F.3d 54, 55-56 (1st Cir. 2005) (remanding to the district court for resentencing in light of intervening Supreme Court authority impacting the relevant sentencing guidelines); *accord U.S. v. Byrne*, 435 F.3d 16, 28 (1st Cir. 2006); *Town of Barnstable v. O'Connor*, 786 F.3d 130, 143 (1st Cir. 2015) (declining "to decide questions of law upon which the district court has itself not yet focused or addressed other than in passing"); *accord LimoLiner, Inc. v. Datto*, 839 F.3d 61, 62 (1st Cir. 2016); *Salazar v. Buono*, 559 U.S. 700, 722 (2010) ("In light of the finding of unconstitutionality in *Buono I*, and the highly fact-specific nature of the inquiry, it is best left to the District Court to undertake the analysis in the first instance" regarding the application of the law to the facts).

The courts that have included reasoning for their summary reversals in the light of *Bruen* have all explained they are following this general practice. *See Sibley*, 2022 WL 2824268, at *1 ("We remand the case to the District Court to consider in the first instance the impact, if any, of *Bruen* on Sibley's claims, which concern a different provision imposing a 'good moral character' requirement on applications for both carry and

at-home licenses."); *Oakland Tactical Supply*, 2022 WL 3137711, at *2 ("The district court should decide, in the first instance, whether Oakland Tactical's proposed course of conduct is covered by the plain text of the Second Amendment" and, if so, "determine whether historical evidence—to be produced by the Township in the first instance—demonstrates that the Ordinance's shooting-range regulations are consistent with the nation's historical tradition of firearm regulation."); *Taveras*, 2022 WL 2678719, at *1 ("Because neither the district court nor the parties' briefs anticipated and addressed this new legal standard, it is appropriate for us to vacate the district court's judgment and remand the case for the district court to reconsider Taveras's claim, applying in the first instance the standard articulated by the Supreme Court in *Bruen*."); *ANJRPC* Order at 1, n. 1, Ex. 2 (reversing and remanding because *Bruen* "provided lower courts with new and significant guidance on the scope of the Second Amendment and the particular historical inquiry that courts must undertake when deciding Second Amendment claims").

Bruen compels the same result here for the same essential reasons.

III. The Framework Under *Bruen*

As the Supreme Court explained in *Bruen*, in the years since *Heller* and *McDonald*, "the Courts of Appeals have coalesced around a 'two-step' framework for analyzing Second Amendment challenges that combines history with means-end scrutiny." *Bruen*, 142 S.Ct. at 2125. "At the first step, the government may justify its regulation by 'establish[ing] that the challenged law regulates activity falling outside the scope of the right as originally understood.'" *Id.* at 2126 (quoting *Kanter v. Barr*, 919 F.3d 437, 441 (7th Cir. 2019)). "If the government can prove that the regulated conduct falls beyond the Amendment's original scope" based on "its historical meaning," "'the analysis can stop there'" because "'the regulated activity is categorically unprotected'" under this test. *Id.* (quoting *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012)). "But if the historical evidence at this step is 'inconclusive or suggests that the regulated activity is not categorically unprotected,' the courts generally proceed to step two." *Id.* (quoting *Kanter*, 919 F.3d at 441).

"At the second step, courts often analyze 'how close the law comes to the core of the Second Amendment right and the severity of the law's burden on that right,'" *Bruen*, 142 S.Ct. at 2126 (quoting *Kanter*, 919 F.3d

at 441), while "generally maintain[ing] 'that the core Second Amendment right is limited to self-defense *in the home*,'" *id.* (quoting *Gould v. Morgan*, 907 F.3d 659, 668-69 (1st Cir. 2018)). "If a 'core' Second Amendment right is burdened, courts apply 'strict scrutiny' and ask whether the Government can prove that the law is 'narrowly tailored to achieve a compelling governmental interest.'" *Id.* (quoting *Kolbe v. Hogan*, 849 F.3d 114, 133 (4th Cir. 2017)). "Otherwise, they apply intermediate scrutiny and consider whether the Government can show that the regulation is 'substantially related to the achievement of an important governmental interest.'" *Id.* at 2126-27 (quoting *Kachalsky v. County of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012)).

The First Circuit's test was in accord: "Under this approach, the court first asks whether the challenged law burdens conduct that falls within the scope of the Second Amendment's guarantee" based on "whether the regulated conduct 'was understood to be within the scope of the right at the time of ratification.'" *Gould v. Morgan*, 907 F.3d at 668-69 (quoting *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010)). "If the challenged law imposes no such burden, it is valid. If, however, it burdens conduct falling within the scope of the Second Amendment, the

court then must determine what level of scrutiny is appropriate and must proceed to decide whether the challenged law survives that level of scrutiny." *Id.* at 669. And, like many, this Court maintained the view that "the core Second Amendment right is limited to self-defense in the home," *id.* at 671, a view the Supreme Court also jettisoned in *Bruen* by affirming that the right unquestionably extends outside the home. *Bruen* at 2134-35; *id.* at 2135 ("confining the right to 'bear' arms to the home would make little sense given that self-defense is 'the central component of the [Second Amendment] right itself,'" *Heller*, 554 U.S. at 599, and it "would nullify half of the Second Amendment's operative protections").

This Court also followed the common practice of bypassing step one by assuming without deciding that the regulated conduct falls within the Second Amendment and resting the analysis on the means-ends scrutiny of step two. *See Worman v. Healey*, 922 F.3d 26, 35 (1st Cir. 2019) ("reluctant to plunge" into th[e] factbound morass" of step one, "we simply assume, albeit without deciding, that the Act burdens conduct that falls somewhere within the compass of the Second Amendment"); *Peña v. Lindely*, 898 F.3d 969, 976 (9th Cir. 2018) ("we and other courts often have assumed without deciding that a regulation does burden conduct

protected by the Second Amendment rather than parse whether the law falls into th[e] exception" in terms of "the presumption of legality for 'conditions and qualifications on the commercial sale of arms'").

Bruen rejected this test as inconsistent with *Heller*: while "[s]tep one of the predominant framework is broadly consistent with *Heller*," insofar as it is "rooted in the Second Amendment's text, as informed by history," the true test demanded by *Heller* and *McDonald* involves a single inquiry, precisely "centered on constitutional text and history," with no means-end scrutiny at all. *Bruen*, 142 S.Ct at 2128-29; *id.* at 2129 (quoting *Heller*, 554 U.S. at 634 ("*Heller* and *McDonald* expressly rejected the application of any 'judge-empowering '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'"). Under this test, the court asks only whether "the Second Amendment's plain text covers" the regulated conduct. *Id.* at 2129. If so, "the Constitution presumptively protects that conduct," and the government must "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* Stated otherwise, "the government must

affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127.

An historical analysis like this "can be difficult" because "it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it.'" *Bruen*, 142 S.Ct. at 2130 (quoting *McDonald v. City of Chicago*, 561 U.S. at 803–804 (2010) (Scalia, J., concurring). The court provided guidance in the proper application of this test. It explained that the Second Amendment's "meaning is fixed according to the understandings of those who ratified it," although its protection "can, and must, apply to circumstances beyond those the Founders specifically anticipated," so that, for example, to it "'extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.'" *Id.* at 2132 (quoting *Heller*, 554 U.S. at 584)). "Much like we use history to determine which modern 'arms' are protected by the Second Amendment, so too does history guide our consideration of modern regulations that were unimaginable at the founding." *Id.* "[T]his historical inquiry that courts must conduct will

often involve reasoning by analogy"—i.e., "a determination of whether the historical and current regulations are "'relevantly similar.'" *Id.* While an "historical *twin*" isn't necessary, the government must "identify a well-established and representative historical *analogue*." *Id.* at 2133.

Further, "*Heller* and *McDonald* point toward at least two metrics" as key factors in this analysis: "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Bruen*, 142 S.Ct. at 2133. "Therefore, whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*' considerations when engaging in an analogical inquiry." *Id.* (quoting *McDonald*, 561 U.S. at 767). Importantly, however, in no event may courts "engage in independent means-end scrutiny under the guise of an analogical inquiry, because "the Second Amendment is the 'product of an interest balancing *by the people*," not the evolving product of federal judges." *Id.* n. 7 (quoting *Heller*, 554 U.S. at 635) (emphasis in *Bruen*).

IV. The Current Record Was Developed Based on the Standards of the "Two-Step" Test that *Bruen* Squarely Rejected

Here, the district court followed the same then well-trodden path in applying the First Circuit's articulation of the now-invalidated "two-step" test. Ex. 1 at 7-8 (setting forth the standards articulated in *Gould v. Morgan*, 907 F.3d 659 as the "Second Amendment Legal Framework"). And it took the typical detour around any textual or historical analysis of the actual scope of the Second Amendment as it relates to the rights at stake, bypassing "step one" to just "assum[e], without deciding, that the challenged regulations touch on conduct protected by the Second Amendment." *Id.* (following *Peña* to "bypass" such an inquiry). The court then immediately proceeded to the "step two," where it quickly found the challenged regulations subject to the then commonly applied "intermediate" form of means-end scrutiny. *Id.* at 9-12. In finding that the challenged regulations impose a "modest burden" on Plaintiffs, the court also emphasized the prevailing view that the Amendment secures only a limited right "'to bear arms for self-defense in one's home.'" *Id.* at 10 (quoting *Draper v. Healey*, 98 F.Supp.3d 77, 85 (D. Mass. 2015)).

Under this government-deferential standard, instead of deferring to the judgment made *by the people* as the *Bruen* standard is designed to

do, the district court deemed itself bound to find the challenged regulations pass muster so long as they reflect "'a reasonable appraisal'" by the Massachusetts legislature, Ex. 1 at 12 (quoting *Gould*, 907 F.3d at 673), because it could not supplant the "judgment" of "the Attorney and the Legislature in determining the appropriate means to pursue its important interests" of protecting public safety, *id.* at 15-16 (quoting *Worman v. Healey*, 922 F.3d 26, 40 (1st Cir. 2009) ("'[t]he role of a reviewing court is limited to ensuring that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence'"). And, consistent with this highly circumscribed review of Second Amendment claims, the only "evidence" the court considered were the stated purposes declared by the legislature and a Government Accounting Office report produced in 1991, centuries after the ratification of the Second Amendment. *Id.* at 13-16. The court inevitably found the challenged regulations "pass intermediate scrutiny," compelling a conclusion that Plaintiffs' Second Amendment claim could not even survive the preliminary testing of a Rule 12(b)(6) motion. *Id.* at 16.

In advocating its motion to dismiss, the Commonwealth pushed the same two-step test under *Gould*. Dkt. No. 15 at 8. While it claimed the

"regulations fall squarely within the category of 'laws imposing conditions and qualifications on the commercial sale of arms' that *Heller* identified as 'presumptively lawful regulatory measures,'" *id.*, the Commonwealth failed to acknowledge that any such exception can only apply to "*longstanding*" regulations of this nature, *Heller*, 554 U.S. at 626-27, n. 26; *McDonald*, 561 U.S. at 786; *Bruen*, 142 S.Ct. at 2162 (Kavanaugh, J., concurring); *see also Duncan v. Bonta*, 9th Circuit Case No. 19-55376, Supp. Brf. of California Attorney General, Ex. 3 at 10-11 ("*Bruen* has since suggested that when determining whether a law is 'longstanding,' the focus should be on gun regulations predating the 20th century"). So, it made no effort to even argue that these regulations—first enacted in 1997, eons after the ratification of the Second Amendment—are "longstanding" in any meaningful sense of the word.

