No. 18-3170

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ASSOCIATION OF NEW JERSEY RIFLE AND PISTOL CLUBS, INC., *et al.*,
PLAINTIFFS-APPELLANTS,

V.

ATTORNEY GENERAL NEW JERSEY, *et al.*,
DEFENDANTS-APPELLEES.

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE DISTRICT OF COLUMBIA, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, MARYLAND, MASSACHUSETTS, NEW YORK, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*

The District of Columbia and the States of California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maryland, Massachusetts, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington ("the *Amici* States") file this brief under Rule 29(a)(2) of the Federal Rules of Appellate Procedure. Together, the *Amici* States seek to protect their governmental prerogative and responsibility to enact and implement legislation that promotes public safety, prevents crime, and reduces the harmful effects of firearm violence. The *Amici* States have each taken different approaches to addressing firearm violence based on their own determinations about the measures that will best meet the needs of their citizens. They join this brief not because they necessarily believe that New Jersey's policy approach would be optimal for them, but to emphasize that the challenged law represents a policy choice that New Jersey is constitutionally free to adopt.

The enactment by States of reasonable firearm regulations that are substantially related to the achievement of important governmental interests is fully compatible with the right to keep and bear arms protected by the Second Amendment. The *Amici* States are concerned that the Second Amendment arguments advanced by appellants would tie the hands of States in responding to threats to public safety and, in particular, that their non-deferential review of

legislative judgments would impermissibly impinge on the States' policymaking authority.

SUMMARY OF ARGUMENT

In 2018, the State of New Jersey prohibited the possession of large-capacity magazines ("LCMs") that hold more than ten rounds of ammunition. New Jersey determined that restricting access to LCMs would reduce the lethality and injuriousness of firearms used in unlawful activity without significantly burdening the core Second Amendment right to self-defense. That conclusion is consistent with those reached by other States and localities, including the half-dozen States and the District of Columbia that have adopted a substantially identical 10-round LCM prohibition. It is also consistent with the conclusion of federal courts of appeals, which have uniformly upheld those laws. *See Kolbe v. Hogan*, 849 F.3d 114, 135, 138 (4th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 469 (2017); *Fyock v. City of Sunnyvale*, 779 F.3d 991, 1001 (9th Cir. 2015) (affirming the denial of a preliminary injunction); *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (2015); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 261-64 (2d Cir. 2015), *cert. denied sub nom. Shew v. Malloy*, 136 S. Ct. 2486 (2016); *Heller v. District of Columbia* ("*Heller II*"), 670 F.3d 1244, 1260-64 (D.C. Cir. 2011). *But see Duncan v. Becerra*, --- F. App'x ---, 2018 WL 3433828 (9th Cir. July 17, 2018) (affirming the grant of a preliminary injunction).

The court below, recognizing those precedents, refused to preliminarily enjoin New Jersey's LCM prohibition and held that "the state has presented sufficient evidence that . . . the LCM law is reasonably tailored to achieve the[] goal of reducing the number of casualties and fatalities in a mass shooting and that it leaves several options open for current LCM owners to retain their magazines and for purchasers to buy large amounts of ammunition." JA28. That conclusion is well within the Supreme Court's recognition that States may—and indeed are encouraged to—reach a variety of conclusions about how best to respond to gun violence within their jurisdictions. *See McDonald v. City of Chicago*, 561 U.S. 742, 784-85 (2010) (plurality op.); *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1630 (2014) ("[O]ur federal structure permits [State] innovation and experimentation . . . ." (internal quotation marks omitted)).[1] Thus, even assuming that LCM restrictions burden Second Amendment rights, States may enact them—and other reasonable firearm regulations—because doing so is substantially related to the achievement of important governmental interests.[2] Prohibiting the possession

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[1] In referring to "States," amici include the District of Columbia and, as relevant, localities with the authority to regulate firearms.

[2] For the reasons stated by New Jersey (at 12-21) and other *amici*, it is not clear that LCMs are entitled to Second Amendment protection. *See, e.g.*, *Kolbe*, 849 F.3d at 135-37 (LCMs are not constitutionally protected because they are "like M-16 rifles, *i.e.*, weapons that are most useful in military service" (internal quotation marks omitted)). However, even if they are protected under the Second Amendment,

of LCMs represents New Jersey's effort to develop innovative solutions to address the complex reality of gun violence within its borders.

