

No. 18-3170

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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ASSOCIATION OF NEW JERSEY RIFLE & PISTOL CLUBS, INC., BLAKE  
ELLMAN, ALEXANDER DEMBOWSKI,

*Plaintiffs-Appellants,*

v.

GURBIR GREWAL, in his official capacity of Attorney General of New Jersey,  
et al.,

*Defendants-Appellees.*

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On Appeal from the United States District Court for the District of  
New Jersey (No. 18-cv-10507) (Hon. Peter G. Sheridan)

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**BRIEF OF *AMICUS CURIAE* GIFFORDS LAW CENTER TO  
PREVENT GUN VIOLENCE IN SUPPORT OF APPELLEES**

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**CORPORATE DISCLOSURE STATEMENT**

Giffords Law Center to Prevent Gun Violence states that it has no parent corporations. It has no stock, and therefore no publicly held company owns 10% or more of its stock.

**INTEREST OF THE *AMICUS CURIAE***

*Amicus curiae* Giffords Law Center to Prevent Gun Violence (“Giffords Law Center”) is a non-profit policy organization dedicated to researching, writing, enacting, and defending laws and programs proven to effectively reduce gun violence. The organization was founded 25 years ago following a gun massacre at a San Francisco law firm that was perpetrated by a shooter who used large-capacity magazines. The group was renamed Giffords Law Center in October 2017 after joining forces with the gun-safety organization founded by former Congresswoman Gabrielle Giffords. Today, Giffords Law Center provides free assistance and expertise to lawmakers, advocates, legal professionals, law enforcement officials, and citizens who seek to improve the safety of their communities.

**INTRODUCTION AND SUMMARY OF ARGUMENT<sup>1</sup>**

On January 8, 2011, a man walked into a Tucson parking lot where Congresswoman Gabrielle Giffords was hosting a constituent meeting. Using a semiautomatic pistol equipped with a 33-round magazine, the man opened fire on Congresswoman Giffords, her staff, and members of the public lined up to meet her. He emptied his magazine in 15 seconds, firing 33 rounds, hitting 19 victims, and killing six, including a young girl named Christina-Taylor Green.

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<sup>1</sup> All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No person other than *amici*, their members, or their counsel contributed money to fund this brief’s preparation or submission.

Congresswoman Giffords’s husband, retired Navy Captain Mark Kelly, later testified before Congress that a law prohibiting ammunition magazines holding more than ten rounds could have saved the girl’s life:

The shooter in Tucson . . . unloaded the contents of that magazine in 15 seconds. Very quickly. It all happened very, very fast. The first bullet went into Gabby’s head. Bullet number 13 went into a nine-year-old girl named Christina-Taylor Green, who was very interested in democracy and our Government and really deserved a full life committed to advancing those ideas. . . . When [the shooter] tried to reload one 33-round magazine with another 33-round magazine, he dropped it. And a woman named Patricia Maisch grabbed it, and it gave bystanders a time to tackle him. I contend if that same thing happened when he was trying to reload one 10-round magazine with another 10-round magazine, meaning he did not have access to a high-capacity magazine, and the same thing happened, Christina-Taylor Green would be alive today.

159 Cong. Rec. S2743 (daily ed. Apr. 17, 2013) (statement of Sen. Leahy) (quoting Judiciary Committee testimony of Captain Mark Kelly).

Of course, if the shooter had used a 15-round magazine instead of a 33-round magazine, Christina-Taylor Green would still be dead. But if he had to stop to reload after firing only ten rounds, she and other bystanders would have had a chance to escape—and onlookers would have had a chance to disarm him—while he paused to reload. All this is contrary to Appellants’ argument that “*nothing* in the record [] shows that a 15-round magazine limit . . . is less effective than the new 10-round limit . . . .” Appellants’ Br. at 8 (emphasis in original).

The large-capacity magazine (“LCM”) restrictions at issue in this case

(“LCM law”) were motivated by the tragic reality that murders like Christina-Taylor Green’s have become commonplace. Gun rampages are no longer “extremely rare” (Appellants’ Br. at 32), but have increased in frequency and lethality to “unprecedented levels in the past ten years.” Louis Klarevas, RAMPAGE NATION: SECURING AMERICA FROM MASS SHOOTINGS 215 (2016) (hereafter “Klarevas, RAMPAGE NATION”). In their incredible attempt to dispute any connection between LCMs and mass shootings (Appellants’ Br. at 32-38), Appellants ignore the simple fact that magazines holding more than ten rounds are the thread linking nearly every notorious high-fatality gun massacre in recent years, including the 2012 Sandy Hook shooting, where a gunman fired 154 rounds, killing 26 children and educators; the 2015 San Bernardino shooting, where assailants shot 36 people and killed 14; the 2016 Orlando shooting, where a gunman shot over 100 people and killed 49; the 2017 Las Vegas shooting, where a killer gunned down 58 people and injured hundreds; and the 2017 Sutherland Springs shooting, where a killer murdered 26 at a Texas church.

New Jersey need not wait for its own high-fatality gun massacre before curtailing access to LCMs. New Jersey’s LCM law is an evidence-based regulation that is consistent with the protections guaranteed by the Second Amendment. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that law-abiding citizens have a right to keep a handgun in the home for self-defense,

but said that “[l]ike most rights, the right secured by the Second Amendment is not unlimited.” It is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” 554 U.S. at 626. Moreover, *Heller* approved banning “dangerous and unusual weapons” and other “longstanding” regulations. *Id.* at 626-27 & n.26. And, recognizing that constitutional rights are not interchangeable, *Heller* endorsed restrictions that would not make sense for other rights. *E.g., id.* at 573 (approving “longstanding prohibitions on the possession of firearms by felons and the mentally ill”); *accord Berron v. Ill. Concealed Carry Licensing Review Bd.*, 825 F.3d 843, 847 (7th Cir. 2016) (“[E]veryone is entitled to speak and write, but not everyone is entitled to carry a concealed firearm in public.”).