While the Commonwealth also claimed that "the challenged handgun safety regulations do not burden conduct that 'was understood to be within the scope of the right at the time of ratification,'" Dkt. No. 15 at 12 (quoting *Gould*, 907 F.3d at 669), it cited only a garden "'variety of gun safety regulations'" "'around the time of the founding,'" like those "'regulating the storage of gun powder,'" "'keeping track of who in the

community had guns,'" "'administering gun use in the context of militia service,'" "'prohibiting the use of firearms on certain occasions and in certain places,'" and "'disarming certain groups and restricting sales to certain groups,'" and an 1821 Maine law that required inspectors to "try the strength" of firearm barrels. *Id.* at 12 (quoting *Nat'l Rifle Ass'n of Am., Inc. v. Bur. of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 200 (5th Cir. 2012)). Again, the government is now required to prove the existence of a well-established and representative historical *analogue*" that "impose[d] a *comparable* burden on the right of armed self-defense." *Bruen*, 142 S.Ct. at 2133 (second italics added).

Amorphous "gun safety" regulations in the Founding Era and a single post-ratification law concerning the strength of barrels are far removed from the challenged regulations which target scores of handguns commonly used and widely available—and thus entirely legal for purchase and transfer—across the country, based on the policy judgment of the Massachusetts legislature and Attorney General that they should be deemed unsafe and thus broadly prohibited from sale.

Anyway, beyond this light scratching of the surface about "the scope of the right at the time of ratification," Dkt. No. 15, the Commonwealth

devoted the lion's share of its analysis to arguing what the district court ultimately found under the *Gould* standards, *id.* at 13-20. So, the gravamen of its argument was that the challenged regulations are subject to the government-deferential form of "intermediate" means-end scrutiny flatly rejected in *Bruen*, under which "[u]ltimately, it is the Legislature and the Attorney General's 'prerogative . . . to weigh the evidence, choose among conflicting inferences, and make the necessary policy judgments.'" *Id.* at 20 (quoting *Worman*, 922 F.3d at 40). Thus, like the district court, the Commonwealth simply pointed to the legislature's stated declarations and the GAO report as being enough to pass constitutional muster, *id.* at 16-20, which the court indeed found were enough under these standards.

For their part, Plaintiffs advocated foremost for "a categorical test" under *Heller* much like the one ultimately adopted in *Bruen*, Dkt. No. 18, pp. 1, 5-7, 11, and they argued in rebuttal to the Commonwealth's claims that the challenged regulations are "longstanding" and target conduct falling outside the scope of the Second Amendment, *id.* at 7-11. However, given the status of the law at the time, they were required to devote most of their allotted argument space to addressing the issues relevant only to

the now-defunct two-step test, which forced the parties to litigate the case through a prism that elevated Massachusetts's legislative prerogatives above the prerogatives of the Second Amendment. *Id.* at 11-20.

V. Vacatur and Remand is the Proper Course of Action

As illustrated by the long list of cases where the judgments have already been reversed and the matters remanded for further proceedings, Plaintiffs seek only what makes sense at this stage of the litigation.

Indeed, in seeking the vacatur and remand just ordered in the *ANJRPC* case, the State of New Jersey itself contended, "[i]n short, *Bruen* now requires the parties to embark on the difficult but important project of identifying historical analogies for the challenged law, and making 'nuanced' and likely competing arguments to the district court regarding 'which evidence to consult and how to interpret it.'" Letter Brf. of New Jersey Attorney General, Ex. 4 at 8 (quoting *Bruen*, 142 S.Ct. at 2132). Now, the Attorney General argued, "the parties must be able to introduce the evidence—including from analogically similar prior laws—that bears on that constitutional inquiry." *Id.* at 1-2. "Such issues have never been addressed by this Court or any other court, and there is no basis to resolve them without record evidence." *Id.* at 5. As noted, the

Third Circuit Court of Appeals agreed, reasoning that *Bruen* "provided lower courts with new and significant guidance on the scope of the Second Amendment and the particular historical inquiry that courts must undertake when deciding Second Amendment claims." Order, No. 19-3142 (Aug. 25, 2022) (3d Cir. Dkt. 147-1), Ex. 2, at 1, n. 1.

The California Attorney General is currently seeking the same result in the *Duncan v. Bonta* case before the Ninth Circuit. He has argued that, because "[t]he Supreme Court has dramatically changed the ground rules with respect to plaintiffs' Second Amendment claim," "[v]acatur and remand is necessary to allow the parties to compile the kind of historical record that *Bruen* now requires, and would allow the district court to address a number of important issues raised by *Bruen* in the first instance." Supp. Brf. of California Attorney General, *Duncan v. Virginia*, Case No. 19-55376, Dkt. No. 203, Ex. 3 at 2. The Attorney General further argued, "[t]he parties should have the opportunity to develop a record and arguments consistent with *Bruen*, and the district court should have the opportunity to conduct the analysis *Bruen* requires, before this Court passes on these questions on the basis of a record that was developed before *Bruen*." *Id.* at 11.

While we do not endorse every aspect of the defendants' arguments in those cases, we do believe that vacatur and remand for the district court to address *Bruen* in the first instance is the proper course of action here.

WHEREFORE, Plaintiffs-Appellants respectfully request that the Court vacate the judgment of the district court and remand the matter for further proceedings consistent with *Bruen*.

Dated: September 6, 2022

Respectfully submitted,

/s/ *Raymond M. DiGuiseppe*
Raymond M. DiGuiseppe
Counsel for Plaintiffs-Appellants

Certification of Word Count

I certify that the foregoing document is prepared with 14-point Century Schoolbook font and contains 3,752 words.

Executed this 6th day of September 2022.

/s/ *Raymond M. DiGuiseppe*
Raymond M. DiGuiseppe
Counsel for Plaintiffs-Appellants

Certificate of Service

I hereby certify that on September 6, 2022, an electronic PDF of the foregoing document was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys. No privacy redactions were necessary.

Dated this 6th day of September 2022.

/s/ *Raymond M. DiGuiseppe*
Raymond M. DiGuiseppe

Exhibit 1

District Court Memorandum and Order

Granata v. Healey, Case No. 1:21-CV-10960-RWZ

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 1:21-CV-10960-RWZ

STEFANO GRANATA, JUDSON THOMAS, COLBY CANNIZZARO, CAMERON PROSPERI, THE GUNRUNNER, LLC, and FIREARMS POLICY COALITION, INC.

v.

MAURA HEALY, in her official capacity as Attorney General of the Commonwealth of Massachusetts, and THOMAS TURCO, in his official capacity as Secretary of the Executive Office of Public Safety and Security of the Commonwealth of Massachusetts

MEMORANDUM & ORDER

May 19, 2022

ZOBEL, S.D.J.

Plaintiffs brought this action to challenge enforcement of the handgun regulatory scheme established by Mass. Gen. Laws ch. 140, § 123, together with the regulations promulgated by the Massachusetts Attorney General and codified at 940 C.M.R. §§ 16.00 *et seq.* The challenged scheme sets forth safety requirements for handguns sold within the Commonwealth, to prevent unnecessary death and injury from unsafe and defective handguns, particularly in the hands of children. Plaintiffs assert that they violate the Second Amendment to the Constitution by effectively banning the sale of eighteen makes and models of handguns that are in common use and sold in other states. Defendants move to dismiss the complaint for failing to state a claim. The motion is allowed.

I. Background

A. The Challenged Handgun Safety Regulations

In 1997, the Attorney General of Massachusetts promulgated regulations applicable to "transfers" of handguns by "handgun purveyors" to customers in Massachusetts,[1] codified at 940 C.M.R. § 16.00 *et seq.*, pursuant to his authority under the Massachusetts Consumer Protection Act, Gen. Laws Ch. 93A, § 2(c). They followed national research and recognition of the need for additional safety restrictions on firearms, especially to protect children. U.S. Gov't Accountability Office, Report to the Chairman, Subcomm. on Antitrust, Monopolies, and Business Rights, Comm. on the Judiciary, U.S. Senate, Accidental Shootings: Many Deaths and Injuries Caused by Firearms Could Be Prevented (1991) ("GAO Report").

The regulations make it "an unfair or deceptive practice for any handgun-purveyor" to transfer to a consumer in the Commonwealth a handgun that does not comply with the minimum safety requirements and performance standards set forth. 940 C.M.R. § 16.02. Their purpose is "to protect responsible gun owners and their families from firearms that are unsafe by design or manufacture." Massachusetts Attorney General, July 16, 2004 Consumer Advisory on Glock Handguns at 8. They do not apply to private sellers, defined as someone who transfers fewer than five handguns per year. 940 C.M.R. § 16.01. The majority of the regulations also do not apply to

---

[1] "Transfer" means "sell, lease, or rent" and excludes sales to firearm wholesalers who cannot resell the firearm to a retailer or consumer in the Commonwealth. 940 C.M.R. § 16.01. "Handgun purveyor" means "any person or entity that transfers handguns to a customer located within the Commonwealth" and excludes any entity that transfers fewer than five handguns per year; transfers for the purpose of supplying law enforcement, military personnel, museums, and other educational collectors; transfers of handguns considered antiques; and transfers of handguns designed and sold specifically for formal target shooting. Id.

transfers of handguns manufactured on or before October 21, 1998. Enforcement Notice #2: Attorney General's Handgun Safety Regulations at 3.

In 1998, soon after the Attorney General's regulations were promulgated, the Massachusetts Legislature codified certain handgun safety requirements at Mass. Gen. Laws ch. 140, § 123, cl. 18-21, making it unlawful for a retailer to sell within the Commonwealth a handgun that does not meet the prescribed safety features. Mass. Gen. Laws ch. 140, § 128. Several of these features overlap with those promulgated by the Attorney General. Like the former, the statutory requirements exempt private sellers, and apply only to "firearm dealer[s] in Massachusetts" as defined at 501 C.M.R. § 7.02. They also do not apply to the sale of firearms that were lawfully owned or possessed on or before October 21, 1998. Mass. Gen. Laws ch. 140, § 123.