Moreover, in reviewing such solutions, courts "accord substantial deference" to a State's "predictive judgment[]." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) ("*Turner I*"). Just as in other constitutional contexts, the proper inquiry is not whether the court would reach the same decision, but whether there is sufficient evidence showing that the State's decision was reasonable. *Id*. at 666. As the district court found, the record evidence supports New Jersey's quintessentially legislative and public-policy judgment that prohibiting LCMs would reduce the threat to public safety from firearm violence. This Court should not second-guess that determination.

ARGUMENT

I. The Second Amendment Authorizes State Experimentation With Measures To Prevent Gun Violence And Gun Fatalities.

The Second Amendment confers an individual right to bear arms, but that right "is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). It does not amount to "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id*.; *see also, e.g.*, *United States v.*

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a ban on their possession survives constitutional scrutiny because it furthers important objectives such as protecting civilians and law enforcement from gun violence, enhancing public safety, and reducing the incidence and lethality of mass shootings. *See supra* p. 2 (citing cases).

Marzzarella, 614 F.3d 85, 92 (3d Cir. 2010) ("*Heller* did not purport to fully define all the contours of the Second Amendment."). Rather, the Second Amendment "protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." *McDonald*, 561 U.S. at 780 (plurality op.); *Heller*, 554 U.S. at 634-35. Within that constitutional "limit[]," the Court explained, "[s]tate and local experimentation with reasonable firearms regulations will continue." *McDonald*, 561 U.S. at 785 (plurality op.). The Second Amendment thus does not bar States from adopting reasonable measures to reduce firearm violence, including restrictions on the possession of LCMs. Appellants' arguments to the contrary risk depriving States of the flexibility to address the problem of gun violence in a manner consistent with local needs and values.

A. The Second Amendment preserves States' authority to enact firearm restrictions in furtherance of public safety.

States have primary responsibility for ensuring public safety, which includes a duty to reduce the likelihood that their citizens will fall victim to preventable firearm violence, and to minimize fatalities and injuries when that violence does occur. *See United States v. Morrison*, 529 U.S. 598, 618 (2000) ("[W]e can think of no better example of the police power . . . reposed in the States[] than the suppression of violent crime and vindication of its victims."). As this Court has stated, "[t]he State of New Jersey has, undoubtedly, a significant, substantial and important interest in protecting its citizens' safety" and it may pursue that interest through

means with a "reasonable fit" to achieve it. *Drake v. Filko*, 724 F.3d 426, 437 (3d Cir. 2013) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)). As States respond creatively to address the problem of firearm violence in light of local conditions, "the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

Indeed, the Supreme Court has stated that codification of the right to keep and bear arms in the Second Amendment, and the incorporation of that right against the States through the Fourteenth Amendment, may impose some "limits" on policy alternatives but "by no means eliminates" the States' "ability to devise solutions to social problems that suit local needs and values." *McDonald*, 561 U.S. at 785 (plurality op.). Policymakers, the Court explained, retain "a variety of tools for combating [firearm violence]." *Heller*, 554 U.S. at 636. The Second Amendment does not "protect the right of citizens to carry arms for *any sort* of confrontation, just as . . . the First Amendment [does not] protect the right of citizens to speak for *any purpose*." *Id*. at 595; *cf*. *McDonald*, 561 U.S. at 802 (Scalia, J., concurring) ("No fundamental right—not even the First Amendment—is absolute."). The Court accordingly generated a list—which did "not purport to be exhaustive"—of "presumptively lawful" regulations, such as prohibitions on carrying concealed

weapons, bans on the possession of firearms by felons and the mentally ill, bans on carrying firearms in sensitive places, and, as relevant here, bans on carrying "dangerous and unusual weapons," including weapons "not typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625, 626-27 & n.26. Moreover, even where the regulation at issue may burden the protected right, it survives constitutional scrutiny where "the asserted governmental end is . . . either 'significant,' 'substantial,' or 'important' . . . [and] the fit between the challenged regulation and the asserted objective [is] reasonable, not perfect." *Marzzarella*, 614 F.3d at 98; *see also Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336, 339 & n.1, 346 (3d Cir. 2016) (reaffirming *Marzzarella*).[3]