New Jersey’s LCM law is quite unlike the handgun ban *Heller* invalidated: it leaves most avenues for lawful self-defense untouched. Because virtually every gun that can be used with an LCM operates identically when equipped with a ten-round magazine, it is a far cry from a gun ban. Suggesting otherwise ignores *Heller*’s recognition that that many gun regulations that do not severely burden responsible self-defense, such as those prohibiting “dangerous and unusual weapons,” are constitutional. 554 U.S. at 626-27 & n.26. Relying as they do on an analogy to *Heller* that fails out of the gate, Appellants have not established a likelihood of success on their Second Amendment claim. Even assuming

Appellants are correct that LCMs are constitutionally protected, New Jersey's LCM law should be reviewed under intermediate scrutiny because it does not place a severe burden on Second Amendment-protected activity: it lets residents use any lawful firearm with an unlimited number of magazines holding up to ten rounds. As the district court correctly found, New Jersey's law survives intermediate scrutiny because it is reasonably tailored to reduce bloodshed during gun massacres by forcing shooters to reload more often. Even if this were not true, the State's other evidence that a ten-round magazine limit will deter criminal use of LCMs independently demonstrates a reasonable fit under intermediate scrutiny.

Under the standards articulated by this Court and the Supreme Court, the evidence on record is more than enough to satisfy intermediate scrutiny. The Court should affirm the ruling below.<sup>2</sup>

## **ARGUMENT**

### **I. Background on Magazine Restrictions in New Jersey**

New Jersey experiences unacceptable levels of gun violence. The state sees an annual average of 280 gun-related homicides, 184 gun-related suicides, 764 non-fatal interpersonal shootings, and 599 unintentional shootings.<sup>3</sup> The ripple

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<sup>2</sup> While this *amicus* brief focuses on the application of Second Amendment intermediate scrutiny, Giffords Law Center joins the State's other Second Amendment, Takings Clause, and Equal Protection arguments in full.

<sup>3</sup> Fatal firearm injury data is from the Centers for Disease Control and Prevention

effect of each gunshot leaves many more people grieving and in fear for their safety,<sup>4</sup> and imposes enormous economic consequences, costing state taxpayers an estimated \$273 million per year.<sup>5</sup>

In 2018, following a series of horrifying gun rampages across the nation, New Jersey's legislature passed a law designed to reduce the likelihood of a high-casualty shooting by prohibiting military-grade ammunition magazines. New Jersey first restricted access to larger magazines in 1999 by generally prohibiting the possession, manufacture, transportation, shipment, sale, or disposal of magazines holding more than 15 rounds of ammunition. A.B. 2826, 1998-1999 Leg., 208th Sess. (N.J. 1999). The 1999 law was a response to gun industry efforts to package LCMs with increasing numbers of newer semiautomatic firearm models. Before the 1980s, the handgun most Americans owned was a revolver, usually holding six rounds.<sup>6</sup> Police also used six-round revolvers, which were

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([www.cdc.gov/injury/wisqars/fatal.html](http://www.cdc.gov/injury/wisqars/fatal.html)). Non-fatal firearm injury data is from the New Jersey Department of Health's New Jersey Discharge Data Collection System (<https://www.nj.gov/health/healthcarequality/health-care-professionals/njddcs/>).

<sup>4</sup> See, e.g., Laura Herzog, *Growing Up In High Crime: How N.J. Kids Cope With Homicides*, NJ.COM, May 10, 2016, [https://www.nj.com/hudson/index.ssf/2016/05/jersey\\_city\\_school\\_neighborhood\\_violence.html](https://www.nj.com/hudson/index.ssf/2016/05/jersey_city_school_neighborhood_violence.html).

<sup>5</sup> Giffords Law Ctr. To Prevent Gun Violence, *The Economic Cost of Gun Violence in New Jersey* (Feb. 20, 2018), [https://lawcenter.giffords.org/wp-content/uploads/2018/04/Cost-of-Gun-Violence-in-New-Jersey\\_Full-Report\\_4.20.18.pdf](https://lawcenter.giffords.org/wp-content/uploads/2018/04/Cost-of-Gun-Violence-in-New-Jersey_Full-Report_4.20.18.pdf).

<sup>6</sup> See, e.g., Violence Policy Center, *Backgrounder on Glock 19 Pistol and Ammunition Magazines Used in Attack on Representative Gabrielle Giffords And*

“seen as adequate for officers’ defensive needs.”<sup>7</sup> But starting in the 1980s, the gun industry developed and aggressively promoted pistols that can be equipped with larger magazines. See Christopher Koper et al., *Impact of Handgun Types on Gun Assault Outcomes*, 9 *Inj. Prev.* 151, 151 (2003). In response to the shifting handgun market, more states recognized that access to the LCMs sold with these guns endangered the public, and responded by adopting modern magazine restrictions.

