

In the
United States Court of Appeals
for the Third Circuit

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

Plaintiffs-Appellants,

v.

ATTORNEY GENERAL NEW JERSEY, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of New Jersey
Case No. 3:18-cv-10507

**BRIEF OF AMICI CURIAE PROFESSORS OF SECOND AMENDMENT
LAW, FIREARMS POLICY COALITION, FIREARMS POLICY
FOUNDATION, MADISON SOCIETY FOUNDATION, CALIFORNIA
GUN RIGHTS FOUNDATION, AND INDEPENDENCE INSTITUTE IN
SUPPORT OF APPELLANTS AND REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici Curiae* make the following statements:

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

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

Madison Society Foundation has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

California Gun Rights Foundation has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

Independence Institute has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

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STATEMENT OF *AMICI CURIAE*

***Amici* law professors** all teach and write on the Second Amendment: Royce Barondes (Missouri), Robert Cottrol (George Washington), Nicholas Johnson (Fordham), Joyce Malcolm (George Mason), Joseph Olson (Mitchell Hamline), Glenn Reynolds (Tennessee), and Gregory Wallace (Campbell). As the Appendix describes, they were cited by the Supreme Court in *District of Columbia v. Heller* and *McDonald v. Chicago*. Oft-cited by lower courts as well, these professors include authors of the first law school textbook on the Second Amendment, as well as many other books and law review articles on the subject.

Firearms Policy Coalition (“FPC”) is a nonprofit membership organization that defends constitutional rights—including the right to keep and bear arms—and promotes individual liberty. FPC engages in direct and grassroots advocacy, research, legal efforts, outreach, and education. FPC has a special interest in this case, because the issue presented is germane to litigation and research in which FPC is currently engaged.

Firearms Policy Foundation (“FPF”) is a nonprofit organization that serves its members and the public through charitable programs

including research, education, and legal efforts, with a focus on constitutional rights. FPF has a special interest in this case, because the issue presented is germane to litigation and research in which FPF is currently engaged.

Madison Society Foundation (“MSF”) is a nonprofit corporation based in California. MSF seeks to promote and preserve the right to keep and bear arms by offering education and training to the public.

California Gun Rights Foundation is a nonprofit organization dedicated to defending the constitutional rights of California gun owners and educating the public about federal, state, and local laws.

Independence Institute is a nonpartisan public policy research organization founded on the eternal truths of the Declaration of Independence. The Institute’s *amicus* briefs in *District of Columbia v. Heller* and *McDonald v. City of Chicago* (under the name of lead *amicus* Int’l Law Enforcement Educators & Trainers Association (ILEETA)) were cited in the opinions of Justices Breyer (*Heller*), Alito (*McDonald*), and Stevens (*McDonald*).

CONSENT TO FILE

All parties have consented to the filing of this brief.¹

¹ No counsel for a party authored this brief in whole or in part. No party or counsel contributed money intended to fund the preparation or submission of this brief. No person other than *amici* and their members contributed money intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Supreme Court held that the Second Amendment protects arms “in common use” in *District of Columbia v. Heller*, 554 U.S. 570 (2008). The only exceptions the Court identified were “longstanding” regulations with “historical justifications,” which are “presumptively lawful.” *Id.* at 626–27 & n.26.

Because Americans own approximately 60 million of the magazines New Jersey bans, they are common. New Jersey’s confiscation, therefore, is permissible only if it is historically justified.

The first known repeating firearms date back to between 1490 and 1530, with guns that fired 10 consecutive rounds. A 1580 gun could fire 16 shots.

In the 17th century, two models of repeating arms were widely copied: Denmark’s 30-round Kalthoff long gun, and Italy’s 7-round Lorenzoni handgun. European repeating firearms were copied and produced in the American colonies.

Repeating arms were being manufactured in the colonies by the mid-1600s. Repeaters capable of firing more than 10 rounds gained further popularity by the early 1700s. Some were introduced during the

Revolutionary War, at which point the Continental Congress ordered repeaters that could “discharge sixteen, or twenty [rounds], in sixteen, ten, or five seconds.”

