UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 18-3170

ASSOCIATION OF NEW JERSEY RIFLE & PISTOL CLUBS, INC., et al.,

Appellants,

v.

ATTORNEY GENERAL NEW JERSEY, et al.,
Appellees.

On Appeal From: The United States District Court for the District of New Jersey
(Docket No. 3-18-cv-10507)
Sat Below: The Honorable Peter G. Sheridan, United States District Judge

BRIEF OF EVERYTOWN FOR GUN SAFETY AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

CORPORATE DISCLOSURE STATEMENT

Everytown for Gun Safety has no parent corporation. It is not a publicly held corporation, has no stock and, therefore, no publicly held company owns 10% or more of its stock.

INTEREST OF AMICUS CURIAE

Everytown for Gun Safety (hereinafter, "Everytown") is the nation's largest gun-violence-prevention organization, with more than five million supporters across all fifty states, including tens of thousands in New Jersey. It was founded in 2014 as the combined effort of Mayors Against Illegal Guns, a national, bipartisan coalition of mayors combating illegal guns and gun trafficking, and Moms Demand Action for Gun Sense in America, an organization formed after the murder of twenty children and six adults in an elementary school in Newtown, Connecticut. Currently, the mayors of 100 New Jersey cities are members of Mayors Against Illegal Guns. Everytown also includes a large network of gun violence survivors who are empowered to share their stories and advocate for responsible gun laws.[1]

INTRODUCTION

This case is about the right of New Jersey residents to be free from gun violence and their power to enact laws to protect that right. In light of the increasing toll of mass shootings, and in response to recent gun massacres in Aurora, Colorado; Newtown, Connecticut; San Bernardino, California; Las Vegas, Nevada; and Sutherland Springs, Texas, among other places, the people of New Jersey sought

[1] All parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

legislation that would limit their risk of dying in such horrific crimes. Their efforts resulted in Assembly Bill No. A2761 (hereinafter, "A2761"), which amends the New Jersey criminal code to prohibit the sale or possession of large-capacity magazines ("LCMs")[2] capable of holding more than ten rounds of ammunition, the type of magazines used in these and other recent mass shootings. N.J. Stat. Ann. 2C:39:1(y); 2C:39:3(j).[3]

In upholding New Jersey's prohibition on LCMs as permissible under the Second Amendment, the district court below followed every federal appeals court to have considered this issue on the merits.[4] But Appellants barely mention this overwhelming precedent. Instead, they argue that their Second Amendment claims are likely to succeed because, Appellants assert, laws regulating ammunition capacity are not longstanding, LCMs are widely owned, and social science does not support the restrictions. As both the State's brief and this *amicus* brief show,

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[2] Appellants euphemistically (and incorrectly) refer to magazines capable of holding more than ten rounds as "standard-capacity magazines" or "SCMs."

[3] *See, e.g.*, Kristina Davis, *Las Vegas Mass Shooting Revives Debate on High-Capacity Magazines*, San Diego Tribune (Oct. 7, 2017), https://bit.ly/2KshdlQ; Mike McIntire, *Weapons in San Bernardino Shootings Were Legally Obtained*, N.Y. Times (Dec. 3, 2015), https://nyti.ms/2JPLR4F.

[4] *See Kolbe v. Hogan*, 849 F.3d 114, 137-38 (4th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 469 (2017); *NYSRPA v. Cuomo*, 804 F.3d 242, 247 (2d Cir. 2015), *cert. denied sub nom. Shew v. Malloy*, 136 S. Ct. 2486 (2016); *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (2015); *Heller v. District of Columbia*, 670 F.3d 1244, 1264 (D.C. Cir. 2011); JA28.

Appellants' arguments are meritless. This Court should reject them and affirm the district court's denial of Appellants' Motion for a Preliminary Injunction.

This *amicus* brief addresses Appellants' Second Amendment claims, and in particular their failure to demonstrate likelihood of success on the merits, and makes three points:[5]

First, as the district court recognized, A2761 is part of a long tradition of regulating weapons that legislatures have determined to be unacceptably dangerous—including a century of restrictions on firearms capable of firing a large number of rounds without reloading. *See* JA23-24 (stating that A2761 is "consistent with this country's history and tradition of 'imposing conditions and qualifications on the commercial sale of arms'" and citing as examples early and late twentieth century laws restricting magazine capacity). This historical tradition alone is sufficient for this Court to find A2761 constitutional.

Second, this Court should also reject Appellants' argument that the national prevalence of a firearm feature, like the LCMs at issue here, somehow gives that feature Second Amendment protection. Such an approach cannot be reconciled with the Second Amendment exceptions articulated by the Supreme Court in *Heller* or by

[5] Everytown also fully endorses the State's other Second Amendment arguments. The district court's denial of a preliminary injunction with respect to Appellants' Equal Protection and Takings Clause claims should also be affirmed for the reasons set forth by the State.

those circuits that have addressed this issue. Put simply, the "common use" test articulated by Appellants and utilized by the district court would transform the constitutional analysis into a consumer referendum and render existing firearms and firearm features like LCMs effectively immune from regulation. That is not the law.