New Jersey’s 1999 law addressed the dangerous proliferation of larger magazines, but it was not an “LCM ban,” since LCMs are “typically defined as ammunition feeding devices holding more than ten rounds of ammunition,” and nearly all states that regulate magazine capacity cap it at ten rounds. Christopher Koper et al., *Criminal Use of Assault Weapons and High-Capacity Semiautomatic Firearms: An Updated Examination of Local and National Sources*, 95 *J. Urban Health* 313, 314 (2017) (hereafter “Koper, *Criminal Use*”); Giffords Law Ctr. To Prevent Gun Violence, *Large-Capacity Magazines: Summary of State Law*, accessed Oct. 25, 2018, <https://lawcenter.giffords.org/gun-laws/policy-areas/hardware-ammunition/large-capacity-magazines/#state>. Because existing law

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*Others* 1 (Jan. 2011), [http://www.vpc.org/fact\\_sht/AZbackgrounder.pdf](http://www.vpc.org/fact_sht/AZbackgrounder.pdf).

<sup>7</sup> Eugene Volokh, *Are Laws Limiting Magazine Capacity to Ten Rounds Constitutional?*, VOLOKH CONSPIRACY (Mar. 6, 2014), <https://washingtonpost.com/news/volokh-conspiracy/wp/2014/03/06/are-laws-limiting-magazine-capacity-to-10-rounds-constitutional/>.

in New Jersey capped magazines at 15 rounds, it could not have prevented deaths like Christina-Taylor Green's, who was struck by bullet number 13.

On the other hand, New Jersey did generally prohibit *possession* of 15-round magazines, making its statute stronger than other state laws that included broad “grandfathering” exceptions for LCMs that were already possessed when the laws took effect. Grandfathering provisions are dangerous: they make LCM laws impossible to enforce because LCMs lack identifying marks showing their date of manufacture or sale, so police cannot verify whether they were possessed prior to a prohibition's effective date.<sup>8</sup> Reflecting the sheer difficulty of enforcement with a grandfathering exception, after California and Maryland implemented LCM laws with grandfathering exceptions, police recovered *more* guns loaded with LCMs.<sup>9</sup>

With its recent legislation, New Jersey strengthened its magazine restrictions by limiting capacity to ten rounds (as experts define LCMs, *see* Koper, *Criminal Use* at 314). While New Jersey continues to generally prohibit possession of

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<sup>8</sup> *See, e.g.*, ASSEMBLY COMM. FOR PUBLIC SAFETY, BILL ANALYSIS FOR SB 396 (HANCOCK) (bill analysis for S.B. 396, 2013-2014 Leg., Reg. Sess. (Cal. 2013)), 7 (quoting police testimony that California's LCM “law is difficult to enforce” since grandfathered magazines “are usually indistinguishable” from illegal ones).

<sup>9</sup> Press Release, Citizens Crime Commission of New York City, *NYC & LA City Councils Introduce Rezo for Federal Ban on Large Capacity Magazines* (Mar. 2, 2011), <http://www.nycrimecommission.org/pdfs/CrimeCmsnNYCLACouncils.pdf>; Brian Freskos, *Baltimore Police Are Recovering More Guns Loaded With High-Capacity Magazines, Despite Ban on Sales*, TRACE, Mar. 27, 2017, <https://www.thetrace.org/2017/03/high-capacity-magazine-ban-baltimore-police/>.

LCMs—which is essential for avoiding the enforcement pitfalls experienced in California and Maryland—the law has exceptions to ease burdens for existing owners. For instance, owners may modify larger magazines so that they hold ten or fewer rounds. A.B. 2761, 2018-2019 Leg., 218th Sess. (N.J. 2018).

**II. Even Assuming New Jersey’s LCM Law Implicates the Second Amendment, at Most, this Court Should Apply Intermediate Scrutiny**

The State correctly argues that LCMs are unprotected by the Second Amendment and may be prohibited under *Heller*. But the Court need not definitively resolve that question to affirm the ruling below. Even assuming LCMs implicate the Second Amendment, New Jersey’s LCM ban imposes only a modest burden on responsible self-defense, so should not be deemed *per se* unconstitutional as Appellants suggest. Instead, this Court should employ the two-step approach and, if it assumes the Second Amendment is implicated here, apply intermediate scrutiny at step two. *See United States v. Marzzarella*, 614 F.3d 85, 89, 95-98 (3d Cir. 2010). As demonstrated below, New Jersey’s LCM law easily passes constitutional muster under that standard.

**A. Precedent Supports Application of Intermediate Scrutiny**

This Court applies intermediate scrutiny to gun regulations that burden conduct that is “not part of the core of the [Second] Amendment,” *see Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013), as well as to laws that “do[] not severely limit the possession of firearms” but merely restrict in the manner in which they

may be used. *Marzzarella*, 614 F.3d at 97.

New Jersey’s LCM law meets both criteria. First, the law does not implicate any “core” Second Amendment right because it does not prevent responsible citizens from keeping firearms in their homes for self-defense—indeed, it allows citizens to use virtually any lawful magazine-accepting firearm, so long as it is equipped with a compliant magazine. The LCM law prohibits only the use of ammunition magazines that have become mass shooters’ favored tool and which result in unnecessary defensive rounds being fired, “endanger[ing] more bystanders.” *Kolbe v. Hogan*, 849 F.3d 114, 127 (4th Cir. 2017) (en banc). Because military-grade magazines are unusually harmful and not needed for responsible self-defense with handguns or other protected firearms, they do not implicate a “core” right. *E.g.*, *Heller v. Dist. of Columbia*, 670 F.3d 1244, 1261-62 (D.C. Cir. 2011); *N.Y. Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 260-61 (2d Cir. 2015).