Taken together, the Attorney General's regulations and § 123 require that handguns lawfully sold within the Commonwealth:

- Not be made of "inferior materials," they must be made of materials that meet specified minimum melting points, tensile strength, and density; or pass a make and model performance test (940 C.M.R. §§ 16.01, 16.04(1) and (3); Mass. Gen. Laws ch. 140, § 123, cl. 18);

- Not be prone to either repeated firing from a single trigger pull or explosion upon firing (940 C.M.R. § 16.04(2); Mass. Gen. Laws ch. 140, § 123, cl. 20);

- Not be prone to accidental discharge (940 C.M.R. §§ 16.01, 16.04(2); Mass. Gen. Laws ch. 140, § 123, cl.19);

- Have a "safety device" that prevents unauthorized use of the firearm (940 C.M.R. § 16.05(1));

- Have a mechanism that "effectively precludes an average five-year-old child from operating the handgun when it is ready to fire" (i.e., a form a childproofing), "such mechanisms shall include, but are not limited to: raising trigger resistance to at least a ten pound pull, altering the firing mechanism so that an average five year old child's hands are too small to operate the handgun, or requiring a series of multiple motions in order to fire the handgun" (940 C.M.R. § 16.05(2));

- Have a tamper-resistant serial number (940 C.M.R. § 16.03); and
- For semi-automatic handguns, have either "a load indicator or a magazine safety disconnect" (940 C.M.R. § 16.05(3) and (4)).[2]

In conjunction with Mass. Gen. Laws ch. 140, § 123, the Legislature directed the Secretary of the Executive Office of Public Safety and Security to "compile and publish a roster" of handguns that meet the § 123 requirements, known as the "Approved Firearms Roster" (the "Roster"). Mass. Gen. Laws ch. 140, § 131-3/4; 501 C.M.R. § 7.00; see also Enforcement Notice #3: Attorney General's Handgun Safety Regulations at 5. To be listed on the Roster, the Secretary must receive a final test report from an approved testing laboratory certifying that the handgun satisfies the § 123 requirements. 501 C.M.R. § 7.03(1). As of June 2021, the Roster listed over 1,000 handgun models from twenty-nine manufacturers, often with multiple models for each manufacturer. Approved Firearms Roster: 06/2021. It is unlawful for a retailer to sell a firearm that is not so listed. 501 C.M.R. § 7.05; see also Enforcement Notice #3: Attorney General's Handgun Safety Regulations at 5.

The Roster lists firearms that meet the statutory requirements of § 123 but not necessarily the Attorney General's regulations on childproofing, load indicators, and tamper-resistant serial numbers. See Enforcement Notice #3: Attorney General's Handgun Safety Regulations at 5-6. Nonetheless, to be legally sold by a retailer in Massachusetts, a handgun must appear on the Roster *and* comply with the Attorney General's regulations. Id.

[2] The Attorney General's regulations also include certain safety warnings and disclosure requirements at the time of sale. See 940 C.M.R. § 16.006. Because Plaintiffs do not allege any injuries related to these requirements, they will not be addressed.

B. The Complaint

Plaintiffs challenge both the Attorney General's regulations and the § 123 statutory requirements (collectively, the "Handgun Safety Regulations"). They are: four individuals, all of whom claim to have a valid Massachusetts license that allows them to purchase handguns and carry them in public (Docket # 1 ¶¶ 47-50); one retail seller, The Gunrunner, LLC, who is alleged to be a licensed handgun purveyor (id. ¶ 51); and one organization, the Firearms Policy Coalition, Inc. ("FPC"), which includes as members the four individual plaintiffs (id. ¶ 52). The two defendants, Maura Healey and Thomas Turco, are both sued in their official capacities, as Attorney General of Massachusetts and Secretary of the Executive Office of Public Safety and Security of Massachusetts, respectively.

The complaint asserts a single cause of action under 42 U.S.C. § 1983 and the United States Constitution that the Handgun Safety Regulations infringe Plaintiffs' Second Amendment right "to keep and bear arms." Docket # 1 ¶¶ 56-73. The individual plaintiffs specifically object to the limitations on handguns incorporated into the roster. They assert that they would purchase eighteen specific models of handguns, "new from a licensed retailer[] for self-defense and other lawful purposes," but for the challenged Handgun Safety Regulations. Id. ¶¶ 47-50. The Gunrunner, the retailer, asserts for itself and "on behalf of all similarly situated licensed retailers," that it would "make available for sale to all of its law-abiding customers all commercially available handguns in common use for self-defense and other lawful purposes that are widely sold and possessed outside of Massachusetts" but for the challenged Handgun Safety

Regulations.[3] Id. ¶ 51. FPC, the organization, asserts, on behalf of its members and similarly situated members of the public, that they "have been adversely and directly harmed by Defendants' enforcement" of these challenged regulations. Id. ¶¶ 52-55. Plaintiffs do not dispute that individual licensed consumers within Massachusetts can still purchase or possess an operational handgun for self-defense or other lawful purposes.

Defendants moved under Fed. R. Civ. P. 12(b)(6) to dismiss Plaintiffs' complaint for failing to state a claim. Docket # 14. They contend that the challenged Handgun Safety Regulations are constitutional and thus enforceable because they do not burden conduct falling within the scope of the Second Amendment, but, even if they did, they easily withstand heightened scrutiny. Id.; Docket # 15.

II. Discussion

A. Legal Standard

To survive a motion to dismiss, a complaint must contain "sufficient factual matter" to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). The Court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. Langadinos v. Am. Airlines, Inc., 199 F.3d 68, 69 (1st Cir. 2000). It need not however, accept legal conclusions as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

[3] Defendants argue that "there is no textual or historical basis upon which to suggest that the Second Amendment protects a right to *sell* firearms," thus "any claim that the challenged regulations impinge upon a purported right of dealers to *sell* firearms must be rejected." Docket # 15 at 8 n.15 (emphasis in original). Whether there is a right to sell firearms does not impact the analysis, wherefore the Court declines to weigh in on this question.

B. Second Amendment Legal Framework

The Second Amendment states: "[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 U.S. Supreme Court has held that the Second Amendment protects an individual's right "to keep and bear arms (unconnected to service in the militia)" and the protection applies to the states through the Fourteenth Amendment. Gould v. Morgan, 907 F.3d 659, 667 (1st Cir. 2018); see also McDonald v. City of Chicago, 561 U.S. 742, 750 (2010); District of Columbia v. Heller, 554 U.S. 570, 592 (2008). The law challenged in District of Columbia v. Heller constituted an "absolute prohibition of handguns held and used for self-defense in the home," which the Court determined does violate the Second Amendment. 554 U.S. at 635-36. Although it has not yet examined "the full scope of the Second Amendment" right, it made clear in Heller that the right "is not unlimited." Id. at 626. Certain "longstanding prohibitions" are "presumptively lawful," including "laws imposing conditions and qualifications on the commercial sale of arms." Id. at 626-27. The Second Amendment does not confer "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." Id.

The First Circuit has adopted a two-step approach for analyzing Second Amendment claims. Gould, 907 F.3d at 668-69. At the first step, the court asks "whether the challenged law burdens conduct that falls within the scope of the Second Amendment's guarantee." Id. "This is a backward-looking inquiry, which seeks to determine whether the regulated conduct was understood to be within the scope of the right at the time of ratification . . ." Id. If the challenged law imposes no such burden, it is valid. "If, however, it burdens conduct falling within the scope of the Second

Amendment," the court moves to the next step at which it determines the appropriate level of scrutiny and whether the challenged law survives that determination. Id.

C. Scope of the Second Amendment Right

The Supreme Court recognizes that "laws imposing conditions and qualifications on the commercial sale of arms" are a category of regulations that are "presumptively lawful." Heller, 554 U.S. at 626-27. However, neither the First Circuit nor the Supreme Court has interpreted the full confines of the phrases "presumptively lawful" or "conditions and qualifications on the commercial sale of arms." Accordingly, courts have been inclined to assume without deciding that a regulation burdens conduct protected by the Second Amendment for purposes of analysis, rather than delving into the question whether the regulation falls into the exception of "conditions and qualifications on the commercial sale of arms." See, e.g., Pena v. Lindley, 898 F.3d 969, 976 (9th Cir. 2018) ("The opaqueness of the presumption of legality for 'conditions and qualifications on the commercial sale of arms' likely explains why we and other courts often have assumed without deciding that a regulation does burden conduct protected by the Second Amendment rather than parse whether the law falls into that exception. . . . We, too, follow this well-trodden and 'judicious course.'"); see also Worman v. Healey, 922 F.3d 26, 35 (1st Cir. 2019) (deciding case at second rather than first step of inquiry, explaining that "courts should not rush to decide unsettled issues when the exigencies of a particular case do not require such definitive measures").

The same approach is taken here, by assuming, without deciding, that the challenged regulations touch on conduct protected by the Second Amendment. "By making this assumption, [the court] bypass[es] the constitutional obstacle course of

defining the parameters of the Second Amendment's individual right in the context of commercial sales." Pena, 898 F.3d at 976.

D. Scrutiny

Because the challenged Handgun Safety Regulations are assumed to implicate Plaintiffs' Second Amendment rights, the analysis turns to the second step to determine the appropriate level of scrutiny and then to use it to assess the regulations. See Gould, 907 F.3d at 668-69.

1. Level of Scrutiny

Plaintiffs argue that strict scrutiny applies because the Handgun Safety Regulations implicate the core of the Second Amendment right, Docket # 18 at 11-12, while Defendants assert that only intermediate scrutiny is required, Docket # 15 at 13-15. Intermediate scrutiny is appropriate here.

"The appropriate level of scrutiny 'turn[s] on how closely a particular law or policy approaches the core of the Second Amendment right and how heavily it burdens that right.'" Worman, 922 F.3d at 36 (quoting Gould, 907 F.3d at 670-71). "[I]ntermediate scrutiny is appropriate as long as a challenged regulation either fails to implicate the core Second Amendment right or fails to impose a substantial burden on that right." Worman, 922 F.3d at 39 ("[I]ntermediate scrutiny is the appropriate level of scrutiny for evaluating a law . . . that arguably implicates the core Second Amendment right to self-defense in the home but places only a modest burden on that right.").

The First Circuit has established "that the core Second Amendment right is limited to self-defense in the home" by "responsible, law-abiding individuals." Id. (quoting Gould, 907 F.3d at 671). Plaintiffs here contend that the regulations do affect

their ability to defend themselves in their homes. Assuming in Plaintiffs' favor that the regulations implicate the core of the Second Amendment right, the inquiry then focuses on "how heavily [they] burden[] that right." Worman, 922 F.3d at 36 (quoting Gould, 907 F.3d at 671).

The Handgun Safety Regulations in this case place, at most, a modest burden on the core Second Amendment right. The regulations only require that handguns lawfully sold within the Commonwealth meet certain safety requirements; they do not restrict the possession of handguns by eligible individuals in the home or elsewhere. See Draper v. Healey, 98 F. Supp. 3d 77, 85 (D. Mass. 2015) (finding that regulation prohibiting the sale of handguns without a load indicator or magazine safety disconnect "does not substantially burden the right to bear arms in self-defense in one's home" because it "in no way prevents citizens from obtaining a wide array of firearms"). Even though the Handgun Safety Regulations may limit the types of handguns with which individuals can defend themselves, to only those that meet the safety requirements of the regulations—unlike Heller, they do not result in a total prohibition against keeping a handgun for self-defense within the home. See Pena, 898 F.3d at 977-78; see also Worman, 922 F.3d at 40 (finding Massachusetts law banning certain semiautomatic firearms passed intermediate scrutiny because "the Act does not outlaw all semiautomatic firearms and magazines[, n]or does it circumscribe in any way the fundamental right of law-abiding, responsible citizens to possess handguns in their homes for self-defense").