Finally, even if A2761 were found or assumed to regulate conduct protected by the Second Amendment, this Court should affirm the district court's determination that the law withstands intermediate scrutiny. Research conducted by Everytown (as well as other relevant social science and statistical evidence presented by the State and other amicus, *see, e.g.*, Appellants' Br. at 15-16, 20-21, 26-35; Giffords Amicus Br. at 17-27; *see also* D. Ct. Dkt. 34-2 at 14-17) demonstrates that LCMs make both mass shootings and day-to-day gun violence more deadly and supports the reasonable fit of A2761 to addressing New Jersey's public safety concerns. Purported evidence to the contrary presented by Appellants' expert is undermined by contradictions, clear methodological errors, and impossibilities. The district court properly did not credit it, and neither should this Court.

ARGUMENT

I. New Jersey's LCM Prohibition Is Part of a Longstanding History of Identical and Analogous Prohibitions.

As the Supreme Court and this Court have emphasized, "longstanding limitations are exceptions to the right to bear arms." *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2013); *see District of Columbia v. Heller*, 554 U.S. 570,

626-27, 635 (2008) (noting that such "longstanding" regulations are treated as tradition-based "exceptions" by virtue of their "historical justifications"). Such longstanding prohibitions need not "mirror limits that were on the books in 1791." *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc). Instead, courts have found that even "early twentieth century regulations might nevertheless demonstrate a history of longstanding regulation if their historical prevalence and significance is properly developed in the record." *Fyock v. City of Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015).[6]

As the district court found, A2761 "is . . . consistent with this country's history and tradition." JA23.[7] In particular, it is part of a long tradition of regulating weapons that lawmakers have determined are unacceptably dangerous—including a century of restrictions enacted shortly after semi-automatic weapons capable of firing a large number of rounds without reloading became widely commercially

[6] *See also Friedman*, 784 F.3d at 408 (noting that "*Heller* deemed a ban on private possession of machine guns to be obviously valid," even though "states didn't begin to regulate private use of machine guns until 1927," and that "regulating machine guns at the federal level" did not begin until 1934); *Skoien*, 614 F.3d at 639-41 (noting that "prohibitions on the possession of firearms by felons and the mentally ill" have been found to be sufficiently longstanding, despite the fact that "[t]he first federal statute disqualifying felons from possessing firearms was not enacted until 1938" and that "the ban on possession by *all* felons was not enacted until 1961").

[7] The district court correctly rejected the alternative history argued below (*see* D. Ct. Dkt. No. 14 at 13-14) and pressed here by Appellants and the NRA (*see* NRA Amicus Br. at 9-14). *See* JA8-9, JA23-24.

available. *See* JA8-9, JA23-24; *see also* Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 Law & Contemp. Probs. 55, 68-71, 81-82 (2017). Many of these laws were passed at about the same time as were prohibitions on sales to felons and the mentally ill and restrictions on commercial sale of arms which the Supreme Court in *Heller* identified as longstanding. *See id*. This historical tradition alone is sufficient to uphold A2761.

A. There Is a Longstanding Tradition of Prohibiting Firearms Capable of Quickly Firing Multiple Rounds Without Reloading.

"Several states began to impose restrictions on the capacity of magazines shortly after they became commercially available in the early part of the [twentieth] century." JA23. Such laws often categorized large-capacity, semi-automatic firearms, along with fully automatic weapons, as "machine guns" and imposed restrictions that effectively prohibited them entirely. *See, e.g.*, 1927 R.I. Pub. Laws 256, §§ 1, 4 (prohibiting the "manufacture, s[ale], purchase or possess[ion]" of a "machine gun," which it defined as "any weapon which shoots more than twelve shots semi-automatically without reloading"); 1927 Mich. Pub. Acts 887, § 3 (prohibiting possession of "any machine gun or firearm which can be fired more than sixteen times without reloading"); JA8 (discussing early twentieth century laws regulating weapons "based on the number of rounds they could fire without needing to reload").

In 1928, the National Conference on Uniform State Laws (now the Uniform Law Commission) adopted a model law that prohibited possession of "any firearm which shoots more than twelve shots semi-automatically without reloading," setting the national standard for laws prohibiting possession of semi-automatic firearms with large magazine capacities. *See* Report of Firearms Committee, 38th Conference Handbook of the National Conference on Uniform State Laws 422-23 (1928). Shortly thereafter, the federal government enacted a similar prohibition for the District of Columbia. *See* 47 Stat. 650, ch. 465, §§ 1, 14 (1932) (making it a crime to "possess any machine gun," which it defined as "any firearm which shoots . . . semiautomatically more than twelve shots without loading"). Ironically, the National Rifle Association—parent organization of the organizational plaintiff in this case—endorsed the D.C. law, saying, "it is our desire [that] this legislation be enacted for [D.C.], in which case it can then be used as a guide throughout the states of the Union." S. Rep. No. 72-575, at 5-6 (1932).