The Supreme Court's confirmation in *McDonald* that State experimentation with firearm regulations could continue is entirely consistent with its recent jurisprudence addressing other constitutional provisions. *See, e.g.*, *Schuette*, 134 S. Ct. at 1630-31 (affirming State "innovation and experimentation" with respect to "whether, and in what manner, voters in the States may choose to prohibit the

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[3] No federal court of appeals has applied strict scrutiny to an LCM regulation. *See supra* p. 2. Doing so here would not only be unwarranted, it could impede state legislatures from responding effectively to a variety of threats to public safety. *See United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011) (applying strict scrutiny would "handcuff[] lawmakers' ability to 'prevent armed mayhem' in public places, and depriv[e] them of 'a variety of tools for combating th[e] problem'" (citation and brackets omitted)).

consideration of racial preferences in . . . school admissions"); *Oregon v. Ice*, 555 U.S. 160, 164 (2009) (leaving to state judges the determination of certain facts that dictate whether a court may impose consecutive as opposed to concurrent sentences). In the Second Amendment context, just as in others, States may pursue a range of policy preferences; within basic constitutional limits, they are not barred from considering policies that might in some way limit the use or possession of a particular type of firearm or firearm feature.

Consistent with the flexibility the Second Amendment provides, States have addressed the threat to public safety posed by firearm violence along a variety of tracks. That is unsurprising. While firearm violence is a national phenomenon, "conditions and problems differ from locality to locality," *McDonald*, 561 U.S. at 783 (plurality op.). The Federal Bureau of Investigation ("FBI") has identified numerous factors "known to affect the volume and type of crime occurring from place to place," including population density, composition and stability of the population, and the extent of urbanization; economic conditions, including median income, poverty level, and job availability; the effective strength of law enforcement; and the policies of other components of the criminal-justice system, including prosecutors, courts, and probation and correctional agencies.[4] These

[4] FBI, Uniform Crime Reporting Statistics: Their Proper Use (May 2017), https://ucr.fbi.gov/ucr-statistics-their-proper-use (last visited Nov. 2, 2018).

factors, among others, vary widely across States. As a result, there are significant variations from State to State in, for example, the number of murders and aggravated assaults committed with firearms.[5] There are also regional variations in the number of law-enforcement officers killed in the line of duty, almost all of whom are killed with firearms.[6] Equally important, given the unique conditions in each State and the "divergent views on the issue of gun control" held by the citizens of those States, *McDonald*, 561 U.S. at 783 (plurality op.), an approach that may be appropriate or effective in one State may not be appropriate or effective in another.

These differences help explain policymakers' varied responses to firearm violence. Thirty-eight States and the District of Columbia, for example, require a permit to carry a concealed firearm, but they afford different degrees of discretion to licensing authorities.[7] Twenty States and the District of Columbia require some

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[5] FBI, Murder: Crime in the United States 2017, tbl. 20, https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-20 (last visited Nov. 2, 2018); FBI, Aggravated Assault: Crime in the United States 2017, tbl. 22, https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-22 (last visited Nov. 2, 2018).

[6] *See* FBI, Law Enforcement Officers Feloniously Killed 2017 (noting that, in 2017, "[b]y region, 24 officers were feloniously killed in the South, 11 officers in the Midwest, 6 officers in the West, 3 officers in the Northeast, and 2 officers in Puerto Rico"), https://ucr.fbi.gov/leoka/2017/topic-pages/felonious_topic_page_-2017 (last visited Nov. 2, 2018).

[7] Law Ctr. To Prevent Gun Violence, Concealed Carry: Summary of State Law, http://smartgunlaws.org/gun-laws/policy-areas/guns-in-public/concealed-carry/#state (last visited Nov. 2, 2018).

form of background check for certain firearms transactions.[8] And nine States (including New Jersey) and the District of Columbia have enacted laws that restrict assault weapons, large-capacity magazines, or both.[9]