Plaintiffs argue that by prohibiting the sale of handguns that do not meet the safety requirements, the Handgun Safety Regulations in effect result in a total ban on the sale and thus possession of those specific makes and models, thereby running afoul

of the Supreme Court's admonition in Heller that states cannot "ban the possession of handguns." Docket # 18 at 13-14 (citing Heller, 554 U.S. at 629). Plaintiffs' argument, however, stretches Heller beyond the plain meaning of its text without any authority for doing so. Prohibiting the sale of specific makes and models of handguns for safety reasons is not the same as a total prohibition of the sale of handguns. See Pena, 898 F.3d at 978 ("being unable to purchase a subset of semiautomatic weapons, without more, does not significantly burden the right to self-defense in the home"); see also Heller, 554 U.S. at 626 ("[T]he right secured by the Second Amendment is not unlimited. . . . [It] was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.").

Eligible individuals within Massachusetts can freely choose from over a thousand handguns listed on the June 2021 Roster that also meet the Attorney General safety regulations. The fact that they cannot purchase every single handgun that may be in common use and available for purchase in other states, does not transform the regulations into a total ban on a category or class of firearms (i.e., handguns in this case). To conclude otherwise would eviscerate Heller's holding that some regulation of firearm possession is permissible. See Worman, 922 F.3d at 32 n.2.

Two additional points reinforce the limited burden placed on individuals' ability to exercise their Second Amendment right: First, the Handgun Safety Regulations carve out private sales of handguns from their safety requirements. Second, Plaintiffs do not claim that the handguns available for purchase in Massachusetts are inadequate to exercise their core Second Amendment right. Thus, there is no basis to conclude that the eighteen handguns specifically identified by Plaintiffs in their complaint, as well as

any other handguns in common use in other states, that allegedly are not available for purchase in the Commonwealth because of the regulations, would in some way enable or enhance an individual's exercise of their right to possess a handgun in their home for self-defense in a way not achievable by the handguns that are available.

Because the Handgun Safety Regulations do not impose a substantial burden on Plaintiffs' core Second Amendment right, intermediate scrutiny is appropriate to assess the enforceability of the regulations. See e.g., Pena 898 F.3d at 979.

2. Application of Intermediate Scrutiny

"To survive intermediate scrutiny, a statute 'must be substantially related to an important governmental objective.'" Worman, 922 F.3d at 38 (quoting Gould, 907 F.3d at 672). "To achieve this substantial relationship, there must be a 'reasonable fit' between the restrictions imposed by the law and the government's valid objectives, 'such that the law does not burden more conduct than is reasonably necessary.'" Id. (quoting Gould, 907 F.3d at 674). In its assessment, a court may consider "the legislative history of the enactment as well as studies in the record or cited in pertinent case law." Pena, 898 F.3d at 979 (internal quotation marks omitted). A court cannot substitute "its own appraisal of the facts for a reasonable appraisal made by the legislature." Gould, 907 F.3d at 673.

Plaintiffs concede that the Commonwealth has important objectives in protecting "[p]ublic safety and preventing accidental firearm injuries," see Docket # 18 at 15, and the First Circuit has recently reiterated the Commonwealth's important objective in preventing crime, see Worman, 922 F.3d at 39 ("Massachusetts indubitably 'has compelling governmental interests in both public safety and crime prevention'").

Accordingly, the only remaining question is whether the regulations substantially relate to those interests. Id.

Both § 123 and the Attorney General's regulations, require that handguns sold commercially are (1) not made of inferior materials or, if they are, they nonetheless pass a performance test; (2) not prone to uncontrolled firing or exploding during normal use; and (3) not prone to discharging accidentally when dropped. 940 CMR § 16.04; Mass. Gen. Laws ch. 140, § 123, cls. 18-20. They allow purchasers of handguns to reasonably rely on the assumption that the handgun will not accidently fire, explode, or pose any other threat to their own safety and the safety others who may have access to the firearm, especially children.

In addition, the Commonwealth's interest in public safety and the Attorney General's child-proofing requirements mutually support the regulations in issue. As Defendants noted, the GAO Report "found that all of the accidental firearm fatalities caused by children under the age of six could have been prevented had the firearm been equipped with childproofing features like those required by the regulations." Docket # 15 at 17-18 (citing GAO Report at 3, 34). The childproofing regulations are satisfied by any mechanism that "effectively precludes an average five-year old from operating a handgun when it is ready to fire," thus Plaintiffs' criticism of one such mechanism—a ten-pound trigger pull (see Docket # 18 at 18)—does not alter the analysis. See 940 CMR §§ 16.05(2), (4) ("such mechanisms shall include, but are not limited to: raising trigger resistance to at least a ten pound pull, altering the firing mechanism so that an average fire year old child's hands are too small to operate the handgun, or requiring a series of multiple motions in order to fire the handgun," as well

as a hammer deactivation device). Similarly, the Attorney General's requirement that handguns be sold with a "safety device" that prevents unauthorized use, 940 CMR § 16.05(1), is supported by the GAO Report's finding that one in three accidental firearm deaths in 1988 and 1989 could have been prevented by the addition of a firearm safety device. Docket #15 at 18 (citing GAO Report at 3, 36).

The requirement that handguns contain tamper-resistant serial numbers also reasonably supports the Commonwealth's interests in public safety and crime prevention. See United States v. Marzzarella, 614 F.3d 85, 98 (3d Cir. 2010). As the Third Circuit explained in an opinion upholding a law prohibiting the possession of a handgun with an obliterated serial number under intermediate scrutiny, "there would appear to be no compelling reason why a law-abiding citizen would prefer an unmarked firearm" which has "value primarily for persons seeking to use [it] for illicit purposes." Id. at 95. The requirement here, is thus also "properly designed to remedy the problem of untraceable firearms." See id. at 101.

Finally, the requirement that semiautomatic pistols contain either a load indicator or magazine safety disconnect easily passes muster. These exact measures have already been deemed constitutional within this jurisdiction and others. See Draper v. Healey, 98 F. Supp. 3d 77, 85 (D. Mass. 2015 (Gorton, J.) (finding Attorney General's load indicator or magazine safety disconnect requirement enforceable under any level of heightened scrutiny); Pena, 898 F.3d at 980 (finding load indicator or magazine safety disconnect requirement "reasonably fit with California's interest in public safety"). These regulations are further supported by the GAO findings that twenty-three percent of accidental firearm fatalities occurred because individuals incorrectly believed the

firearms were unloaded and that those deaths could have been prevented by a load indicator. Docket # 15 at 18-19 (citing GAO Report at 3).

Each individual safety requirement set forth in the regulations buttresses the important government interests identified; wherefore the requirement that handguns be pre-approved for sale and listed on the Roster fully passes scrutiny.

The existence of available alternatives that may promote public safety—e.g., "education, training, and public outreach regarding basic rules of firearm safety, storage, and use" identified by Plaintiffs (Docket # 1 ¶ 42)—do not alter the analysis. Nor is the analysis altered by Plaintiffs' argument that the GAO Report is unsuitable to support the enforceability of the regulations because it showed that the studied safety requirements only prevented some, but not all or enough, accidental deaths. Docket # 18 at 15-18. The means for accomplishing the important government interests need not be narrowly tailored nor is there any requirement that regulations prevent all deaths. See Gould, 907 F.3d at 674 ("a legislature's chosen means need not be narrowly tailored to achieve its ends" when applying intermediate scrutiny); id. at 674-75 (finding requirements for obtaining a license to carry firearm in public passed intermediate scrutiny because states with more restrictive firearm licensing schemes have lower rates of gun-related deaths, even though not all deaths were prevented). Nor should the Court substitute its own judgment for that of the Attorney General and Legislature in determining the appropriate means to pursue its important interests. See Worman, 922 F.3d at 40 (it is "the legislature's prerogative . . . to weigh the evidence, choose among conflicting inferences, and make the necessary policy judgments," "[t]he role of a reviewing court is

limited to ensuring 'that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence'").

The Handgun Safety Regulations are well supported and reasonable, a conclusion reinforced by the fact that Massachusetts "consistently has one of the lowest rates of gun-related deaths in the nation." See Gould 907 F.3d at 674-75. The challenged regulations therefore pass intermediate scrutiny.

III. Conclusion

Defendants' Motion to Dismiss Plaintiffs' Complaint (Docket # 14) is ALLOWED.

May 19, 2022
DATE

RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

Exhibit 2

Order, Third Circuit Court of Appeals

Association of New Jersey Rifle and Pistol Clubs v. New Jersey Attorney General

Case No. 19-3142

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 19-3142

ASSOCIATION OF NEW JERSEY RIFLE AND PISTOL CLUBS INC;
BLAKE ELLMAN; ALEXANDER DEMBOWSKI, Appellants

v.

ATTORNEY GENERAL NEW JERSEY;
SUPERINTENDENT NEW JERSEY STATE POLICE;
THOMAS WILLIVER, in his official capacity as
Chief of Police of the Chester Police Department;
JAMES B. O'CONNOR, in his official capacity as
Chief of Police of the Lyndhurst Police Department

(D.N.J. No. 3-18-cv-10507)

Present: JORDAN, MATEY and ROTH, Circuit Judges

ORDER

This matter having been remanded for further consideration in light of the Supreme Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), and upon consideration of the parties' positions on whether it should in turn be remanded to the District Court for decision in the first instance under the standard announced in *Bruen*, it is hereby ORDERED that the matter is so remanded. Judge Matey dissents from this order, as described in the attached opinion.[1]

[1] We recognize that there are good arguments to be made for resolving this case now, on the record before us, and our dissenting colleague has ably articulated them. Even so, we are mindful that "we are a court of review, not of first view[.]" *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). The Dissent rightly notes that, even prior to the Supreme Court's latest Second Amendment decision, we have regularly "trace[d] the [Second

By the Court,

s/ Kent A. Jordan
Circuit Judge

Dated: 25 August 2022
AWI/CC: All Counsel

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

Amendment's] reach by studying the historical record[,]" *Drummond v. Robinson Twp.*, 9 F.4th 217, 225-26 (3d Cir. 2021) (citing *District of Columbia v. Heller*, 554 U.S. 570, 603 (2008)) – the same approach recently endorsed and "made … more explicit" by the Court, *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2134 (2022). But the Court's decision in *Bruen* also provided lower courts with new and significant guidance on the scope of the Second Amendment and the particular historical inquiry that courts must undertake when deciding Second Amendment claims. *Id.* at 2126-27, 2131-38. In light of that guidance, the State has requested a remand for further record development, targeted at the legal and historical analysis required under *Bruen*. Given the additional guidance provided in *Bruen* – and given that our last decision in this case turned on law-of-the-case considerations that are no longer in play – it is appropriate to afford the State that opportunity, consistent with our prior practice. *See In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 186 (3d Cir. 2015) (vacating and remanding "[b]ecause the District Court did not have the opportunity to consider [the Supreme Court's] later-issued guidance in the first instance"); *Higgins v. Burroughs*, 834 F.2d 76, 77-78 (3d Cir. 1987) (remanding "because the parties may require additional evidence in connection with the standard now announced by the Supreme Court").