Many states followed the federal government's lead, regulating firearms based on magazine capacity. California, for example, prohibited the sale or possession of not only "all firearms . . . capable of discharging automatically," but also "all firearms . . . automatically fed after each discharge from or by means of clips, discs, drums, belts or other separable mechanical device *having a capacity of*

greater than ten cartridges." 1933 Cal. Stat. 1170, § 3 (emphasis added).[8] Several other states, including Minnesota, Ohio, and Virginia, also regulated firearms based on magazine capacity.[9] Still others passed laws limiting possession of automatic weapons based on the number of rounds that a firearm could discharge without reloading.[10]

As this historical record shows—and the district court acknowledged, *see* JA23-24—A2761 is the continuation of nearly a century of valid restrictions based on the ability to shoot large numbers of rounds in a short time without reloading. As such, the statute qualifies as a longstanding restriction, which accordingly falls

[8] These statutes were at least as restrictive as A2761, and indeed appear more restrictive: the 1933 law prohibited *firearms* capable of receiving LCMs, rather than only the LCMs at issue here. *See id.*

[9] *See* 1933 Minn. Laws 232, § 1 (banning "[a]ny firearm capable of automatically reloading after each shot is fired, whether firing singly by separate trigger pressure or firing continuously" if the weapon was modified to allow for a larger magazine capacity); 1933 Ohio Laws 189, § 1 (banning "any firearm which shoots more than eighteen shots semi-automatically without reloading"); 1934 Va. Acts 137, § 1 (effectively prohibiting possession or use of "weapons . . . from which more than sixteen shots or bullets may be rapidly, automatically, semi-automatically or otherwise discharged without reloading").

[10] These limitations were more stringent than the challenged ten-round restriction here. *See* 1933 S.D. Sess. Laws 245, § 1 (five rounds); 1933 Tex. Gen. Laws 219, § 1 (same); 1934 Va. Acts 137, § 1 (seven rounds for automatics, 16 for semi-automatics); 1931 Ill. Laws 452, § 1 (eight rounds); 1932 La. Acts 337, § 1 (same); 1934 S.C. Acts 1288, § 1 (same). As the district court stated, these regulations on automatic, rather than semiautomatic, firearms "inform the Court's analysis in that they focused on the number of bullets that could be fired *without reloading*, not the number of times the shooter needed to pull the trigger." JA23 n.8.

outside the scope of the Second Amendment. *See Drake v. Filko*, 724 F.3d 426, 432 (3d Cir. 2013) (finding that New Jersey's concealed-carry licensing standard, in effect "in some form for nearly 90 years," "qualifies as a longstanding, presumptively lawful regulation" (internal quotation marks omitted)).

B. A2761 Is Consistent with Centuries of Laws Prohibiting Weapons Deemed to Be Especially Dangerous.

A2761 is also part of a long history of government prohibition of weapons that pose heightened threats to public safety, either because the weapons themselves are particularly lethal or because they are especially suitable for criminal use. In particular, prohibitions on weapons deemed to be especially dangerous date back to early English legal history, beginning with the 1383 prohibition of launcegays (a particularly lethal type of spear) and the 1541 prohibition of crossbows and firearms less than a yard long. *See* 7 Ric. 2, 35, ch. 13 (1383); 33 Hen. 8, ch. 6, § 1 (1541). The regulation of unusually dangerous weapons continued as the American colonies and first states, including New Jersey, adopted the English tradition. *See generally* 1763-1775 N.J. Laws 346 (prohibiting set or trap guns); The Laws of Plymouth Colony (1671) (same); Records of the Colony of New Plymouth in New England 230 (Boston 1861) (same).

States continued to pass prohibitions or regulations on unreasonably dangerous weapons after ratification of the Second Amendment. For example,

several states banned or placed prohibitively high taxes on Bowie knives,[11] which were determined to be "instrument[s] of almost certain death." *See Cockrum v. State*, 24 Tex. 394, 402 (1859). In addition, a number of states prohibited certain types of small and easily concealable handguns, which were determined to be ideal for criminal use.[12]

Throughout the early twentieth century, as firearms and weapons technology evolved, many states passed laws prohibiting additional unusually dangerous weapons or weapon features, such as silencers.[13] And, in the 1920s and 1930s, at least twenty-eight states and the federal government passed prohibitions or severe

[11] *See* 1837 Ala. Laws 7, § 1 (prohibitively taxing Bowie knives); 1837 Ga. Laws 90 (banning Bowie knives**)**; 1837-1838 Tenn. Pub. Acts 200 (prohibiting the sale of Bowie knives); *Aymette v. State*, 21 Tenn. 154, 158 (1840) (finding Bowie knives are "weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin").

[12] *See* 1881 Ark. Acts § 1909 (pocket pistols and "any kind of cartridge[] for any pistol"); 1879 Tenn. Pub. Acts 135, ch. 96, § 1 ("belt or pocket pistols, or revolvers, or any other kind of pistols, except army or navy pistol"); 1907 Ala. Law 80, § 1 (similar); 1903 S.C. Acts 127, § 1 (similar).