Whatever measures a State may adopt, all States have an interest in maintaining the flexibility, within the constraints established by the United States Constitution and their own State constitutions, to enact common-sense regulations aimed at minimizing the adverse effects of firearm violence while preserving the right of law-abiding, responsible citizens to use arms in defense of hearth and home. *See Friedman*, 784 F.3d at 412 ("Within the limits established by the Justices in *Heller* and *McDonald*, federalism and diversity still have a claim."). Indeed, a State's ability to craft the kind of innovative solutions acknowledged by this Court is most pronounced in areas, like police powers and criminal justice, where States have long been understood to possess special competencies. *See Ice*, 555 U.S. at 170-71 (quoting *Patterson v. New York*, 432 U.S. 197, 201 (1977)). Courts should thus "not lightly construe the Constitution so as to intrude upon" a State's crime-fighting efforts. *Patterson*, 432 U.S. at 201. Neither the policy choices of other

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[8] Law Ctr. To Prevent Gun Violence, Universal Background Checks: Summary of State Law, http://smartgunlaws.org/gun-laws/policy-areas/background-checks/universal-background-checks/#state (last visited Nov. 2, 2018).

[9] Law Ctr. To Prevent Gun Violence, Large Capacity Magazines: Summary of State Law, http://smartgunlaws.org/gun-laws/policy-areas/hardware-ammunition/large-capacity-magazines/#state (last visited Nov. 2, 2018).

States, nor the policy preferences of appellants here, should limit New Jersey's ability to respond to firearm violence within its borders.

B. Appellants' arguments jeopardize States' ability to experiment with and reform gun laws.

Appellants' arguments that banning the possession of LCMs is "off the table" (App. Br. 3) threatens the States' continued experimentation with firearms regulation in several significant ways.

First, the argument (at 15-19) that LCMs cannot be banned no matter what dangers they may pose because they are in "common use" would impede, if not prevent, regulation of any firearm or firearm feature that is *prevalent*. The Supreme Court has not adopted that argument (*cf.* App. Br. 15), and doing so would lead to an unworkable result: States could enact regulations only in the narrow window after a firearm or firearm feature becomes a problem but before the firearm or firearm feature becomes widespread. In addition, appellants' argument would permit the absence of firearm regulations in a plurality of States to render the laws of other States "more or less open to [Second Amendment] challenge," *Friedman*, 784 F.3d at 408, 412—precisely the opposite of the federalism-driven diversity the Supreme Court praised in *McDonald*.

Second, appellants' argument (at 21-26) likening the *regulation* of a particular firearm or firearm feature—here possession of an ammunition magazine holding more than ten rounds—to the "total ban" of the "quintessential self-defense weapon"

at issue in *Heller*, 554 U.S. at 629, would take out of States' hands *most* questions about which weapons are appropriate for self-defense. *Heller*'s reasoning, however, does not support the conclusion that a prohibition on the possession of a subset of ammunition magazines amounts to a "prohibition of an entire class of 'arms.'" *Id*. at 628; *see United States v. One (1) Palmetto State Armory PA-15 Machinegun Receiver/Frame, Unknown Caliber Serial No. LW001804*, 822 F.3d 136, 144 (3d Cir. 2016) ("[*Heller*] does not mean that a categorical ban on any particular type of bearable arm is unconstitutional."). In particular, an LCM regulation "does not restrict the possession of magazines in general such that . . . lawfully possessed firearms [are] inoperable, nor does it restrict the number of magazines that an individual may possess." *Fyock*, 779 F.3d at 999 (distinguishing a similar LCM restriction from the ban in *Heller*); *Cuomo*, 804 F.3d at 260 (same); *Heller II*, 670 F.3d at 1261-62 (same). If a discrete regulation could so easily be transformed into a class-of-arms prohibition, *Heller*'s instruction that the Second Amendment is not a "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose," 554 U.S. at 626, would have little effect. *Cf. Binderup*, 836 F.3d at 345 (refusing to "condemn without exception all laws and regulations containing preconditions for the possession of firearms by individuals with Second Amendment rights") (opinion of Ambro, J.).