The state-of-the-art rifle when the Second Amendment was ratified had a 22-round magazine. Meriwether Lewis famously carried one he acquired from a Pennsylvania gunsmith on the Lewis and Clark Expedition. America’s Founders knew about and embraced such arms.

From the 1830s onward, advancements in manufacturing made repeaters more affordable, and Americans had many to choose from. Repeating arms with greater than 10-round capacities became some of the 19th century’s most popular arms—including the iconic Winchester and Henry rifles, followed by semiautomatics after 1885.

Magazine bans have been a rarity in American history. There were no magazine restrictions prior to the 20th century. During Prohibition, a few states enacted—and later repealed—ammunition-capacity restrictions. None were as severe as New Jersey’s, and none is “longstanding.” New Jersey’s magazine ban has no support in American history and is therefore unconstitutional.

ARGUMENT

I. *Heller* held that the Second Amendment protects arms “in common use.”

Heller specifically addressed “*what* types of weapons” the right to keep and bear arms protects. *District of Columbia v. Heller*, 554 U.S. 570, 624 (2008) (emphasis in original). *Heller* held that the right protects arms that are “typically possessed by law-abiding citizens for lawful purposes.” *Id.* at 625. In other words, “the sorts of weapons protected [are] those ‘in common use at the time.’” *Id.* at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

In the founding era, “when called for militia service able-bodied men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.” *Id.* at 624 (quoting *Miller*, 307 U.S. at 179) (brackets omitted). “The traditional militia was formed from a pool of men bringing arms ‘in common use at the time’ for lawful purposes like self-defense.” *Id.* Because “weapons used by militiamen and weapons used in defense of person and home were one and the same,” protecting arms in common use is “precisely the way in which the Second Amendment’s operative clause furthers the purpose announced in its preface.” *Id.* at 625 (citations omitted).

Thus, “the pertinent Second Amendment inquiry is whether [the arms] are commonly possessed by law-abiding citizens for lawful purposes *today*.” *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1032 (2016) (Alito, J., concurring) (emphasis in original). *See also Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Thomas, J., joined by Scalia, J., dissenting from the denial of certiorari) (“Under our precedents, that [the arms are commonly used for lawful purposes] is all that is needed for citizens to have a right under the Second Amendment to keep such weapons.”).

Appellants have demonstrated that Americans own approximately 60 million of the banned magazines.² *Opening Br.* at 7. And this Court has previously found that the magazines are “typically possessed by law-abiding citizens.” *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 116 (3d Cir. 2018). The magazines are thus common arms.³

² Some courts have found the number of magazines to be substantially higher. *See e.g., Kolbe v. Hogan*, 849 F.3d 114, 129 (4th Cir. 2017) (en banc) (75 million); *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1143 (S.D. Cal. 2019) (noting evidence of over 100 million); *Worman v. Healey*, 922 F.3d 26, 35 (1st Cir. 2019) (115 million).

³ Several sister circuits have either decided or assumed that such magazines are common. *New York State Rifle & Pistol Ass'n, Inc. v.*

II. *Heller* recognized possible exceptions for only “longstanding” regulations.

Heller declared that some “longstanding” regulations⁴ with “historical justifications” are “presumptively lawful.” 554 U.S. at 626–27 & n.26. *Heller* listed examples,⁵ and promised to “expound upon the historical justifications for the exceptions . . . when those exceptions come before us.” *Id.* at 635. The Court repeated these “longstanding regulatory measures” in *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010). While none of the examples involved prohibitions on types of arms, *Heller* clarified that “our list does not purport to be exhaustive.” 554 U.S. at 627 n.26. Thus, unlisted “presumptively lawful” arms prohibitions may exist,

Cuomo, 804 F.3d 242, 255 (2d Cir. 2015) (“*NYSRPA I*”); *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) (“*Heller II*”); *Fyock v. Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015); *Worman*, 922 F.3d at 35–36. No federal circuit court has found the magazines uncommon.

⁴ *Heller* recognized “the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons,’” 554 U.S. at 627, but because that limitation applies to “unusual” arms, it necessarily does not apply to common arms. *See Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015) (if “the banned weapons are commonly owned . . . then they are not unusual.”).