[13] *See, e.g.*, 1909 Me. Laws 141 (prohibiting silencers); 1912 Vt. Acts & Resolves 310, § 1 (same); 1913 Minn. Laws 55 (same); 1916 N.Y. Laws 338-39, ch. 137, § 1 (same); 1926 Mass. Acts 256, ch. 261 (same). States also banned a wide variety of other unusually dangerous weapons, including blackjacks and billy clubs, slung-shots, brass knuckles, various kinds of knives, and explosives. *See, e.g.*, 1917 Cal. Stat. 221, ch. 145, § 1 (blackjacks and billy clubs); 1911 N.Y. Laws 442, ch. 195, § 1 (slung-shots); 1917 Minn. Laws 614, ch. 243, § 1 (brass knuckles); 1913 Iowa Acts 307, ch. 297, § 2 (daggers and similar-length knives); 1927 Mich. Pub. Acts 887, No. 372, § 3 (explosives).

restrictions on automatic weapons, along with the restrictions on large capacity semi-automatic weapons discussed above. *See supra* Part I.A.

Within this historical context, New Jersey's prohibition on LCMs can be understood as merely the latest part of a longstanding tradition of government prohibition or regulation of unusually dangerous weapons. This long history of analogous regulation further supports the conclusion that A2761 does not burden a "right secured by the Second Amendment." *Heller*, 554 U.S. at 626-27.

And, finally, even if this Court were to determine that the district court was correct to conclude that LCMs fall within the scope of the Second Amendment, the historical record shows that, at most, regulations on weapons that pose heightened threats to public safety, such as LCMs, burden conduct outside the core of the Second Amendment right. Thus, the district court correctly applied intermediate scrutiny to A2761. *See Drake*, 724 F.3d at 436 (applying intermediate scrutiny to New Jersey's public carry law because it did not burden "the core of the Amendment"); *see also Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 86 (2d Cir. 2012) ("Because our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public, we conclude that intermediate scrutiny is appropriate in this case.").

II. The "Common Use" Test Proposed by Appellants and Used by the District Court Is Illogical and Should Not Be Followed.

While ultimately reaching the correct conclusion in rejecting Appellants' preliminary injunction motion, the district court misstepped in relying on a threshold test that focuses on whether the law bans weapons that are "in common use." JA21-24. Such a test is not required by *Heller*, is not well grounded in Second Amendment jurisprudence, and does not fully account for important principles of federalism. And these flaws would only be amplified if the test were applied categorically, as demanded by Appellants. *See* Appellants' Br. at 15-19.

The argument that LCMs must be afforded Second Amendment protection because they are widely available misconstrues the Supreme Court's decision in *Heller*. The *Heller* Court held that the Second Amendment "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." 554 U.S. at 625. It does not logically follow—and neither the Supreme Court nor other courts have held—that the Second Amendment somehow protects all weapons that have achieved a degree of commercial success. *See Kolbe*, 849 F.3d at 142 ("The *Heller* majority said nothing to confirm that it was sponsoring the popularity test."); *Worman v. Healey*, 293 F. Supp. 3d 251, 266 (D. Mass. 2018) ("[P]resent day popularity is not constitutionally material.").

In addition to lacking firm jurisprudential foundation, the "common use" test proves hopelessly circular. Following this approach would allow the

constitutionality of weapons prohibitions to be decided not by how dangerous a weapon is, but rather by "how widely it is circulated to law-abiding citizens by the time a bar on its private possession has been enacted and challenged." *Kolbe,* 849 F.3d at 141. Just as "[i]t would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn't commonly owned," *Friedman,* 784 F.3d at 409, it would be similarly absurd to allow the fact that a law previously did not exist to stand as a constitutional bar to its enactment. *See* Joseph Blocher & Darrell A.H. Miller, *Lethality, Public Carry, and Adequate Alternatives*, 53 Harv. J. on Legis. 279, 288 (2016) (discussing the "central circularity" that plagues the "common use" test: "what is common depends largely on what is, and has been, subject to regulation"). Yet this is what application of the "common use" test, advocated by Appellants, would dictate, here and elsewhere.

This approach also fails to provide workable standards, or indeed, any guidance, as to whether LCMs' "common use" is determined by considering the number produced or sold or the number of law-abiding owners. *See Kolbe,* 849 F.3d at 135-36. This distinction is critical because American firearm ownership is extremely concentrated, with 3% of adults possessing 50% of the country's guns. *See* Lois Beckett, *Meet America's Gun Super-Owners—With An Average of 17 Firearms Each*, The Trace (Sept. 20, 2016), http://bit.ly/2d89dGH. If production or sales numbers form the basis of the common use analysis, this small group of gun

owners would be essentially placed in control of the meaning of the Second Amendment. But this tyranny of a tiny minority was obviously not what the *Heller* Court intended.