Second, because New Jersey’s LCM law regulates ammunition capacity, it operates as a restriction on *how* protected arms may be used, rather than a limitation on gun possession itself. *See Marzzarella*, 614 F.3d at 97 (applying intermediate scrutiny to “regulation of the manner in which persons may lawfully exercise their Second Amendment rights”). LCM laws do not “severely limit the possession of firearms,” *id.*, because they leave open ample alternative avenues to exercise self-defense rights—including access to the handguns protected under

*Heller* with an unlimited number of ten-round magazines. Though Appellants strenuously argue that the LCM law bars them from owning magazines they would *like* to possess, their preferences do not determine the standard of review when they remain free to possess and use all constitutionally protected firearms.

**B. Appellants’ Inapposite Analogies to *Heller* and First Amendment Rights Do Not Justify Departing from Intermediate Scrutiny**

Appellants urge this Court to find that LCMs are absolutely constitutionally protected, and strike down New Jersey’s law without even weighing its public safety benefits through application of intermediate scrutiny. This argument rests on two erroneous contentions: that LCM possession bans are indistinguishable from the *Heller* handgun ban, and that such bans impermissibly target protected activity to reduce “secondary effects.” This Court should reject both arguments.

**1. An LCM Ban is Not a Handgun Ban**

Appellants’ analogy to the *Heller* handgun ban fails because LCMs are not themselves a class of arms, but accessories for arms that enhance their firepower beyond what is constitutionally required. New Jersey’s LCM law does not prohibit Appellants or anyone else from using a handgun or any other firearm—it simply requires a gun user to reload more frequently.

*Heller* defined Second Amendment-protected arms as “weapons of offence, or armour of defence.” 554 U.S. at 581 (citing 1 Dictionary of the English Language 106 (4th ed.) (reprinted 1978)). An LCM is neither—it is an ammunition

storage device. LCMs increase the number of rounds a gun may fire before it is necessary to reload, but a gun still functions with a lower-capacity magazine: it will just fire no more than ten rounds without reloading. Because they are optional devices, LCMs are better categorized as an accessory than as offensive or defensive weaponry.<sup>10</sup>

*Heller*'s holding that it is unconstitutional to prohibit handguns—a “class of ‘arms’ that is overwhelmingly chosen” for lawful self-defense, 554 U.S. at 628—is thus inapplicable to laws like New Jersey’s that ban firepower-enhancing *accessories*. In addition to not being arms themselves, LCMs are not an essential functional part of lawful arms. Certainly, LCMs may be used with arms, including handguns, and may even come as the “factory-issued” magazine. But such arms will also function with a magazine holding ten or fewer rounds, making LCMs an optional rather than necessary accessory.<sup>11</sup>

Accepting this argument does not mean that *ammunition*, or magazines

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<sup>10</sup> Historical sources support the conclusion that accessories like LCMs are not “arms.” A founding-era militia law distinguished “arms” and “ammunition” from a third category, “accoutrements”—analogous to accessories that enhance an already-functional gun. *Heller*, 554 U.S. at 650 (Stevens, J., dissenting) (quoting Act for Regulating and Disciplining the Militia, 1785 Va. Acts ch. 1, § 3, p. 2).

<sup>11</sup> Because they are non-essential accessories, the Court might also conclude that like scopes or silencers, LCMs are not “bearable arms” protected by the Second Amendment. See *United States v. Cox*, No. 17-3034, 2018 U.S. App. LEXIS 29036, \*29-\*30 (10th Cir. Oct. 16, 2018) (“A silencer is a firearm accessory; it’s not a weapon in itself . . . it can’t be a ‘bearable arm’ protected by the Second Amendment.”).

necessary to operate firearms, are unprotected by the Second Amendment. *Cf. Fyock v. City of Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015) (recognizing corollary “but not unfettered” right to ammunition “necessary to render firearms operable”). A magazine needed to provide a protected firearm with bullets that facilitate its intended use may be essential to its core function and constitutionally protected. But New Jersey’s law leaves access to such magazines undisturbed, while banning those that dangerously enhance guns’ firepower and facilitate mass-shooting atrocities.

Even if LCMs were protected “arms,” Appellants’ analogy to *Heller* would still fail. While striking down a law prohibiting the possession of operable handguns in the home, *Heller* stated that weapons “most useful in military service—M-16 rifles and the like—may be banned” under the Second Amendment. 554 U.S. at 627. Courts following this guidance have determined—contrary to Appellants’ argument—that it is unnecessary to apply heightened scrutiny to LCM bans because, unlike handguns, military-style magazines are not protected by the Constitution in the first place. *See Kolbe*, 849 F.3d at 135; *Friedman v. City of Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015); *Worman v. Healey*, 293 F. Supp. 3d 251, 266 (D. Mass. 2018); *People v. Zondorak*, 220 Cal. App. 4th 829, 836 (Cal. Ct. App. 2013). These decisions confirm that under *Heller*, it is wrong to treat LCM restrictions as *per se* unconstitutional based on their purported

popularity as a “class of arms.” Since LCMs confer military-grade firepower, they may be prohibited even if they are in “common use” like handguns. *See Kolbe*, 849 F.3d at 135-36; *Friedman*, 784 F.3d at 408-09 (noting that the machine gun’s “popularity” in the 1920s “didn’t give it a constitutional immunity”).<sup>12</sup>