Finally, appellants' argument (at 33-34) threatens to foreclose States' ability to regulate firearms or firearm features whenever it could be argued that criminals, including mass shooters, will simply "'use whatever [means] they have available' to commit their crimes." As an initial matter, "[t]he mere possibility that some subset of people intent on breaking the law will indeed ignore [firearm regulations] does not make them unconstitutional." *Cuomo*, 804 F.3d at 263. But even if criminal ingenuity were a legitimate consideration in determining the constitutionality of a firearm regulation, it would not render the impact of New Jersey's regulation "negligible" here, as demonstrated by evidence establishing that LCM restrictions *do* reduce the incidence or lethality of mass shootings. *See* N.J. Br. 27-30. In any event, States need not demonstrate the efficacy of a regulation not yet in place. *See infra* pp. 17-18.

Contrary to appellants' arguments, the best way to evaluate how crime, self-defense, and the possession of LCMs relate to each other "is through the political process and scholarly debate." *Friedman*, 784 F.3d at 412. The Court's precedents, of course, "set limits on the regulation of firearms; but within those limits, they leave matters open." *Id*. Appellants' argument that New Jersey's law is per se unconstitutional, however, would impede New Jersey and other jurisdictions "from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise." *Lopez*, 514 U.S. at 583 (Kennedy, J.,

concurring). That "would be the gravest and most serious of steps" and "impair the ability of government to act prophylactically" on a "life and death subject." *Kolbe*, 849 F.3d at 150 (Wilkinson, J., concurring); *cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("Denial of the right to experiment may be fraught with serious consequences to the nation.").

II. Intermediate Scrutiny Does Not Authorize Courts To Second-Guess A State's Policy Judgments.

For legislation to survive intermediate scrutiny,[10] the government must show that (1) its stated interest is "significant, substantial, or important," and (2) that there is a "reasonable fit between that asserted interest and the challenged law." *Drake*, 724 F.3d at 436 (citing *Marzzarella*, 614 F.3d at 98). Drawing from cases applying intermediate scrutiny to content-neutral regulations under the First Amendment, this Court has instructed that the "fit" required between the challenged firearm regulation and the governmental interest "be reasonable, not perfect." *Marzzarella*, 614 F.3d at 98; *see also id.* at 89 n.4; *Binderup*, 836 F.3d at 345 (opinion of Ambro, J.).

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[10] Every federal court of appeals to reach the issue has applied intermediate scrutiny to LCM regulations. *See supra* pp. 2, 7 n.3. Indeed, in *Heller II*, the D.C. Circuit relied on this Court's reasoning in *Marzzarella* to determine that intermediate scrutiny applied to an LCM ban. *See* 670 F.3d at 1262 (reasoning that if intermediate scrutiny applied to the prohibition of unmarked firearms, which "left a person 'free to possess any otherwise lawful firearm,'" intermediate scrutiny would also apply to an LCM prohibition, which similarly "does not effectively disarm individuals or substantially affect their ability to defend themselves").

A. A deferential standard governs judicial review of a legislature's predictive judgments.

In determining whether a law satisfies intermediate scrutiny, both this Court and the Supreme Court "accord substantial deference" to the legislature's judgments, and limit their review of the fit between challenged regulation and governmental interest to "assur[ing] that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) ("*Turner II*"); *Drake*, 724 F.3d at 436-37.[11] Specifically, in reviewing those legislative judgments, the court may not "reweigh the evidence de novo, or . . . replace [the legislature's] factual predictions with [the court's] own"; instead, the court should defer to a legislative finding even if two different conclusions could be drawn from the supporting evidence. *Turner II*, 520 U.S. at 195. Such a high degree of deference is appropriate, the Court explained, both "out of respect for [the State's] authority to exercise the legislative power" and because legislatures are "far better equipped than the judiciary to amass and evaluate

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[11] Although *Turner II* involved the predictive judgment of Congress, its reasoning applies with equal force to the judgments of State and local legislatures. Like Congress, such legislatures "are better qualified to weigh and evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts." *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987) (internal quotation marks omitted); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) (plurality op.) ("[W]e must acknowledge that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems.").

. . . data bearing upon legislative questions." *Id*. at 195, 196 (citations and internal quotation marks omitted).