Indeed, a constitutional analysis driven by the prevalence of the prohibited firearm in the market would create perverse incentives for the firearms industry, giving it the unilateral ability to provide highly dangerous firearms or firearm features with Second Amendment protection "simply by manufacturing and heavily marketing them" before a government could assess their danger, determine whether to regulate and build the political momentum to actually do so. *See* Cody J. Jacobs, *End the Popularity Contest: A Proposal for Second Amendment "Type of Weapon" Analysis*, 83 Tenn. L. Rev. 231, 265 (2015). The choices, including the irresponsible choices, of the gun industry cannot and should not define the meaning of the Second Amendment. *See Kolbe*, 849 F.3d at 141-42 (rejecting such a test).

Such an approach also raises federalism concerns, as states that fail to immediately regulate new and potentially dangerous firearms or firearm features could lose the ability to do so if such products are quickly adopted by consumers in other states.[14] Thus, firearm safety decisions made in some states would render the

[14] A counterfactual demonstrates why the "common use" test is inappropriate: if Congress renewed the federal LCM prohibition rather than permitting it to lapse in 2004, the weapons prohibited by A2761 would not be in widespread use today and would therefore not be subject to Second Amendment protection under Appellants' "common use" theory.

laws of other states "more or less open to challenge under the Second Amendment," and "would imply that no jurisdiction other than the United States as a whole can regulate firearms." *Friedman*, 784 F.3d at 412. But *Heller* "does not foreclose all possibility of experimentation" by state and local governments. *Id.* Directly to the contrary, it permits states and localities to do what they have long done in the realm of firearm legislation: "experiment with solutions to admittedly serious problems." *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 966 (9th Cir. 2014) (quoting *City of Renton v. Playtime Theatres, Inc.* 475 U.S. 41, 52 (1986)).

This Court should be guided by the historical tradition discussed above, and consider whether the firearm, or firearm component, at issue is appropriate for self-defense or instead is a weapon designed to produce mass casualties. *See Kolbe*, 849 F.3d at 121 (finding that LCMs that "allow a shooter to fire more than ten rounds without having to pause to reload . . . 'are particularly designed and most suitable for military and law enforcement applications' [as they] enhance a shooter's capacity to shoot multiple human targets very rapidly"); *see also NYSRPA*, 804 F.3d at 256 (noting that *Heller* permitted the prohibition of military-grade weapons "without implicating the Second Amendment"); *Friedman*, 784 F.3d at 408 (noting that, under *Heller*, the Second Amendment does not protect "military-grade weapons" or "weapons especially attractive to criminals").

III. Use of LCMs Makes Mass Shootings and Other Gun Violence Incidents Deadlier.

The use of LCMs, whether in mass shootings or in day-to-day gun violence, results in more people being shot, more injuries per victim, and more deaths. New Jersey thus has a strong public interest in reducing the risk of harm to its citizens by prohibiting the possession and use of LCMs throughout the State. The district court's determination that A2761 is a reasonably tailored attempt to address this serious public safety concern, and is thus constitutional, *see* JA27-28, should be affirmed.

A. Everytown's Analysis of Mass Shootings Shows that the Use of LCMs Results in More Deaths and Injuries.

Relying largely on press coverage and FBI data, Everytown has tracked and documented mass shootings since 2013 and has released several reports summarizing this data.[15] While Everytown's research cannot present a comprehensive dataset of the magazines used in every mass shooting (the reality of gun violence in the United States is that this kind of information is not available in every instance), the available information indicates that LCMs make shootings significantly more deadly.

[15] Everytown's most recent mass shooting report, *Mass Shootings in the United States: 2009-2016* (Mar. 2017), is available at https://every.tw/2BvFkXr.

For example, a report on mass shootings issued by Everytown's predecessor organization in 2013 shows that, on average, shooters who use LCMs, or assault weapons (which are typically equipped with LCMs), shoot more than twice as many victims (151% more) and kill 63% more victims as compared to other mass shooters. Mayors Against Illegal Guns, *Analysis of Recent Mass Shootings* (Sept. 2013), https://bit.ly/R5K9zi; *see also* JA562 (Kleck Supp. Decl. ¶ 35) (acknowledging that "there are, on average, more casualties in mass shootings in which LCMs are used than in those in which they are not," but claiming no causal link). More recently, data from Everytown's continued tracking of mass shootings shows that where assault weapons—which, except for in jurisdictions where they are prohibited, generally come standard with LCMs—are used, an average of twice as many people are killed (10.1 per shooting versus 4.9) and more than ten times as many are shot and injured (11.4 per shooting versus 1.1) than in shootings in which such weapons are not used. *See* Everytown, Appendix to *Mass Shootings in the United States: 2009-2016* (Apr. 11 2017), https://every.tw/2JPBIVz; *see also* Louis Klarevas, *Rampage Nation: Securing America from Mass Shootings* 221 (2016) (use of LCMs in high-casualty mass shootings increased death toll by 17%).