MATEY, *Circuit Judge*, dissenting.

Two years ago, I stated that "determining whether magazines enjoy the guarantees of the Second Amendment, and whether that protection varies based on their capacity," are issues that "affect the rights of individuals throughout our Circuit." *Ass'n of N.J. Rifle & Pistol Clubs Inc. v. Att'y Gen.*, 974 F.3d 237, 263 (3d Cir. 2020) (Matey, J., dissenting), *abrogated by N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) ("*N.J. Rifle II*"). Likewise, I noted that "resolving those questions [would] allow state governments to design public safety solutions that respect the freedoms guarded by the Second Amendment." *Id.* Drawing on the rich historical evidence readily available, I then explained that the constitutional character of a magazine cannot "rise[] and fall[] on a single extra round of ammunition." *Id.* at 250. Nor could "I imagine [that] the Second Amendment allows any government to diminish an individual's rights through nomenclature." *Id.* Failing to answer those questions, I feared, saddled "District Court judges with the difficult task of determining whether a magazine is small enough to satisfy the Second Amendment or large enough to slip outside its guarantee." *Id.*

Today, nothing has changed. Not the law, which remains focused on the history of firearms regulations, as explained by the Supreme Court fourteen years ago. Not the facts about restrictions on repeating firearms, already exhaustively surveyed by the courts, and ably briefed by the parties. Not New Jersey's prohibition on magazines holding more than ten rounds of ammunition which may, or may not, be a "large capacity" in the State's eyes. And certainly not the Second Amendment, which "codified a pre-existing right" of the people "to keep and bear arms." *District of Columbia v. Heller*, 554 U.S.

570, 592 (2008) (emphasis omitted). Respectfully, we should not wait for more of the same to lurch through litigation before turning to the task at hand. A task that remains as it always was: applying "a test rooted in the Second Amendment's text, as informed by history." *Bruen*, 142 S. Ct. at 2127.

I.

Refreshing our recollection illustrates the problem with remand. In 2008, the Supreme Court held that the "18th-century meaning" of "arms" is "no different from the meaning today," and the Second Amendment was not limited to "only those arms in existence in the 18th century." *Heller*, 554 U.S. at 581–82. Instead, *Heller* directed courts to apply a "methodology centered on constitutional text and history" to determine whether the challenged regulation touched upon protected conduct. *Bruen*, 142 S. Ct. at 2128–29; *see also Heller*, 554 U.S. at 592 (explaining that we look to "the historical background of the Second Amendment" because it "codified a pre-existing right" (emphasis omitted)). *Heller* directed us to look backwards—not to new and novel claims of necessity by the government.

Even a glance is sufficient here.[2] Repeating firearms grew in use throughout the 18th century, when early technical advances paved the way to Samuel Colt's famous rotating cylinder revolver. *See N.J. Rifle II*, 974 F.3d at 255 (Matey, J., dissenting). By 1866, rifles holding more than ten rounds of ammunition were widely available, with handguns holding more than ten rounds appearing in stores by 1935. *Id.* at 256. Both

[2] I summarize, rather than repeat, my earlier historical analysis.

quickly proved popular, and Americans came to hold tens of millions of magazines holding over ten rounds. *Id.*

Despite this popularity, regulations on magazine capacity arrived slowly. *Id.* at 257–58. A few accompanied the Prohibition Era, all except one later repealed. *Id.* Slower still, New Jersey did not limit magazine capacity to fifteen rounds until 1990. *Id.* at 258. Or reduce that number to ten until 2018. *Ass'n of N.J. Rifle & Pistol Clubs Inc. v. Att'y Gen.*, 910 F.3d 106, 110 (3d Cir. 2018), *abrogated by Bruen*, 142 S. Ct. 2111 ("*N.J. Rifle I*"). All showing, as we summarized the record of the District Court's three-day hearing, "that millions of magazines are owned, often come factory standard[,] . . . are typically possessed by law-abiding citizens[,] . . . and there is no longstanding history" of magazine regulation. *Id.* at 116–17 (citations omitted). And all revealing "a long gap between the development and commercial distribution of magazines, on the one hand, and limiting regulations, on the other." *N.J. Rifle II*, 974 F.3d at 258 (Matey, J., dissenting). Facts found and the law settled, deciding this case is appropriate.

II.

Slow down, cries the State. *Bruen*, it argues, changed everything by announcing a "new legal test." N.J. Letter Br. 3. Deciding the case now would be unfair because "the State has not yet been given the opportunity to provide the historical evidence of weapons that were regulated at the Founding." N.J. Reply Letter Br. 5 (emphasis omitted). Neither point proves persuasive.

For one thing, *Bruen* confirmed, rather than created, the historical inquiry informing the Second Amendment's guarantee. 142 S. Ct. at 2131 ("The test that we set

forth in *Heller* and apply today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding."). A point we have repeatedly recognized in Second Amendment challenges. *See United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010) (describing "the historical approach [that] *Heller* used to define the scope of the right"); *see also Drummond v. Robinson Twp.*, 9 F.4th 217, 225 (3d Cir. 2021) (noting that *Heller* directed us to "look[] to historical evidence and long-settled traditions" (cleaned up)); *Beers v. Att'y Gen.*, 927 F.3d 150, 155 (3d Cir. 2019), *vacated as moot*, 140 S. Ct. 2758 (2020) (explaining "the historical approach the Court applied in *Heller*"); *United States v. One (1) Palmetto State Armory PA-15 Machinegun Receiver/Frame, Unknown Caliber Serial No. LW001804*, 822 F.3d 136, 141 (3d Cir. 2016) (commenting that *Heller* "[g]round[ed] its inquiry in historical analysis"); *Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013) (citing *Heller* and noting its "extensive consideration of the history and tradition of the Second Amendment"). That is also the test we applied here, citing "17th century commentary on gun use in America that the possession of arms also implied the possession of ammunition." *N.J. Rifle I*, 910 F.3d at 116 (discussing *United States v. Miller*, 307 U.S. 174, 180 (1939)).

The State's follow-on—that it missed the chance to provide historical evidence—fares no better. Round after round, in both the District Court and this Court, history took center stage. The State joined that discussion, arguing unsuccessfully that laws regulating ammunition capacity were longstanding. It strains credibility for New Jersey to now suggest it simply overlooked the focus on history and practice outlined in *Heller*,

repeatedly applied by this Court, and vigorously advocated in this case. That the State *decided* not to press those points harder, whether as clever strategy or careless slip, is not relevant. We have been far less forgiving of that sort of waiver by far less sophisticated litigants.

With no new law to apply, and the historical record firm, there would seem no work remaining on remand.[3] But what is the harm, some might ask? Why the rush? A question rarely raised when other fundamental rights are at issue and answered, again, by the Supreme Court: bearing arms "is not a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Bruen*, 142 S. Ct. at 2156 (cleaned up). As always, "[t]he basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled." *Watson v. City of Memphis*, 373 U.S. 526, 533 (1963). And "[a]t its core, the Second Amendment recognizes the widely accepted principle at the Founding that the right to self-defense derived directly from the natural right to life, giving the people predictable protections for securing the 'Blessings of Liberty.'" *N.J. Rifle II*, 974 F.3d at 262 (Matey, J., dissenting) (quoting U.S. Const. pmbl.). That balance tips easily toward decision, not further delay.

---

[3] Indeed, we have explained that "[w]e may decide a question not addressed by the District Court when the record has been sufficiently developed for us to resolve the legal issue." *Chehazeh v. Att'y Gen.*, 666 F.3d 118, 140 (3d Cir. 2012) (cleaned up); *see also Hess v. Comm'r Soc. Sec.*, 931 F.3d 198, 213 n.17 (3d Cir. 2019) (same). Similarly, we have found that "remand is not required" where "it would not affect the outcome of the case." *Rutherford v. Barnhart*, 399 F.3d 546, 553 (3d Cir. 2005). Standards seemingly satisfied here.

III.

Finally, I note a bunker to avoid in future proceedings: the protean "large capacity magazine."[4] Throughout this case, exactly what is being regulated has not been clear. In 1990, New Jersey first prohibited a "large capacity ammunition magazine," defined as "a box, drum, tube or other container which is capable of holding more than [fifteen] rounds of ammunition to be fed continuously and directly therefrom into a semi-automatic firearm." *N.J. Rifle I*, 910 F.3d at 110 n.2. In 2018, the State amended that definition by reducing the maximum capacity to ten rounds. *Id.* The 2018 law is what Plaintiffs challenge. Any discussion of "large capacity magazines," therefore, should refer only to the 2018 law.

That has not happened. The State and this Court have twice altered the definition. First, what began as an inquiry into whether "magazines" are constitutionally protected became a discussion over whether a specific kind of magazine fell outside the Second Amendment's guarantee. *See N.J. Rifle II*, 974 F.3d at 249–50 (Matey, J., dissenting). Second, the arguments and analysis soon sank into a survey of all magazine restrictions, then firearms with "combat-functional ends" capable of "rapidly" discharging ammunition, and finally fully automatic rifles. *Id.* at 250. But those are not the same and each is subject to different regulations in New Jersey—not to mention other states and federal law. *Id.* Blurring these lines improperly boosted the State's claims of regulatory interest. Doing so again will hopelessly complicate the otherwise straightforward

[4] Again, I summarize my prior points.

historical inquiry of *Heller* and *Bruen*, producing a search for an analogy to an object that did not exist at the founding, and does not exist today.

To avoid further confusion, there simply is no such thing as a "large capacity magazine." It is a regulatory term created by the State, meaning no more than the maximum amount of ammunition the State has decided may be loaded into any firearm at one time. Sixteen rounds was large yesterday, eleven rounds is large today. The State is welcome to market its policy goals using catchy slogans, but the rights of our Republic are built on sturdier stuff. Stripping away the buzzwords reveals the real question: whether "the Second Amendment's plain text" protects possession of a firearm magazine, in which case "the Constitution presumptively protects that conduct." *Bruen*, 142 S. Ct. at 2126. The only avenue around that presumption is proof—presented by the State—that its cap on magazine capacity "is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id*. at 2127.

Remand is unnecessary as both questions have already been answered. First, "[b]ecause magazines feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended, magazines [fall] within the meaning of the Second Amendment." *N.J. Rifle I*, 910 F.3d at 116 (cleaned up). And second, "there is no longstanding history of" magazine capacity regulation. *Id*. at 116–17. Another four years of proceedings to reach those conclusions again is not needed. Nor can the United States remain "a government of laws . . . if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). I respectfully dissent.

Exhibit 3

Supplemental Brief of California Attorney General

Duncan v. Bonta

Ninth Circuit Court of Appeals, Case No. 19-55376

No. 19-55376

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGINIA DUNCAN, ET AL.,
Plaintiffs-Appellees,

v.