In arriving at its predictive judgment, a legislature may rely on a range of authority. For example, while the legislature's judgment *can* be based on empirical evidence, it need not be; it can also be based on "history, consensus, and simple common sense." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995); *see also Drake*, 724 F.3d at 438 (citing *IMS Health, Inc. v. Ayotte*, 550 F.3d 42, 55 (1st Cir. 2008)). That is in part because "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Turner I*, 512 U.S. at 665. "A state legislature is not constitutionally required to wait for conclusive scientific evidence before acting to protect its citizens from serious threats of harm." *King v. Governor*, 767 F.3d 216, 239 (3d Cir. 2014), *abrogated on other grounds by Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018). Moreover, in the event a legislature relies on empirical evidence, that evidence need not come with "sample sizes or selection procedures." *Turner I*, 512 U.S. at 665; *see also Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 969 (9th Cir. 2014) (even if the evidence suggests that "the lethality of

hollow-point bullets is an open question," that is "insufficient to discredit San Francisco's reasonable conclusions").[12]

A legislature also need not "conduct new studies or produce evidence independent of that already generated by other[s] . . . , so long as whatever evidence [it] relies upon is reasonably believed to be relevant to the problem that the [legislature] addresses." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986); *see also United States v. Jimenez*, 895 F.3d 228, 236 (2d Cir. 2018) (agreeing that the government need not "present any statistical evidence about the propensity for violence among the dishonorably discharged" and may "rel[y] on the fact that those convicted of felonies have been widely found to be more dangerous with deadly weapons"). Indeed, a legislature may rely on "studies and anecdotes pertaining to different locales altogether." *Went For It, Inc.*, 515 U.S. at 628.

Applying these principles, the Supreme Court in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), expressly rejected the argument that Los

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[12] *Went For It* addressed the constitutionality of a Florida Bar rule that prohibited lawyers from using direct mail to solicit personal injury or wrongful death clients within 30 days of an accident. Applying intermediate scrutiny, the Court credited a "106-page summary of [the Florida Bar's] 2-year study" and an "anecdotal record" that included newspaper editorial pages. *See* 515 U.S. at 623-24, 625-27. The Court contrasted the sufficiency of that record with the one it reviewed in *Edenfield v. Fane*, 507 U.S. 761, 768 (1993), where the Florida Board of Accountancy "presented no studies" and "the record did not disclose any anecdotal evidence from Florida or any other State." *Went For It, Inc.*, 515 U.S. at 626 (brackets omitted).

Angeles needed to "demonstrate, not merely by appeal to common sense, but also with empirical data, that its ordinance will successfully lower crime." *Id*. at 439 (plurality op.) (sustaining a municipal ordinance regulating adult businesses). "Our cases," the Court explained, "have never required that municipalities make such a showing, certainly not without actual and convincing evidence from plaintiffs to the contrary." *Id*. In fact, "[a] municipality considering an innovative solution may not have data that could demonstrate the efficacy of its proposal because the solution would, by definition, not have been implemented previously." *Id.* at 439-40. Accordingly, while "shoddy data or reasoning" is insufficient, a legislature may "rely on *any* evidence that is 'reasonably believed to be relevant' for demonstrating a connection between [what is being regulated] and a substantial, independent government interest." *Id*. at 438 (emphasis added); *see also id*. at 451 (Kennedy, J., concurring) ("[W]e have consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required.").

Thus, in a wide variety of constitutional contexts, both this Court and the Supreme Court routinely defer to a range of legislative judgments. In *Turner II*, the Supreme Court deferred to Congress's express finding that statutory provisions requiring cable-television systems to carry local stations were necessary to preserve those stations. *See* 520 U.S. at 196 ("[D]eference must be accorded to [legislative] findings as to the harm to be avoided and to the remedial measures adopted for that

end . . . ."). In *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), the Court rejected arguments that Missouri lacked "empirical evidence of actually corrupt practices or the perception among Missouri voters [of the same]." 528 U.S. at 390-91. It upheld certain campaign contribution limits, finding sufficient the "authority of *Buckley* [*v. Valeo*, 424 U.S. 1 (1976)]" and a record that included a State senator's statement that contributions had the "real potential to buy votes," several media accounts reporting large contributions, and the fact that "74 percent of Missouri voters determined that contribution limits are necessary." *Id*. at 390-91, 393-94. In *King*, this Court upheld a New Jersey statute prohibiting licensed counselors from engaging in "sexual orientation change efforts" with minor children after crediting the consensus of "independent professional organizations that possess specialized knowledge and experience concerning the professional practice under review," notwithstanding that consensus might "fall[] short of the demanding standards imposed by the scientific community." 767 F.3d at 238-39.