## 2. The “Secondary Effects” Doctrine Is Irrelevant to LCMs

Appellants also claim that New Jersey’s LCM law is categorically invalid because “the government ‘may not regulate the secondary effects of [protected conduct] by suppressing the [protected conduct] itself.’” Appellants’ Br. at 2. This ignores the fact that laws prohibiting LCMs are arms-neutral. By limiting ammunition capacity, these laws permissibly restrict the “manner” in which firearms may be used; they do not prevent (categorically or otherwise) the use of any firearms for self-defense. *See Marzzarella*, 614 F.3d at 96-97; *Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 964 (9th Cir. 2014) (law that “burdens only the ‘manner in which persons may exercise their Second Amendment rights’ . . . resembles a content-neutral speech restriction”). If there is any analogy to be drawn between LCM laws and laws implicating the First Amendment,<sup>13</sup> LCM

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<sup>12</sup> This Court has acknowledged that *Heller* permits prohibiting “dangerous and unusual” arms without requiring a numerical analysis of how “unusual” the arm is. *Marzzarella*, 614 F.3d at 95 (“While a short-barreled shotgun is dangerous and unusual in that its concealability fosters its use in illicit activity, it is also dangerous and unusual because of its heightened capability to cause damage.”).

<sup>13</sup> While this Court has drawn methodological comparisons between the First and

prohibitions resemble content-neutral “decibel-control” ordinances that limit the volume of speech. *E.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989).

Appellants’ effort to import First Amendment “secondary effects” principles wholesale into the Second Amendment context is illogical for the additional reason that, unlike First Amendment-protected expressive content, firearms can physically injure and kill people. *E.g.*, *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015). This distinction must make it permissible for governments to regulate the lethal effects of firearms in ways they could not do with the effects of purely expressive activity. *See id.* Appellants’ invocation of the First Amendment does not necessitate departing from intermediate scrutiny.

### **III. New Jersey’s LCM Law Withstands Intermediate Scrutiny**

Under intermediate scrutiny, New Jersey must show that its LCM possession ban reasonably furthers substantial public safety interests. *Drake*, 724 F.3d at 436.

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Second Amendments, it has recognized that gun and speech rights differ enough to prevent the rote application of First Amendment doctrines in Second Amendment cases. *Drake*, 724 F.3d at 435 (while “the structure of First Amendment doctrine should inform our analysis of the Second Amendment,” that does not “compel” importation of First Amendment prior restraint doctrine); *see also Woollard v. Gallagher*, 712 F.3d 865, 883 n.11 (4th Cir. 2013) (“We are hesitant to import substantive First Amendment principles wholesale into Second Amendment jurisprudence.”) (internal citation omitted); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 92 (2d Cir. 2012) (“there are salient differences between the state’s ability to regulate” First and Second Amendment rights).

“‘[T]he fit’ between those interests and the challenged law need not be ‘perfect,’” *id.*, and courts should “accord substantial deference to the [legislature’s] predictive judgments.” *Id.* at 436-37 (quoting *Turner Broad. Sys. v. FCC*, 520 U.S. 180 (1997)). Deference is warranted because the Second Amendment does not “eliminate” states’ ability to choose among various policies to prevent gun violence. *McDonald v. City of Chi.*, 561 U.S. 742, 784-85 (2010). More than one firearm policy choice in a given area can be reasonably adapted to a substantial interest, and legislatures are empowered to weigh the evidence and decide which policy to adopt. *See Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 99 (2d Cir. 2012).

Deference to legislative judgment is an established principle of constitutional jurisprudence not limited to the Second Amendment. The Supreme Court has repeatedly explained that heightened means-end scrutiny, including intermediate scrutiny, does not compel legislatures to furnish exact empirical justifications for regulations. The Court has, for example, “permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and ‘simple common sense.’” *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995)); *see also Paris Adult Theatre I v.*

*Slaton*, 413 U.S. 49, 60 (1973) (“We do not demand of legislatures ‘scientifically certain criteria of legislation.’”) (internal citation and quotation omitted).

Under the standards articulated by this Court and the Supreme Court, the evidence supporting New Jersey’s LCM law is more than enough to satisfy intermediate scrutiny.

**A. LCM Laws Are Likely to Reduce the Frequency and Lethality of Mass Shootings**

LCM prohibitions are well-tailored to reduce both the occurrence of mass shootings and the lethality of these crimes. A recent analysis by Dr. Michael Siegel of Boston University found that the states that restrict access to LCMs—usually defined with a ten-round limit—experience 63% fewer mass shootings. Sam Petulla, *Here is 1 Correlation Between State Gun Laws and Mass Shootings*, CNN (Oct. 5, 2017), <https://www.cnn.com/2017/10/05/politics/gun-laws-magazines-las-vegas/index.html> (discussing empirical analysis for CNN by Dr. Siegel).

Appellants are completely wrong that “there is not even a statistical *association* between mass shootings” and LCMs. Appellants’ Br. at 35.

There is also a compelling link between LCM use and mass shooting fatalities. Dr. Louis Klarevas analyzed mass shooting data over five decades and found that the sharpest increase in casualties during high-fatality “gun massacres” was driven by access to LCMs that allow shooters to hit more targets without interruption. Klarevas, *RAMPAGE NATION*, at 257, 215-25. He found that use of

LCMs is “the factor most associated with high death tolls in gun massacres. . . . If such magazines were completely removed from circulation, the bloodshed would be drastically reduced.” *Id.* at 257. Dr. Klarevas determined that use of LCMs, not multiple firearms, drives higher death tolls (*id.* at 222-23), corroborating the district court’s conclusion that magazine restrictions reduce fatalities by building in a critical “pause” when shooters must change guns or magazines. *See id.* at 210.