Everytown's tracking of mass shootings also shows that LCMs are almost always used in the most deadly and injurious events. These include the shooting in San Bernardino, which resulted in fourteen deaths and twenty-two injuries; the

massacre of forty-nine people and wounding of fifty-three more in a nightclub in Orlando; the attack in Las Vegas in which the shooter used dozens of LCMs to fire hundreds of rounds into a concert crowd, resulting in the death of fifty-eight people and the injury of 869 more; and the attack on a church in Sutherland Springs that resulted in twenty-six deaths and twenty injuries.[16] Indeed, at least nine of the ten deadliest mass shootings in modern American history involved the use of a gun with an LCM.[17]

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[16] *See* Everytown, Appendix to *Mass Shootings*, at 3, 6; *see* Jackie Valley et al., *No Clear Motive in Las Vegas Strip Shooting That Killed 59, Injured 527*, Nevada Independent (Oct. 2, 2017), http://bit.ly/2x4m4is; Jason Hanna & Holly Yan, *Sutherland Springs church shooting: What we know*, CNN.com (Nov. 7, 2017), https://cnn.it/2HlsfV6. Last weekend's horrific shooting at a Pittsburgh synagogue, which killed eleven and injured several others, was reportedly committed with an AR-15, which typically comes equipped with an LCM. Richard A. Oppel Jr., *Synagogue Suspect's Guns Were All Purchased Legally, Inquiry Finds*, N.Y. Times (Oct. 30, 2018), https://nyti.ms/2qkN4IB.

[17] Las Vegas (58 fatalities); Orlando (49); Virginia Tech (32); Newtown (26); Sutherland Springs (26); Killeen, Tex. (23); San Ysidro, Cal. (21); Austin, Tex. (18); San Bernardino (14). *See* Violence Policy Center, *High Capacity Ammunition Magazines are the Common Thread Running Through Most Mass Shootings in the United States*, https://bit.ly/2HnPC0k. The attack on Marjory Stoneman Douglas High School in Parkland, Florida, which killed seventeen and injured at least fifteen people, involved the use of a Smith and Wesson M&P 15, which comes standard with a thirty-round magazine, though it has not yet been officially confirmed whether LCMs were actually used in the shooting. *See* Alex Daugherty & Mary Ellen Klass, *Why Limiting Gun-Magazine Size Is a Tough Problem for Marco Rubio*, Miami Herald (Mar. 29, 2018) https://hrld.us/2CXvQbK (reporting, from "a federal law enforcement official," "that all of the ammunition used [in Parkland] was in 30-round magazines").

Appellants continue to claim, however, that LCMs are hardly ever used in the commission of mass shootings. They assert, citing to their own expert, whose testimony the district court found to be of "little help," JA17, that "between 94% and 99% of mass shootings do not involve [LCMs]." Appellants' Br. at 35. But that assertion is flatly inconsistent with their position that the LCMs prohibited by A2671 are widely possessed and used. *See id.* at 15-19. Unless Appellants are arguing that mass shooters intentionally select smaller-capacity magazines, this bizarre claim regarding the use of LCMs in mass shootings simply makes no sense. And, rather than supporting Appellants, their expert has admitted that there is no evidentiary basis for this claim. As he stated just two years ago, in his view, "it is impossible to distinguish (a) shootings in which the perpetrator did not use an LCM from (b) shootings in which the perpetrator did use an LCM." Gary Kleck, *Large-Capacity Magazines and the Casualty Counts in Mass Shootings: The Plausibility of Linkages*, 17 Just. & Res. Pol. 28 (2016), https://bit.ly/2EkKtse.

Appellants also egregiously misrepresent the results of a 2015 Everytown analysis, which relied on news reports to find that "at least 15 of the [133] incidents (11%)" in the report involved the use of LCMs. JA942; Everytown, *Analysis of Recent Mass Shootings* (Aug. 2015), https://every.tw/2O8km8E. Appellants reverse the "at least" 11% from the Everytown report, to claim that "at least 89% of mass shootings do not involve [LCMs]." Appellants' Br. at 35. But that is not what

Everytown's report shows. Because of the difficulty of gathering data, the majority of the 133 mass shootings have no known data for ammunition capacity.[18] And where information about ammunition used in a mass shooting is unknown, it is more reasonable to assume that an LCM likely was involved. In fact, in those jurisdictions without existing LCM restrictions, many popular handguns and assault-style rifles are sold with LCMs as a feature of the weapon.[19]

Mass shootings involving LCMs also have a unique impact that the Court should consider when weighing the significant harm caused by LCMs. Indeed, mass shootings like those that occurred at Virginia Tech, Aurora, Newtown, Tucson, Orlando, Las Vegas, and Sutherland Springs sear themselves into the national consciousness and affect the way people live their everyday lives. *See* Alana Abramson, *After Newtown, Schools Across the Country Crack Down on Security*, ABC News (Aug. 21, 2013), http://abcn.ws/1KwN9Ls (comparing impact of the Newtown shooting on school security to that of 9/11 on airport security and noting school districts have spent tens of millions of dollars on security improvements); *see*

[18] A forthcoming Everytown publication, analyzing mass shootings data from 2009 to 2017 *when magazine size is known and verified by police or media reports*, finds that roughly half of mass shootings involve guns with LCMs.