ROB BONTA,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of California
No. 17-cv-1017-BEN-JLB
The Honorable Roger T. Benitez, Judge

SUPPLEMENTAL BRIEF FOR THE ATTORNEY GENERAL IN RESPONSE TO THE COURT'S AUGUST 2, 2022 ORDER

ROB BONTA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
THOMAS S. PATTERSON
Senior Assistant Attorney General
SAMUEL P. SIEGEL
HELEN H. HONG
Deputy Solicitors General
P. PATTY LI
Supervising Deputy Attorney General
JOHN D. ECHEVERRIA
Deputy Attorney General

CALIFORNIA DEPARTMENT OF JUSTICE
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102-7004
(415) 510-3917
Sam.Siegel@doj.ca.gov

August 23, 2022

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTRODUCTION

In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court changed the legal landscape for analyzing Second Amendment claims. Instead of the "two-step test" adopted by this and most other federal courts of appeals, *Bruen* directed courts to apply a standard "rooted in the Second Amendment's text, as informed by history." *Id.* at 2126-2127. *Bruen* also provided important guidance about how that test should be applied. *See id.* at 2127-2134, 2136-2138. And it recognized that this historical analysis "can be difficult," requiring courts to make "nuanced judgments about which evidence to consult and how to interpret it." *Id.* at 2130 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 803-804 (2010) (Scalia, J., concurring)).

In light of *Bruen*, California respectfully submits that this Court should vacate the district court's judgment and its order enjoining the Attorney General from enforcing California Penal Code Section 32310, and remand this case for further proceedings. Plaintiffs here challenge California's restrictions on large-capacity magazines, regulations that this Court previously concluded were an important component of the State's effort to "reduce the devastating harm caused by mass shootings." *Duncan v. Bonta*, 19 F.4th 1087, 1110 (9th Cir. 2021) (en banc), *vacated and remanded*, 142 S. Ct. 2895 (2022). In resolving plaintiffs' Second Amendment claim, both this Court and the district court addressed the

constitutionality of California's large-capacity magazine restrictions under the then prevailing two-step framework.

The Supreme Court has dramatically changed the ground rules with respect to plaintiffs' Second Amendment claim. Vacatur and remand is necessary to allow the parties to compile the kind of historical record that *Bruen* now requires, and would allow the district court to address a number of important issues raised by *Bruen* in the first instance. That course would also be consistent with this Court's orders vacating district court judgments and remanding six other appeals raising Second Amendment claims that were pending when *Bruen* was decided—including two that raise a Second Amendment challenge to California's related restrictions on assault weapons. *See Rupp v. Bonta*, No. 19-56004 (June 28, 2022) (9th Cir. Dkt. 71); *Miller v. Bonta*, No. 21-55608 (Aug. 1, 2022) (9th Cir. Dkt. 27); *see also McDougall v. Cty. of Ventura*, No. 20-56220 (June 29, 2022) (en banc) (9th Cir. Dkt. 55); *Martinez v. Villanueva*, No. 20-56233 (July 6, 2022) (9th Cir. Dkt. 45); *Young v. Hawaii*, No. 12-17808 (Aug. 19, 2022) (en banc) (9th Cir. Dkt. 329); *Cupp v. Bonta*, No. 21-16809 (Aug. 19, 2022) (9th Cir Dkt. 23).

ARGUMENT

I. *BRUEN* ALTERED THE LEGAL STANDARD FOR ANALYZING SECOND AMENDMENT CLAIMS

In *Bruen*, the Supreme Court addressed the constitutionality of New York's requirement that individuals show "proper cause" as a condition of securing a

license to carry a firearm in public. 142 S. Ct. at 2122-2123. Before turning to the merits, the Court announced a new methodology for analyzing Second Amendment claims. It recognized that lower courts had "coalesced around a 'two-step' framework for analyzing Second Amendment challenges that combines history with means-end scrutiny." *Id.* at 2125. At the first step of that approach, the government could "justify its regulation by establishing that the challenged law regulates activity falling outside the scope of the Second Amendment right as originally understood." *Id.* at 2126 (brackets and quotation marks omitted). Courts asked whether there was "persuasive historical evidence showing that the regulation does not impinge on the Second Amendment right as it was historically understood." *Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021) (en banc), *vacated and remanded*, 142 S. Ct. 2895 (2022). Laws "restricting conduct that [could] be traced to the founding era" fell "outside of the Second Amendment's scope" and were upheld "without further analysis." *Id.* In addition, courts would "uphold a law without further analysis if it f[ell] within the 'presumptively lawful regulatory measures' that *Heller* identified." *Id.* (quoting *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016)).

If the first step of the pre-*Bruen* analysis revealed that the challenged restriction burdened conduct protected by the Second Amendment, courts proceeded to the second step of the analysis. *See Young*, 992 F.3d at 783-784.

Alternatively, in many cases—"particularly where resolution of step one [wa]s uncertain and the case raise[d] 'large and complicated' questions"—this and other federal courts of appeals "assumed, without deciding, that the challenged law implicate[d] the Second Amendment," and analyzed the challenge solely at step two. *Duncan v. Bonta*, 19 F.4th 1087, 1102-1103 (9th Cir. 2021) (en banc), *vacated and remanded*, 142 S. Ct. 2895 (2022).[1] That part of the inquiry required courts to determine "how close[ly] the law c[ame] to the core of the Second Amendment right and the severity of the law's burden on the right." *Bruen*, 142 S. Ct. at 2126. If the law severely burdened the "'core' Second Amendment right" of self-defense in the home, strict scrutiny applied; otherwise, courts applied intermediate scrutiny. *Id.*; *see also* Appellant's Opening Br. 21-24 (describing the two-step framework); *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 960-961 (9th Cir. 2014) (same).

The Supreme Court jettisoned the two-step approach in *Bruen*. 142 S. Ct. at 2126. The Court explained that its earlier decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), "do not support applying means-end scrutiny in the Second Amendment

[1] *See also, e.g.*, *Pena v. Lindley*, 898 F.3d 969, 976 (9th Cir. 2018); *Bauer v. Becerra*, 858 F.3d 1216, 1221 (9th Cir. 2017); *Silvester*, 843 F.3d at 826-827; *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013).

context." *Id.* at 2127. It then announced a new standard for analyzing Second Amendment claims that is "centered on constitutional text and history." *Id.* at 2128–2129. Under this text-and-history approach,

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.

Id. at 2129–2130.

This test requires courts to make two inquiries. As a threshold matter, courts must assess whether the "Second Amendment's plain text covers an individual's conduct," *Bruen*, 142 S. Ct. at 2126—*i.e.*, whether the regulation at issue prevents the "people" from "keep[ing]" or "bear[ing]" "Arms" for lawful purposes, U.S. Const. amend. II. If the plain text of the Second Amendment covers the conduct in which plaintiffs wish to engage, the Constitution "presumptively protects that conduct." *Bruen*, 142 S. Ct. at 2126; *see also id.* at 2129–2130 ("When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."); *id.* at 2134 (examining whether the "plain text of the Second Amendment" protected the *Bruen* plaintiffs' course of conduct); *id.* at 2135 (similar). The burden then shifts to the government to justify its regulation by showing that the law is "consistent with this Nation's historical tradition of firearm regulation." *Id.* at 2126.

Bruen also provided guidance about how courts should conduct the Second Amendment historical inquiry. In some cases—such as when a challenged law addresses a "general societal problem that has persisted since the 18th century"—the Court observed that this historical inquiry will be "fairly straightforward." *Bruen*, 142 S. Ct. at 2131. But in others, the Court recognized that the historical analysis requires a "more nuanced approach." *Id.* at 2132. For example, when a regulation addresses "unprecedented societal concerns or dramatic technological changes," *Bruen* instructs courts to "reason[] by analogy." *Id.* To justify regulations of that sort, *Bruen* held that governments are not required to identify a "historical *twin*," but need only identify a "well-established and representative historical *analogue*." *Id.* at 2133.

And the Court also explained how courts should conduct this "analogical reasoning." *Bruen*, 142 S. Ct. at 2132. In evaluating whether a "historical regulation is a proper analogue for a distinctly modern firearm regulation," *Bruen* directs courts to determine whether the two regulations are "'relevantly similar.'" *Id.* The Court identified "two metrics" by which regulations must be "relevantly similar under the Second Amendment": "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2132-2133. The Court explained that those considerations are especially important because "'individual self-defense is "the *central component*" of the Second Amendment right.'" *Id.*

(quoting *McDonald*, 561 U.S. at 767, in turn quoting *Heller*, 554 U.S. at 599).[2] Thus, after *Bruen*, a regulation that restricts conduct protected by the plain text of the Second Amendment is constitutional if it "impose[s] a comparable burden on the right of armed self-defense" as its historical predecessors, and the modern and historical laws are "comparably justified." *Id.*

II. THE COURT SHOULD VACATE THE DISTRICT COURT'S JUDGMENT AND REMAND THIS CASE TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS IN LIGHT OF *BRUEN*

In light of the new text-and-history standard for adjudicating Second Amendment claims, this Court should vacate the district court's judgment and remand this case for further proceedings consistent with *Bruen*. The parties litigated this case—and this Court and the district court analyzed plaintiffs' Second Amendment claim—under the now-defunct two-step approach. Vacatur and remand would serve the interests of both parties, allowing them a full and fair opportunity to address the new emphasis on historical analogues, and would allow the district court in the first instance to address several important questions about how *Bruen* applies.

[2] *See also Heller*, 554 U.S. at 628 ("[T]he inherent right of self-defense has been central to the Second Amendment right.").

For example, consistent with the then-prevailing approach, in this Court and the district court, the parties focused on the burden imposed by California's large-capacity magazine restrictions on plaintiffs' ability to defend themselves, and whether those restrictions satisfied the relevant standard of scrutiny.[3] And in its decision, this Court assumed without deciding that California's large-capacity magazine restrictions burdened conduct protected by the Second Amendment, *Duncan*, 19 F.4th at 1103, before upholding them because they imposed only a minimal burden on plaintiffs' ability to defend themselves and because they satisfied the appropriate standard of review—intermediate scrutiny, *see id.* at 1103-1111. But *Bruen* has since made clear that "*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context." 142 S. Ct. at 2127. Instead, courts must apply a test "centered on constitutional text and history." *Id.* at 2128-2129.

Remand is necessary to allow the parties to develop evidence and present argument under this new test. In particular, remand is required to allow the parties to develop evidence about whether California's large-capacity magazine

[3] *See* Appellant's Opening Br. 31-52 (9th Cir. Dkt. 7); Answering Br. for Appellees 21-31 (9th Cir. Dkt. 46); Attorney General's Opening Supplemental Br. 15-30 (9th Cir. Dkt. 162); Plaintiffs' Opening Supplemental Br. 7-16 (9th Cir. Dkt. 164); Attorney General's Opposition to Plaintiffs' Motion for Summary Judgment 13-22 (D. Ct. Dkt. 53); Plaintiffs' Memorandum of Points & Authorities in support of Plaintiffs' Motion for Summary Judgment 12-19 (D. Ct. Dkt. 50-1).

restrictions are "consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2130. Here, California has strong arguments as to why its large-capacity magazine restriction is constitutional under that test: Even assuming that the plain text of the Second Amendment protects large-capacity magazines because they are "arms," U.S. Const. amend. II, *Bruen* repeats *Heller*'s assurance that States may regulate access to "dangerous and unusual weapons" consistent with the Second Amendment, *Bruen*, 142 S. Ct. at 2128 (quoting *Heller*, 554 U.S. at 627); *see also id.* at 2162 (Kavanaugh, J., concurring) (same).[4] Remand will allow California to develop a record showing that its large-capacity magazine restrictions impose a "comparable burden on the right of armed-self-defense" as historical restrictions on dangerous or unusual weapons, and that the modern and historical regulations are "comparably justified." *Id.* at 2133.