Similarly, LCMs are associated with greater numbers of injuries during mass shootings. On average, mass shooters who use such magazines or assault weapons shoot over twice as many victims than in comparable shootings. *See* Everytown Research, *Analysis of Recent Mass Shootings*, at 4 (Aug. 2015), <https://everytownresearch.org/documents/2015/09/analysis-mass-shootings.pdf>.

Medical research corroborates the unsurprising fact that LCMs create more carnage because victims are more likely to suffer multiple bullet wounds and more severe tissue damage. Jen Christensen, *Gunshot Wounds Are Deadlier Than Ever As Guns Become Increasingly Powerful*, CNN, Jun. 14, 2016, <https://www.cnn.com/2016/06/14/health/gun-injuries-more-deadly/>.

Overall, this evidence—as well as the State’s expert testimony and supporting research—amply supports the district court’s conclusion that prohibiting LCMs is reasonably likely to reduce mass shooting fatalities by limiting the number of rounds a shooter can fire before it is necessary to reload.

**B. LCM Restrictions Are Likely to Reduce the Lethality of Everyday Shootings and Attacks Against Law Enforcement Officers**

The district court relied solely on evidence about mass shootings to uphold New Jersey’s law. But there is also strong evidence that the law is likely to reduce the lethality of day-to-day gun violence and assaults on police officers— independently justifying the LCM possession ban under intermediate scrutiny.

Recent research by Professor Christopher Koper analyzed four data sources pertaining to crime guns, police shootings, and mass shootings, and concluded that “high-capacity semiautomatics have grown from 33 to 112% as a share of crime guns since the expiration of the federal ban.” Koper, *Criminal Use* at 313. In Maryland, where LCM restrictions are nearly impossible to enforce because the state has a grandfathering exception, police have seen LCMs “surge[] in popularity among criminals.” Freskos, *supra* note 9. Over the past ten years the number of corpses at the Maryland state medical examiner’s office with ten or more bullet wounds doubled, suggesting criminals are increasingly using LCMs to fire more shots and kill more victims. *Id.* The same trend manifested in New Jersey while the 15-round magazine limit was in place. In a 2010 report, a former Newark police director explained that “high-capacity magazines, without a doubt, are making an

enormous difference in the number of murders that we're experiencing.”<sup>14</sup> He noted that in Newark, “although we made an enormous reduction in shooting incidents, we actually have an increase of 11 percent in our murder rate, because more rounds are being fired in particular incidents”<sup>15</sup>

In addition to curtailing bloodshed during everyday shootings, LCM restrictions protect the police officers most likely to confront heavily armed killers. Professor Koper's analysis of criminal use of LCMs, discussed above, found that LCM-compatible firearms were used to murder police officers in 40.6% of cases, in some years reaching 48% of murder weapons. Koper, *Criminal Use* at 214. Appellants argue that Koper's study on police murder weapons should be ignored since some of the underlying data identified firearm type but not magazine used. Appellants' Br. at 31-32. But the reasonable inference that LCMs were used by perpetrators wielding LCM-compatible weapons is amply supported by officer experiences and testimony. A 2010 survey of 164 police departments found that “38 percent of the police departments reported noticeable increases in criminals' use of semiautomatic weapons *with high-capacity magazines holding 10 or more rounds*” after the federal LCM restrictions expired. POLICE EXECUTIVE RESEARCH

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<sup>14</sup> POLICE EXECUTIVE RESEARCH FORUM, GUNS AND CRIME: BREAKING NEW GROUND BY FOCUSING ON THE LOCAL IMPACT 24 (2010), <https://www.issueLab.org/resources/14333/14333.pdf>.

<sup>15</sup> *Id.* at 12.

FORUM, *supra* n.14, at 2 (emphasis added). Opining on the increasing risks that LCMs pose to police officers, one police commissioner has said that “something needs to happen” because “[w]e’re outgunned.” Rick Jervis, *Gun Control Advocates Target High-Capacity Magazines*, USA TODAY (Jul. 31, 2012).

#### **IV. The District Court Did Not Abuse Its Discretion**

Appellants’ remaining attacks on the district court’s determinations of fact are all unavailing. They identify no abuse of discretion by the court.

##### **A. The District Court Properly Rejected Appellants’ Expert Testimony on Reload Times and Defensive Gun Use**

Appellants urge this Court to reject the link between LCMs and deadlier mass shootings, arguing that New Jersey’s law will not influence the behavior of mass shooters and only make it harder for citizens to engage in lawful self-defense. The district court was correct to find this evidence not credible.

Appellants first argue that “magazine changes will have no effect on [mass shooters’] rate of fire,” citing their expert’s contention that such shooters “almost always take longer between shots than the time it would take to change a magazine.” Appellants’ Br. at 37. Even assuming the truth of the implausible argument that mass shooters change magazines more quickly than they can shoot, Appellants’ conclusion that forcing magazine changes will have “no effect” on mass shooters’ rates of fire is still wrong, because a pause of any length is better than no pause at all. *See Colo. Outfitters Ass’n v. Hickenlooper*, 24 F. Supp. 3d

1050, 1073 (D. Colo. 2014), *vacated on other grounds*, 823 F.3d 537 (10th Cir. 2016) (“A pause, of any duration, imposed on the offensive shooter can only be beneficial, allowing some period of time for victims to escape, victims to attack, or law enforcement to intervene.”). Indeed, pauses necessitated by use of a smaller magazine, lower-capacity weapon, or malfunction have saved lives during numerous mass shootings not cited by the Appellants,<sup>16</sup> including the shooting in Parkland, Florida.<sup>17</sup> *See Colo. Outfitters*, 24 F. Supp. at 1072-73 (it is relevant to consider shooters’ pauses due to a malfunction or other reasons because limiting “magazine size makes the critical pause *mandatory*”) (emphasis added).