[19] *See, e.g.*, *Glock 19*, Glock, http://bit.ly/1UYJ1vZ (listing standard magazine capacity as 15 rounds); *Glock 17*, Glock, https://bit.ly/2qp9yYZ (17 rounds); *Beretta M9 Pistols*, Cabela's, http://bit.ly/2xMx2IW (listing models with capacities of 10 and 15 rounds); Colt M-4 Carbine, https://bit.ly/2JxXL2L (30 rounds); Smith and Wesson M&P 15, https://bit.ly/2IGvRBr (30 rounds).

also Friedman, 784 F.3d at 412 (noting that mass shootings "are highly salient"). While mass shootings on the scale of these tragedies remain statistically rare compared to the plague of day-to-day gun violence, their enormous impact reinforces the compelling justifications for New Jersey's law.

B. Appellants' Social Science Evidence Is Unconvincing.

The declaration and testimony of Appellants' expert, Professor Gary Kleck—which is undermined by contradictions, clear methodological errors, and impossibilities—fails to show LCMs do not increase the lethality of mass shootings or are necessary for self-defense. The district court was correct not to rely upon it. *See* JA17-18.

Kleck, for example, asserts in his declaration that "in 1993 there were approximately 2.5 million incidents in which guns were used for self-protection." (D. Ct. Dkt. No. 11 (Kleck Decl.) ¶ 4; *see* JA17). But this figure, and the methodology used to derive it, have been repeatedly debunked.[20] As Dr. David Hemenway, director of the Harvard Injury Control Research Center has noted, Kleck's "estimate is not plausible and has been nominated as the 'most outrageous number mentioned in a policy discussion.'" Hemenway, *supra* n.20, at 66-68. In

[20] *See, e.g.*, Philip Cook et al., *The Gun Debate's New Mythical Number: How Many Self-Defense Uses Per Year?*, 16 J. Pol'y Analysis & Mgmt. 43, 463-69 (2007); David Hemenway, *Private Guns, Public Health* 66-68, 238-43 (2004); Violence Policy Ctr., *Firearm Justifiable Homicide and Non-Fatal Self-Defense Gun Use*, at 4 (Sept. 2018), https://bit.ly/2Rubf2G.

fact, the NRA does not even credit his estimate, instead using a number more than three-times lower in its own advocacy materials. National Rifle Association (@NRA), Twitter (June 28, 2018), https://bit.ly/2tZzBr9 (claiming 760,000 annual defensive gun uses). And, before the district court, Kleck himself claimed that the current rate of defensive gun use "was approximately half" of the 2.5 million number, but acknowledged that even that estimate is "a guess for which [he] had no data at all." JA17.

This error is also the basis for Appellants' claim that there are over 4,663 defensive gun uses in the home per year involving firing more than ten shots. Appellants' Br. at 25-26. That number was reached by taking Kleck's clearly erroneous, and admittedly out-of-date, 2.5 million defensive-gun-uses number, multiplying that by his estimate of the percentage of defensive gun uses in the home, and then multiplying that by the percentage of such incidents found in the NRA's defensive-gun-use database in which more than ten shots were reportedly fired (2 of 411). JA328. This approach takes 411 of what are certainly some of the most extreme and newsworthy cases of defensive gun across a period of more than six years, JA69, and assumes that they are representative of *all* defensive gun uses.[21] In

[21] The NRA's Armed Citizen Database is drawn from media reports and reader submissions. Regardless of how defensive gun use is measured, these reports represent a small fraction of defensive gun uses, highlighting the most newsworthy cases and obviously do not present a representative sample. *See* Armed Citizen Stories, https://bit.ly/29TVDF6.

reality, someone firing more than ten shots in self-defense is so newsworthy and likely to be reported that the two cases included in the database could well be the only two examples during the six-year period. Certainly, if there were, as Appellants necessarily contend, more than 28,000 examples (4,663 x 6) of defensive gun uses in the home in which more than ten rounds were fired during the six-year period examined—*an average of nearly thirteen per day*—an advocacy organization like the NRA would have information on more than two.

The methodology underlying one of the central arguments of Kleck's declaration, focusing on the average time per shot, is similarly unsound. Kleck takes the reported total length of each mass shooting, divides it by the number of rounds fired, and uses that average to argue that mass shootings are not impacted by the use of LCMs because on average a shooter could have reloaded between each shot. JA1201-04 (Kleck Decl. ¶¶ 30-31). This argument erroneously assumes, with no evidence, that mass shooters fire their gun at a completely consistent rates throughout the shooting rather than in bursts, interspersed between periods of movement or inactivity. As has been demonstrated elsewhere, this assumption cannot plausibly be credited. (*See* Declaration of Professor Daniel W. Webster, *Duncan v. Becerra*, No. 17-cv-1017-BEN-JLB, at ¶ 14 (S.D. Cal. June 5, 2017) (ECF Dkt. No. 15).)