Indeed, even in applying strict scrutiny, the Supreme Court has emphasized that a legislature's predictive judgments are entitled to deference. In *Burson v. Freeman*, 504 U.S. 191 (1992), the Court upheld as narrowly tailored a voting regulation prohibiting electioneering within 100 feet of a polling place, stating that "this Court never has held a State 'to the burden of demonstrating empirically the objective effects on political stability that [are] produced' by the voting regulation

in question." *Id*. at 209. "Legislature[s]," the Court explained, "should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Id*. The Court accordingly rejected as not of "constitutional dimension" arguments that the boundary line should have been fewer than 100 feet. *Id*. at 210; *see also id*. at 211 ("A long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary . . . [and] requiring solicitors to stand 100 feet from the entrances to polling places does not constitute an unconstitutional compromise.").

Deference to a legislature's predictive judgments is particularly apt in the context of firearm regulation, where the legislature is "far better equipped than the judiciary" to make sensitive public policy judgments. *Turner I*, 512 U.S. at 665; *see Kachalsky v. County of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012) (extending "substantial deference" with respect to a concealed-carry law). In examining a prohibition on LCMs substantially identical to the one at issue here, the Ninth Circuit stated that the City of Sunnyvale was "entitled to rely on any evidence 'reasonably believed to be relevant' to substantiate its important interests" and that the evidence it presented—that LCMs result in more gunshots fired and more gunshot wounds per victim, that LCMs are disproportionally used in mass shootings and against law enforcement officers, and that defensive gun use incidents involved fewer than ten

rounds of ammunition—was sufficient to substantiate its interest. *Fyock*, 779 F.3d at 1000-01 (district court did not abuse its discretion in denying a preliminary injunction). The Fourth Circuit similarly determined that Maryland's legislative judgment that reducing the availability of LCMs would "lessen their use in mass shootings, other crimes, and firearms accidents" "is precisely the type of judgment that legislatures are allowed to make without second-guessing by a court." *Kolbe*, 849 F.3d at 140.

Here, New Jersey may rely on not just the legislative records amassed by Maryland, New York, and other jurisdictions, *see Went For It, Inc.*, 515 U.S. at 628; *Renton*, 475 U.S. at 51-52; *Drake*, 724 F.3d at 438, but also the judicial decisions incorporating those records. *See supra* p. 2.[13] Several federal courts of appeals have reviewed—and upheld—LCM restrictions, crediting the same or similar evidence. In *Cuomo*, the Second Circuit credited evidence that LCMs are "disproportionally used in mass shootings" and "result in 'more shots fired, persons wounded, and more

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[13] *See also City of Erie v. Pap's A.M.*, 529 U.S. 277, 297 (2000) (recognizing that the City of Erie "could reasonably rely on the evidentiary foundation set forth in *Renton* and [*Young v.*] *American Mini Theatres*[, *Inc.*, 427 U.S. 50 (1976)], to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood"); *Kachalsky*, 701 F.3d at 98 (noting that "[t]he connection between promoting public safety and regulating handgun possession in public is not just a conclusion reached by New York[,] [i]t has served as the basis for other states' handgun regulations, as recognized by various lower courts"); *United States v. Chovan*, 735 F.3d 1127, 1140 (9th Cir. 2013) (crediting the government's reliance on evidence presented to the Seventh Circuit).

wounds per victim.'" 804 F.3d at 263, 264. In *Heller II*, the D.C. Circuit similarly observed that LCMs "greatly increase the firepower of mass shooters," increase resulting injuries, and "tend to pose a danger to innocent people and particularly to police officers." 670 F.3d at 1263, 1264. And in *Kolbe*, the Fourth Circuit—based partly on the evidence discussed in *Cuomo*, such as studies showing that LCMs are "particularly attractive to mass shooters and other criminals, including those targeting police"—was "satisfied that there is substantial evidence" that "by reducing the availability of [LCMs], the [challenged law] will curtail their availability to criminals." 849 F.3d at 139-41. This consensus among legislatures and courts demonstrates the substantial records underlying the predictive judgments involved.