To be sure, *Bruen* recognizes that the historical analysis conducted at step one of the two-step approach was "broadly consistent with *Heller*." 142 S. Ct. at 2127. And in this case, the parties introduced evidence regarding the history of regulating especially dangerous weapons. For example, in its supplemental brief to the en

[4] As the Fourth Circuit has observed, while *Heller* "invoked Blackstone for the proposition that 'dangerous and unusual' weapons have historically been prohibited, Blackstone referred to the crime of carrying 'dangerous *or* unusual weapons.'" *Kolbe v. Hogan*, 849 F.3d 114, 131 n.9 (4th Cir. 2017) (en banc) (quoting 4 Blackstone 148-149 (1769)).

banc Court, California explained how its large-capacity magazine restriction was part of a longer tradition of regulating especially dangerous weapons once they began to circulate widely in society. Attorney General's Opening Supplemental Br. (ASB) 9-15 (9th Cir. Dkt. 162). For their part, plaintiffs argued that certain weapons that could fire more than 10 rounds—including the Pepperbox pistol, the Puckle Gun, and the Girandoni air rifle—had been around since the time of the founding, and that the absence of government regulation of these weapons demonstrated that large-capacity magazines fell within the scope of the Second Amendment. Plaintiffs' Opening Supplemental Br. 2-7 (9th Cir. Dkt. 164). *But see* ASB 10-11 (explaining that most of these firearms were not widely available and none presented the same dangers posed by modern large-capacity magazines).

On remand, much of this history will be relevant to the district court's consideration of the issues presented here. But *Bruen* clarified how the historical inquiry should proceed, and the analysis it requires differs from the one courts used before *Bruen* in important respects. Among other things, neither the parties, nor the district court, nor this Court employed the reasoning-by-analogy analysis—with its emphasis on comparable burdens and comparable justifications—that *Bruen* requires. *See Bruen*, 142 S. Ct. at 2133 (noting that these questions "are *central* considerations when engaging in an analogical inquiry") (quotation marks omitted). In addition, California's historical arguments were consistent with

guidance from this Court that laws from the early 20th century could be considered "longstanding" and therefore presumptively constitutional under *Heller*. *See, e.g.*, *Silvester*, 843 F.3d at 831 (Thomas, C.J., concurring) (concluding that a law that dated to 1923 was a longstanding regulation); *see also Duncan*, 19 F.4th at 1102 (observing that there is "significant merit" to California's argument that its large-capacity magazine restrictions are longstanding because of a tradition of imposing firing-capacity restrictions that dates back "nearly a century"). But *Bruen* has since suggested that when determining whether a law is "longstanding," the focus should be on gun regulations predating the 20th century. *See* 142 S. Ct. at 2137.

Bruen also left open other questions that are best resolved by the district court in the first instance. The Court did not decide "whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope" or look to the "public understanding of the right to keep and bear arms" when the Second Amendment was ratified in 1791. *Bruen*, 142 S. Ct. at 2138. More broadly, the Court "d[id] not resolve" the "manner and circumstances in which postratification practice may bear on the original meaning of the Constitution." *Id.* at 2162-2163 (Barrett, J., concurring).

In resolving these and other historical questions, *Bruen* directs district courts (and then, later, courts of appeals) to follow "'various evidentiary principles and

default rules,'" including "the principle of party presentation." 142 S. Ct. at 2130 n.6. And as *Bruen* recognizes, this historical analysis "can be difficult," and sometimes requires judges to "resolv[e] threshold questions" and "mak[e] nuanced judgments about which evidence to consult and how to interpret it." *Id.* at 2130 (quoting *McDonald*, 561 U.S. at 803–804 (Scalia, J., concurring)).[5] That is especially true in cases like this one, which implicates "unprecedented societal concerns [and] dramatic technological changes." *Id.* at 2132; *see also id.* (recognizing that these cases "require a more nuanced approach"). The parties should have the opportunity to develop a record and arguments consistent with *Bruen*, and the district court should have the opportunity to conduct the analysis *Bruen* requires, before this Court passes on these questions on the basis of a record that was developed before *Bruen*. *Cf. Shirk v. U.S. ex rel. Dep't of Interior*, 773 F.3d 999, 1007 (9th Cir. 2014) (federal courts of appeals are "court[s] of review, not first view").

In addition, vacating the district court's judgment and remanding for further proceedings in light of *Bruen* would accord with what this Court has done in six other appeals raising Second Amendment claims that were pending when *Bruen*

[5] *See also Bruen*, 142 S. Ct. at 2134 ("[W]e acknowledge that 'applying constitutional principles to novel modern conditions can be difficult and leave close questions at the margins.'" (quoting *Heller v. District of Columbia*, 670 U.S. 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting))).

was decided. *See Rupp v. Bonta*, No. 19-56004 (June 28, 2022) (9th Cir. Dkt. 71); *McDougall v. Cty. of Ventura*, No. 20-56220 (June 29, 2022) (en banc) (9th Cir. Dkt. 55); *Martinez v. Villanueva*, No. 20-56233 (July 6, 2022) (9th Cir. Dkt. 75); *Miller v. Bonta*, No. 21-55608 (Aug. 1, 2022) (9th Cir. Dkt. 27); *Young v. Hawaii*, No. 12-17808 (Aug. 19, 2022) (en banc) (9th Cir. Dkt. 329); *Cupp v. Bonta*, No. 21-16809 (Aug. 19, 2022) (9th Cir Dkt. 23). Other courts of appeals have similarly vacated district court judgments resolving Second Amendment claims and remanded for further proceedings in light of *Bruen*.[6] And vacatur and remand here would be consistent with what this Court has done in other cases where the Supreme Court vacated a judgment issued by this Court and remanded for further consideration in light of an intervening Supreme Court decision. *See, e.g.*, *Padilla v. Immigration & Customs Enforcement*, 41 F.4th 1194 (9th Cir. 2022); *Foothill*

[6] *See, e.g.*, *Oakland Tactical Supply, LLC v. Howell Twp.*, 2022 WL 3137711, at *2 (6th Cir. Aug. 5, 2022) (vacating district court judgment and remanding to decide whether the plaintiff's "proposed course of conduct is covered by the plain text of the Second Amendment" and, if so, whether the regulation is "consistent with the nation's historical tradition of firearm regulation"); *Sibley v. Watches*, 2022 WL 2824268, at *1 (2d Cir. July 20, 2022) (vacating judgment and remanding to the district court to "consider in the first instance the impact, if any, of *Bruen*" on challenge to "good moral character" requirement for concealed carry licenses); *Taveras v. New York City*, 2022 WL 2678719, at *1 (2d Cir. July 12, 2022) (vacating and remanding because "neither the district court nor the parties' briefs anticipated and addressed [*Bruen*'s] new legal standard").

Church v. Watanabe, 3 F.4th 1201 (9th Cir. 2021); *Rodriguez v. Swartz*, 800 F. App'x 535 (9th Cir. 2020).

CONCLUSION

The Court should vacate the district court's judgment and its order enjoining the Attorney General from enforcing California Penal Code Section 32310, and remand this case for further proceedings.

Dated: August 23, 2022

Respectfully submitted,

s/ Samuel P. Siegel

ROB BONTA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
THOMAS S. PATTERSON
Senior Assistant Attorney General
SAMUEL P. SIEGEL
HELEN H. HONG
Deputy Solicitors General
P. PATTY LI
Supervising Deputy Attorney General
JOHN D. ECHEVERRIA
Deputy Attorney General

CALIFORNIA DEPARTMENT OF JUSTICE
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102-7004
(415) 510-3917
Sam.Siegel@doj.ca.gov

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 19-55376

I am the attorney or self-represented party.

This brief contains 3,135 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ○ complies with the word limit of Cir. R. 32-1.
- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ○ is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ○ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - ○ it is a joint brief submitted by separately represented parties;
  - ○ a party or parties are filing a single brief in response to multiple briefs; or
  - ○ a party or parties are filing a single brief in response to a longer joint brief.
- ◉ complies with the length limit designated by court order dated 8/2/2022.
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Samuel P. Siegel **Date** 8/23/2022

*(use "*s/[typed name]*" to sign electronically-filed documents)*

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

Exhibit 4

Letter Brief of New Jersey Attorney General

Association of New Jersey Rifle and Pistol Clubs v. New Jersey Attorney General

Third Circuit Court of Appeals, Case No. 19-3142

State of New Jersey

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO Box
TRENTON, NJ 08625-0

MATTHEW J. PLATKIN
Acting Attorney General

MICHAEL T.G. LONG
Director

August 10, 2022

VIA CM/ECF
Patricia S. Dodszuweit, Clerk of Court
Office of the Clerk
United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Re: **Association New Jersey Rifle, et al. v. Attorney General New Jersey, et al.**
Case Number: 19-3142
District Court Case Number: 3:18-cv-10507

Dear Ms. Dodszuweit:

Please accept this reply letter brief in further support of the State's position that this matter should be remanded to the district court for further development of the record, in accordance with the recent decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022). The question presented at this posture is not one of the ultimate merits, but is only whether the State should have an opportunity to meet the burden *Bruen* assigns it to demonstrate that the challenged law fits within the broad historical tradition of firearms regulation in this country. As *Bruen* recognized, the parties must be able to introduce the evidence—including from analogically similar prior laws—that bears on that constitutional

inquiry. There is no basis to deprive the State, or to deprive the reviewing district court, of that opportunity here.

I. This Case Should Be Remanded For Further Record Development.

Although Plaintiffs urge this Court to invalidate the State's large-capacity magazine law outright, it has no support for that proposition. Indeed, as the State already explained in its opening brief, this Court is one "of review, not first view," meaning that district courts must make factual and legal findings in the first instance. *Jerri v. Harran*, 625 F. App'x 574, 579 (3d Cir. 2015); *see also United States v. Brewster*, 128 F. App'x 271, 273 (3d Cir. 2005) (holding that "the sentencing issues appellant raises are best determined by the District Court in the first instance" and remanding for resentencing in accordance with the intervening decision of *United States v. Booker*, 543 U.S. 220 (2005)). That is an important responsibility, and it allows this Court to perform its appellate function effectively.

It should thus come as no surprise that several other courts of appeals already have remanded analogous cases to the district court in light of *Bruen*, and that no court of appeals has taken the dramatic step Plaintiffs seek of resolving a post-*Bruen* challenge in the absence of a post-*Bruen* record or district court ruling. As detailed in the State's opening brief, a number of Second Amendment cases have been remanded to the district court for further action in light of *Bruen*'s historically-guided framework. *See* Br. of Defs.-Appellees at 7-8 (citing *Martinez v. Villanueva*, No. 20-56233, 2022 WL 2452308, at *1 (9th Cir. July 6, 2022)); *McDougall v. County of Ventura*, No. 20-56220, 2022 WL 2338577, at *l (9th Cir. June 29, 2022); *Rupp v. Banta*, No. 19-56004, 2022 WL 2382319, at *1 (9th Cir.