Kleck also contradicts himself on the ease of changing magazines. According to Kleck, for armed victims, changing magazines is virtually impossible because "[u]nder the intense emotional stress of a crime victimization, when taken by surprise, the victim's hands are shaking, making it impossible for some victims to eject the expended magazine and insert a new one quickly." JA1194 (Kleck Decl. ¶ 18). For criminals, however, Kleck asserts that being forced to reload, even in the chaotic atmosphere of a mass shooting, poses essentially no burden. JA1196-97 (Kleck Decl. ¶ 22) ("it takes two to four seconds for shooters to eject an expended magazine from a semi-automatic gun, insert a loaded magazine, and make the gun ready to fire").

In reality, however, the pause after a mass shooter expends his ammunition and has to either reload or change weapons is critical for ending or escaping from attacks. As the district court correctly noted, the "delay associated with reloading . . . may provide an opportunity for potential victims to escape or for a bystander to intercede and somehow stop a shooter." JA27. During April's mass shooting at a Waffle House in Tennessee, for example, a bystander intervened during a pause in firing by grabbing the attacker's AR-15 ending the shooting. Alan Blinder, *'I Just Wanted to Live,' Says Man Who Wrested Rifle From Waffle House Gunman*, N.Y. Times, April 23, 2018, https://nyti.ms/2I03Cxs. At Seattle Pacific University in 2014, students tackled a gunman while he was reloading, thus ending the shooting.

Kelsey Mallahan, *Timeline: Seattle Pacific University Shooting*, K5 News, June 24, 2016, https://kng5.tv/2m22501. And during the mass shooting in Newtown, "nine children were able to run from a targeted classroom while the gunman paused to change out a large-capacity thirty-round magazine." *Kolbe*, 849 F.3d at 128. These examples make clear that "limiting a shooter to a ten-round magazine could 'mean the difference between life and death for many people.'" *Id.*

Rather that bolstering Appellants' position, Kleck's proposed testimony actually supports the State's assessment that A2761 furthers its interest in protecting its citizens from gun violence. As he acknowledges, LCMs create the opportunity for a dramatic increase in the number of errant shots. JA1191 (Kleck Decl. ¶ 12) ("people miss with most of the rounds they fire, especially under duress"). And one recent study tracking stray-bullet shooting events found that during a one-year period there were 284 stray-bullet shooting events during which 317 people were injured and sixty-five died. Garen Wintemute et al., *Epidemiology and Clinical Aspects of Stray Bullet Shootings in the United States,* 73 J. of Trauma and Acute Care Surgery 215 (2012). This is not a small concern in New Jersey, the country's most densely populated state, where the victims of shootings are often not the intended targets. JA27 (noting that "New Jersey, a densely populated state, has a particularly strong local interest in regulating firearms"); *see, e.g.*, Anna Merriman, *Bystander Killed in Trenton Standoff was Father of 6, Beloved Husband*, NJ.com

(May 11, 2017), https://bit.ly/2tSKVpL; Myles Ma & Erin O'Neill, *Toddler was Bouncing on Parent's Bed When Killed by Stray Bullet Fired in Shootout*, NJ.com (Oct 13, 2014), https://bit.ly/2KMc9Iw; Dan Ivers, *Car Wash Employee Killed by Stray Bullet in Newark; Two Others Injured*, NJ.com (Oct. 12, 2014), https://bit.ly/2KJFoeP.

* * *

In sum, Everytown's research, along with the other evidence adduced by the State and other amicus, *see supra* p. 4, supports the district court's determination at the preliminary injunction stage that A2761 "is reasonably tailored to achieve [the State's] goal of reducing the number of casualties and fatalities in a mass shooting" and therefore "passes constitutional muster."

CONCLUSION

For the foregoing reasons, Everytown respectfully requests that the Court affirm the district court's denial of a preliminary injunction.

Respectfully submitted,

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Dated: November 2, 2018

CERTIFICATE OF COMPLIANCE

I, Lawrence S. Lustberg, Esquire, hereby certify that:

(1) this brief contains 6,500 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), and thus does not exceed the 6,500-word limit;

(2) this brief complies with the typeface and style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared using a proportionally spaced typeface, Times New Roman, with 14-point font, using Microsoft Word 2016;

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s/ Lawrence S. Lustberg
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Dated: November 2, 2018

CERTIFICATE OF BAR MEMBERSHIP

Lawrence S. Lustberg and Jessica L. Hunter are members in good standing of the Bar of United States Court of Appeals for the Third Circuit.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 2, 2018, I caused the foregoing Brief to be electronically filed with the Clerk of the United States Court of Appeals for the Third Circuit through the Court's CM/ECF system, and to have paper copies delivered by sending seven paper copies of the Brief via FedEx.

I also certify that on November 2, 2018, I caused the foregoing Brief to be served upon all counsel of record through the Notice of Docketing Activity issued by this Court's CM/ECF system.

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Dated: November 2, 2018