Appellants next argue that by barring use of LCMs in self-defense, New

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<sup>16</sup> During the 2013 massacre at Washington Navy Yard, a man with a seven-shell shotgun killed twelve people, but while he reloaded, a victim he had cornered was able to crawl to safety. In 2014, a gunman at Seattle Pacific University was tackled while reloading. Other examples abound. John Wilkens, *Construction Workers Felt They ‘Had To Do Something,’* SAN DIEGO UNION-TRIBUNE, Oct. 11, 2010, <http://www.sandiegouniontribune.com/sdut-hailed-as-heroes-construction-workers-who-stopped-2010oct11-htmlstory.html> (workers stopped gunman “as he stopped to reload”); *Deer Creek Middle School Shooting*, HUFFINGTON POST, Apr. 25, 2010, [http://www.huffingtonpost.com/2010/02/23/deer-creek-middle-school\\_n\\_473943.html](http://www.huffingtonpost.com/2010/02/23/deer-creek-middle-school_n_473943.html) (math teacher “tackled the suspect as he was trying to reload”); Sheila Dewan, *Hatred Said to Motivate Tenn. Shooter*, THE NEW YORK TIMES, Jul. 28, 2008, <http://www.nytimes.com/2008/07/28/us/28shooting.html> (“It was when the man paused to reload that several congregants ran to stop him.”).

<sup>17</sup> Nicholas Nehamas & David Smiley, *Florida School Shooter’s AR-15 May Have Jammed, Saving Lives, Report Says*, MIAMI HERALD, Feb. 27, 2018, <https://www.miamiherald.com/news/local/community/broward/article202486304.html> (police believe Parkland shooter dropped his weapon after it malfunctioned).

Jersey’s law “disadvantages victims relative to their attackers.” Appellants’ Br. at 26. This argument is based on exaggerated estimates of defensive gun use and the dangerous, unsupported assumption that crime victims can improve their safety by indiscriminately firing bullets. As an initial matter, the district court correctly disregarded Appellants’ expert’s contention that there are millions of incidents of defensive gun use every year. The more reliable data demonstrates that crime victims rarely use guns in self-defense and that persons with firearms are no safer than other crime victims. *See* David Hemenway & Sara J. Solnick, *The Epidemiology of Self-Defense Gun Use: Evidence from the National Crime Victimization Surveys 2007–2011*, 79 *Preventive Med.* 22, 23 (Oct. 2015).<sup>18</sup>

The district court also correctly afforded no weight to the idea that LCMs are needed to fight off groups of attackers. Appellants’ argument to this effect is pure speculation: they observe that some violent crimes involve four or more assailants, and then opine that “[b]ecause police hit about 37% of their targets, it is reasonable to assume that average citizens will require at least 12 rounds to shoot four attackers.” Appellants’ Br. at 25. This neither proves that LCMs (or even firearms) are widely used to defend against four or more attackers, nor that it is necessary or responsible for untrained civilians to fire bullets continuously with a concededly

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<sup>18</sup> One study concluded that carrying a gun *increases* a victim’s risk of injury during the commission of a crime. Charles Branas, *Investigating the Link Between Gun Possession and Gun Assault*, 99 *Am. J. Pub. Health* 2034, 2037 (Nov. 2009).

low rate of accuracy when faced with multiple attackers. On the contrary, Appellants' argument demonstrates why LCMs are poorly adapted for civilian defense and present grave risks to bystanders caught in the crossfire. *See Kolbe*, 849 F.3d at 127 (“in the hands of law-abiding citizens, large-capacity magazines are particularly dangerous”; “inadequately trained civilians... fire more rounds than necessary and thus endanger more bystanders”).

**B. Appellants' Other Factual Arguments Are Contradicted by the Weight of the Evidence**

In addition to challenging the rejection of their experts' speculative testimony, Appellants dispute New Jersey's evidence in three areas. They argue that LCM restrictions will not improve public safety because (1) mass shootings are rare, (2) the federal LCM ban was ineffective, and (3) criminals will not follow the law. These objections should be resolved in New Jersey's favor because its legislature was entitled to reach contrary conclusions based on competent evidence pointing to the effectiveness of LCM restrictions. *Drake*, 724 F.3d at 436-37 (courts should “accord substantial deference” to legislature's judgment). But even if this Court were to consider Appellants' arguments afresh, it should reject them.

First, mass shootings are by no means “extremely rare” (Appellants' Br. at 32), but have been occurring more frequently and resulting in more fatalities. *See, e.g.*, Tanya Basu, *Mass Public Shootings in the U.S. Have Risen*, TIME, Aug. 4, 2015, <http://time.com/3983557/mass-shootings-america-increasing> (citing analysis

by the Congressional Research Service); Rob Arthur, *No Matter How You Measure Them, Mass Shooting Deaths Are Up*, FIVETHIRTYEIGHT, Nov. 7, 2017, <https://fivethirtyeight.com/features/no-matter-how-you-measure-them-mass-shooting-deaths-are-up/>. Reflecting their increased frequency, three of the ten deadliest shootings in U.S. history occurred within five months in late 2017 and early 2018, including the killing of 17 students and educators in Parkland.