B. New Jersey made a considered and well-supported judgment in prohibiting LCMs.

Here, the New Jersey legislature determined that the possession of LCMs should be prohibited within its borders. *See* JA27 ("New Jersey, a densely populated urban state, has a particularly strong interest in regulating firearms."). The long history of legislative and judicial determinations regarding the lethality and injuriousness of LCMs provides a substantial basis for New Jersey's judgment.

As an initial matter, New Jersey's LCM law is an important, incremental improvement on more than two decades of federal and state legislative measures seeking to address the particular risks that LCMs pose to public safety. The

legislature acted in the context of the prevalence of mass shootings and prior State and federal attempts to regulate LCMs. Specifically, the law revises the number of rounds of ammunition a "large capacity ammunition magazine" can lawfully hold to ten—bringing it line with the laws of six other states. *Compare* N.J. Stat. Ann. § 2C:39-1y (2013), *with* Act A2761 § 1(y); *see also* N.J. Stat. Ann. § 2C:39-3(j) (2018); JA9 (citing state laws).

The record developed in this litigation confirms the validity of New Jersey's predictive judgment that prohibiting the possession of these LCMs will reduce firearm injuries and fatalities. LCMs—by design—increase the number of bullets fired in a short period, resulting in more shots fired, more victims wounded, and more wounds per victim. *See* JA913-15 (Donohue Decl. ¶¶ 40, 42); *Heller II*, 670 F.3d at 1263. LCMs are thus particularly attractive to mass shooters and other criminals (JA909-910 (Donohue Decl. ¶ 29)) and pose heightened risks to innocent civilians and law enforcement (JA1104 (Stanton Decl. ¶¶ 26-27)). In the last thirty years, not only has there been a proliferation of mass shootings, but, in instances where the magazine capacity used by the killer could be determined, 54 out of 83 mass shootings involved an LCM. *See* JA852 (Allen Decl. ¶ 22). Mass-shooters using LCMs have caused significantly greater numbers of injuries and fatalities than shooters not using them—an average of 31 victims killed or injured, as compared with nine victims killed or injured. JA853 (Allen Decl. ¶ 24).

Both common sense and empirical evidence suggest that prohibiting LCMs will reduce the number of crimes in which LCMs are used and reduce the lethality and devastation of gun crime when it does occur. *See* JA913-14 (Donohue Decl. ¶¶ 40-41 (bans on LCMs "reduc[e] the lethality of mass shooters by limiting the number of bullets that can be fired without reloading")); *Heller II*, 670 F.3d at 1264 (the "two or three second pause during which a criminal reloads his firearm 'can be of critical benefit to law enforcement'"). Indeed, in *Cuomo*, the Second Circuit credited expert testimony—similar to that in this case, *see* JA911, JA914-15 (Donohue Decl. ¶¶ 38, 42)—that banning the possession of LCMs is likely to "prevent and limit shootings in the state over the long run," 804 F.3d at 264. At the same time, there is no proof that LCMs are necessary—or even commonly used—for self-defense. *See, e.g.*, JA915-18 (Donohue Decl. ¶¶ 43-48); JA845-46 (Allen Decl. ¶¶ 8-11 (citing National Rifle Association reports that individuals engaging in self-defense, including those in New Jersey, fired on average 2.2 shots)).

Relying on this and other evidence, New Jersey has demonstrated that prohibiting the possession of LCMs is a reasonable fit to achieve its goal of reducing the lethality and injuriousness of mass shootings. In dismissing this empirical and anecdotal evidence, appellants apply a cramped and overly demanding standard of what constitutes a "reasonable" fit, and they eliminate the deference to which New Jersey's predictive judgments are entitled. As courts—including this one—have

recognized, States enjoy the flexibility—within the bounds of *Heller* and *MacDonald*—to regulate firearm violence. Appellants' insistence that New Jersey specifically justify the rounds-per-magazine in its LCM restriction or prove the efficacy of its regulation in advance would "impos[e] judicial formulas so rigid that they [would] become a straightjacket that disables government from responding to serious problems." *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996) (Breyer, J., concurring in part and concurring in the judgment). That approach is unwarranted and should not be applied here.

CONCLUSION

The order denying the preliminary injunction should be affirmed.

Respectfully submitted,

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