June 28, 2022)). Since that time, yet another Second Amendment case—this one involving a challenge to California's Assault Weapons Control Act—was remanded to the district court "for further proceedings consistent with the United States Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. ____ (2022)." *Miller v. Bonta*, No. 21-55608, (9th Cir. Aug. 1, 2022), ECF No. 27. And the Ninth Circuit is hardly alone in this approach. *See, e.g.*, *Sibley v. Watches*, No. 21-1986, 2022 WL 2824268, at *1 (2d Cir. July 20, 2022) (vacating and remanding to district court to "consider in the first instance the impact, if any, of Bruen" on challenge to other requirements for carry permit); *Taveras v. New York City*, No. 21-398, 2022 WL 2678719, at *1 (2d Cir. July 12, 2022) (similar, and acknowledging that "neither the district court nor the parties' briefs anticipated and addressed [*Bruen*'s] new legal standard"). And notably, despite knowing the State would seek remand, Plaintiffs' brief fails to cite a single analogous case declining remand to the district court, let alone in light of *Bruen*.

Bruen itself compels this approach. *Bruen* has made clear that particularly where a challenged state law relates to "unprecedented societal concerns or dramatic technological changes," the constitutional inquiry is "nuanced." *Bruen*, 142 S. Ct. at 2132. Recognizing that "[t]he regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868," the State may support a statute by "reasoning by analogy"—that is, by showing a law is "relevantly similar," *id.*, to a "well-established and representative historical analogue," *id.* at 2133. That is not as simple as asking about the provenance of the challenged statute; "analogical

reasoning requires . . . that the government identify a well-established and representative historical *analogue*, not a historical *twin*," and that evidence need not be a "dead ringer" for the challenged law. *Id.* A record would thus allow the parties to show "how and why" a prior statute "burden[ed] a law-abiding citizen's right to armed self-defense." *Id.* In other words, the parties can offer competing evidence as to whether a historical predecessor law "impose[d] a comparable burden on the right of armed self-defense" and was "comparably justified." *Id.* The Court was express in contemplating that evidentiary records can be built as part of this analysis, recognizing that courts have to "mak[e] nuanced judgments about which *evidence* to consult and how to interpret it." *Id.* at 2130 (emphasis added) (quoting *McDonald v. Chicago*, 561 U.S. 742, 803-804 (2010) (Scalia, J., concurring)); *see also id.* at 2130 n. 6 (noting that courts are equipped to resolve historical questions by applying "various evidentiary principles" to the record presented by the parties.).

Plaintiffs' brief in fact demonstrates why this Court likewise needs a record in this case in light of *Bruen*, and why this Court should not be the first appellate panel to resolve a post-*Bruen* challenge without one. For one, Plaintiffs repeatedly make a *factual* assertion that LCMs are in common use, but this Court has so far only "assume[d] without deciding" that LCMs are possessed by law-abiding persons for law-abiding purposes. *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. N.J.* (*ANJRPC*), 910 F.3d 106, 117 (3d Cir. 2018). That remains one of many factual issues for the district court to address in the first instance based on a complete record. For another, Plaintiffs contend that this Court already found that no relevant history can support LCM regulations. But that is entirely mistaken.

This Court was, at that time, simply making a comment about the length of time *identical* state magazine capacity restrictions had been in effect. *See id.* at 116-17 & n.18. This Court was not asking whether any historical analogues existed to support the challenged statute. And it was not inquiring into "how and why" previous historical restrictions on kinds of firearms or gunpowder existed—that is, whether they "impose[d] a comparable burden" and were "comparably justified." Such issues have never been addressed by this Court or any other court, and there is no basis to resolve them without record evidence.

Plaintiffs take a stab at trying to answer that inquiry in their supplemental briefing, but they rely on the very sort of evidence that should be considered by the district court on a full record in the first instance. Plaintiffs claim there is a "long tradition of arms capable of firing more than 10 rounds without reloading," and highlight in particular firearms like the Pepperbox-style pistol, the Girandoni air rifle, and the Winchester 66. *See* Pls.' Supp. Br. at 14-16. But the State has not yet been given the opportunity to provide the historical evidence of weapons that *were* regulated at the Founding, or to demonstrate the profound technological changes and evolving threats to public safety that have occurred since that demonstrate the "how and why" of this current capacity restriction. And the district court has thus not yet been called on to "mak[e] nuanced judgments about which evidence to consult and how to interpret it." *Bruen*, 142 S. Ct. at 2130. To the limited extent prior briefing and proposed findings addressed firearms regulatory history, the prior submissions were cursory—at most, a couple of double-spaced pages per filing—and no expert testimony was presented on analogies. *See, e.g.*, Pls.' Reply Br. at 56, *ANJRPC v. Grewal*,

No. 18-cv-10507 (D.N.J. July 9, 2018), ECF No. 39; Pls.' Proposed Findings of Fact & Conclusions of Law at 7-9, *ANJRPC v. Grewal*, No. 19-cv-10507 (D.N.J. Sept. 4, 2018), ECF No. 60; Defs.' Proposed Findings of Fact & Conclusions of Law at 47-50, *ANJRPC v. Grewal*, No. 19-cv-10507 (D.N.J. Sept. 4, 2018), ECF No. 61; Reply Br. of Pls.-Appellants at 7-9, *ANJRPC v. Grewal*, No. 18-3170 (3d Cir. Nov. 2, 2018); Corrected Br. of Pls.-Appellants at 20-21, *ANJRPC v. Grewal*, No. 18-3170 (3d Cir. Oct. 9, 2018). That Plaintiffs recognize the need to go into much greater detail about such history for the first time in a supplemental brief, relying on factual and historical assertions that have not been vetted by the State or the district court to date, underscores that the record in this litigation is not yet appropriate for the inquiry *Bruen* lays out.

II. It Is Not Too Late To Develop The Factual Record.

Perhaps recognizing that the normal course would be to develop a record in the wake of a decision like *Bruen*, Plaintiffs incorrectly suggest that it is simply too late for the State to develop a record. But Plaintiffs misunderstand the procedural history and the law.

The procedural history of this case refutes Plaintiffs' claims. Plaintiffs make much of the fact that they initiated this lawsuit four years ago, and they claim that was more than ample time to build the appropriate record. But for the vast majority of that time, there was no reason for either party to build the kind of record New Jersey is now seeking to establish. After all, this Court issued its decision finding the statute constitutional at the preliminary injunction stage back in 2018. *See ANJRPC*, 910 F.3d at 110. As the State explained in its opening brief to this panel, that decision became law of the case, and it was unnecessary to

seek additional discovery or introduce any further historical evidence into the record (and it might not have been appropriate to do so). *See* Br. of Defs.-Appellees at 13, *ANJRPC v. Grewal*, No. 19-3142, 2020 WL 1325629 (3d Cir. Mar. 11, 2020). Indeed, the district court granted summary judgment to the State on the sole basis that this Court's 2018 preliminary injunction ruling "explicitly held" that the Act does not violate the Constitution, *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Grewal*, No. 3:18-cv-10507, 2019 WL 3430101, at *3 (D.N.J. July 29, 2019), and this panel affirmed on that basis too, *see Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. N.J.*, 974 F.3d 237 (3d Cir. 2020). In other words, this law was upheld on December 5, 2018, and since that time it would have made no sense—and was unnecessary—for the State to build a historical record in a case it had won.

Of course, the State agrees with Plaintiffs that the Court's decision in *Bruen* and the Court's subsequent "grant, vacate, and remand" order in this case changed that calculus. Like Plaintiffs, the State recognizes the law-of-the-case doctrine no longer applies (and so the district court's decision should be vacated) because *Bruen* both declined to adopt this Circuit's two-step means-end framework and clarified that Second Amendment challenges will be decided under an analogically-guided framework. But Plaintiffs cannot have it both ways. Plaintiffs want this Court to hold both that *Bruen* frees them from the prior judgment the Third Circuit issued in 2018 and yet that the State is still bound to the record that was developed in light of that prior Third Circuit judgment. That is wrong; for the very reason that *Bruen* allows Plaintiffs to continue to press forward with a constitutional challenge to the Act, it also requires that the State have an opportunity to develop the historical record

and defend the Act under the new legal standard. In short, *Bruen* now requires the parties to embark on the difficult but important project of identifying historical analogies for the challenged law, and making "nuanced" and likely competing arguments to the district court regarding "which evidence to consult and how to interpret it." *Bruen*, 142 S. Ct. at 2132. This Court's precedent did not previously mandate this analogical analysis, so there was no occasion to litigate it in this case—whatever the length of the lawsuit.

More broadly, Plaintiffs' cramped view of when a remand is appropriate would be inconsistent with traditional circuit practice after a GVR issues. Not surprisingly, courts of appeals have repeatedly remanded cases where, as here, a vacatur from the Supreme Court means their prior decision is no longer law of the case. *See, e.g.*, *United States v. Castillo*, 220 F.3d 648 (5th Cir. 2000) (on remand from Supreme Court, remanding to district court for further proceedings consistent with the Court's intervening opinion in C*astillo v. United States*, 530 U.S. 120 (2000)). Plaintiffs' view that such a remand is only appropriate based on how long the case has been around would be strange. A GVR order almost by definition comes late in a case—after a district court has rendered a judgment and an appellate court has ruled. Instead, the question is not how long the case has existed, but whether there is a need for additional record development in light of the intervening decision by the Supreme Court. Such a need plainly exists here, as several other federal appellate panels to consider these questions after *Bruen* have concluded. A remand to the district court best makes sure that this Court can ultimately perform its reviewing function most effectively.

* * *

In short, several circuit courts considering similar cases after *Bruen* have decided to remand the cases to the district court, so that the parties can build the historical records the Court emphasized. Plaintiffs point to no case to the contrary. The questions *Bruen* raises are challenging and will require serious historical inquiries and debates over the proper analogies. None of that should happen for the first time in supplemental briefing before an appellate court, particularly where the entirety of the prior summary judgment proceedings turned on the law-of-the-case doctrine. Plaintiffs should have an opportunity to press their claims, and the State likewise should have the chance to meet its legal burden, but the parties must do so in the first instance before the district court.

Sincerely yours,

MATTHEW J. PLATKIN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: /s/Stuart M. Feinblatt
Stuart M. Feinblatt
Assistant Attorney General

cc: All counsel of record (via ECF)

CERTIFICATE OF SERVICE

I certify that on August 10, 2022, the foregoing Appellees' Reply Letter Brief was electronically filed with the clerk of the court with the United States Court of Appeals for the Third Circuit through the Court's CM/ECF system, which filing effected service upon counsel of record through the CM/ECF system.

Dated: August 10, 2022

By: /s/ Stuart M. Feinblatt
Stuart M. Feinblatt (NJ ID# 018781979)
Assistant Attorney General