Even if mass shootings were infrequent, their rarity would not diminish the importance of efforts to stem injuries and community trauma resulting from them. New Jersey is entitled to adopt legislation to prevent mass shootings before they occur or become even more common. Until recently, residents of Parkland never imagined the possibility of a large-scale massacre close to home, and New Jersey's communities are not immune from the threat of violence either: Recently in Trenton, large-capacity magazines were apprehended at the scene and in a suspect's possession after shooters injured 22 people at an arts festival.<sup>19</sup>

Second, Appellants are incorrect to suggest that no evidence supports the effectiveness of the federal LCM restrictions in effect between 1994 and 2004. Although the success of the federal law was limited by its "grandfathering"

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<sup>19</sup> Luis Ferré-Sadurní and Mihir Zaveri, *Mass Shooting at New Jersey Arts Festival Leaves 22 Injured and 1 Dead*, N.Y. TIMES, June 17, 2018, <https://www.nytimes.com/2018/06/17/nyregion/trenton-mass-shooting.html>.

exception,<sup>20</sup> Giffords Law Center submitted evidence in its district court *amicus* brief that the 1994 federal law achieved dramatic reductions in high-fatality “gun massacres” involving six or more victims—fulfilling one of the legislation’s main purposes. *See* Klarevas, RAMPAGE NATION at 240-43 (ban was “extremely successful” in reducing high-fatality shootings). Specifically, Dr. Klarevas observed:

During the ten-year period that the [federal ban] was in effect, the numbers [of fatalities per mass shooting] declined substantially, with only twelve gun massacres, resulting in eighty-nine deaths, for an average of 7.4 fatalities per incident. What’s particularly astounding about this time period is that during the first four and a half years of the ban, there wasn’t a single gun massacre in the United States. Not one. This is unprecedented in modern American history.

*Id.* at 243. When the federal ban expired in 2004, fatality rates connected to large-scale shootings spiked, “further evidenc[ing] the [ban’s] effectiveness.” *Id.*

Finally, Appellants speculate that “mass shooters will continue using [LCMs] to the extent they desire to do so,” citing evidence that Maryland’s law failed to “stamp out the use of big magazines by criminals.” Appellants’ Br. at 34. As discussed above, however, Maryland has a “grandfathering” exception that severely hinders its law’s effectiveness. *See supra* p. 8 & note 9. The district court was correct to conclude that *enforceable* weapons regulations like New Jersey’s can impact mass shooters’ weapon choices. *See, e.g.*, Klarevas, RAMPAGE NATION,

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<sup>20</sup> *See* CHRISTOPHER KOPER ET AL., AN UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACTS ON GUN MARKETS AND GUN VIOLENCE, 1994—2003 96, 101 (2004), <https://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf>.

at 264 (mass shooter who killed 12 people and injured 70 at an Aurora, Colorado movie theater said he chose guns instead of bombs because bombs are “too regulated & suspicious”). Although the ability of any law to deter criminals can be second-guessed, it was still reasonable for the State to assume that criminalizing LCMs will force some shooters to use smaller magazines and inflict fewer injuries.

### **CONCLUSION**

To prevail under intermediate scrutiny, the State need not disprove with empirical certainty each of Appellants’ assertions that LCM bans are ineffectual, that criminals will not obey them, or that LCMs might be desirable for self-defense. *See Paris Adult Theatre I*, 413 U.S. at 60 (legislation need not be supported by “scientifically certain criteria”). Rather, the State must show that it drew reasonable inferences that LCMs holding more than ten rounds will save lives from mass shootings and criminal attacks, while leaving citizens free to use other magazines and firearms in lawful self-defense. Because it has discharged that burden, this Court should affirm the decision below.

Dated: Newark, New Jersey  
October 31, 2018

Respectfully Submitted,

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**CERTIFICATION OF BAR MEMBERSHIP**

I certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

s/ Timothy M. Haggerty  
Timothy M. Haggerty

Dated: October 31, 2018

**CERTIFICATION OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(a)(7)(C)(i), Fed. R. App. P. 29(a), and L.A.R. 31.1(c), I certify that:

1. This brief complies with Fed. R. App. P. 29(a)(5) because the brief contains 6,414 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and thus does not exceed the 6,500-word limit.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using the Microsoft Word word-processing system in 14-point Times New Roman font.

3. The text of the brief filed with the Court by electronic filing is identical, except for the signature, to the text of the paper copies being filed with the Court.

4. This brief complies with L.A.R. 31.1(c) in that prior to being electronically mailed to the Court today, it was scanned by the following virus detection software and found to be free from computer viruses:

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s/ Timothy M. Haggerty  
Timothy M. Haggerty

Dated: October 31, 2018

**CERTIFICATION OF SERVICE**

I hereby certify that on October 31, 2018, I caused the Brief for *Amicus curiae* Giffords Law Center to Prevent Gun Violence, to be filed with the Clerk of the United States Court of Appeals for the Third Circuit via electronic filing and by causing seven paper copies of the Brief to be sent via Federal Express overnight delivery. Counsel of record and the pro se Plaintiffs-Appellants will be served with the Brief via the Court's electronic filing system and will receive paper copies via U.S. mail.

s/ Timothy M. Haggerty  
Timothy M. Haggerty

Dated: October 31, 2018