⁵ The examples provided were “prohibitions on the possession of firearms by felons and the mentally ill, [] laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, [and] laws imposing conditions and qualifications on the commercial sale of arms.” *Heller*, 554 U.S. at 627.

but the Court has demonstrated that such regulations must be “longstanding” and contain a “historical justification.” *See Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336, 343 (3d Cir. 2016) (en banc) (“*Heller* catalogued a non-exhaustive list of ‘presumptively lawful regulatory measures’ that have historically constrained the scope of the right.”); *United States v. Bena*, 664 F.3d 1180, 1183 (8th Cir. 2011) (“the Supreme Court contemplated [] a historical justification for the presumptively lawful regulations”).

III. Magazines holding more than 10 rounds predate the Second Amendment by over two hundred years and were protected when the right was ratified.

Repeating arms—arms capable of firing multiple times without reloading—have existed for half a millennium, and predate the Second Amendment by nearly three centuries. Magazine-fed firearms with a capacity greater than 10-rounds existed by 1580, and predate the Second Amendment by over two centuries. The state-of-the-art rifle at the time of the Second Amendment’s ratification was a repeating arm with a capacity of 22 rounds that employed a tubular magazine.

A. Repeating arms were invented around 1500, and repeating arms capable of firing more than 10 rounds existed by 1580.

“The desire for . . . repeating weapons is almost as old as the history of firearms, and there were numerous attempts to achieve this goal, beginning at least as early as the opening years of the 16th century.”

Harold L. Peterson, ARMS AND ARMOR IN COLONIAL AMERICA 215 (1956).

The first known repeating firearms date back to between 1490 and 1530; when fired, they shot ten bullets in succession with a single trigger pull.⁶ King Henry VIII (reigned 1509–1547) owned a similar firearm.⁷ The first known repeater capable of firing more than 10 shots was invented around 1580; it could fire 16 consecutive rounds.⁸

The above firearms shot all of their bullets together, one after another. In the next century, technological improvements allowed the user to fire

⁶ M.L. Brown, FIREARMS IN COLONIAL AMERICA: THE IMPACT ON HISTORY AND TECHNOLOGY, 1492–1792, at 50 (1980). The ammunition was stored in a revolving cylinder.

⁷ W.W. Greener, THE GUN AND ITS DEVELOPMENT 81–82 (9th ed. 1910).

⁸ Lewis Winant, FIREARMS CURIOSA 168–70 (1955); *16-Shot Wheel Lock*, AMERICA’S 1ST FREEDOM, May 10, 2014, <http://bit.ly/2tngSDD>. The gun used superposed loads—that is, each round stacked on top of another.

one bullet at time, and then to press the trigger again whenever he chose to take the next shot.

B. Repeating arms gained popularity in England during the 17th century, including some with 30-round magazines.

“Successful systems [of repeating arms] definitely had developed by 1640, and within the next twenty years they had spread throughout most of Western Europe and even to Moscow.” Harold L. Peterson, THE TREASURY OF THE GUN 229 (1962). “[T]he two principal magazine repeaters of the era [were] the Kalthoff and the Lorenzoni. These were the first guns of their kind to achieve success.” *Id.*

“The Kalthoff repeater was a true magazine gun. In fact, it had two magazines, one for powder and one for balls. The earliest datable specimens which survive are two wheel-lock rifles made by Peter Kalthoff in Denmark in 1645 and 1646.”⁹ *Id.* “[T]he number of charges in the magazines ran all the way from six or seven to thirty.” Peterson, THE TREASURY OF THE GUN, at 230.

⁹ The wheel-lock was invented by Leonardo da Vinci in the late 16th century. Nicholas J. Johnson, et al., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS AND POLICY 141 (2d ed. 2017). It was superior to its predecessor, the matchlock, because it could be kept always ready for sudden use, and was more reliable. *Id.*

Kalthoff repeaters “were undoubtedly the first magazine repeaters ever to be adopted for military purposes. About a hundred flintlock rifles of their pattern were issued to picked marksmen of the Royal Foot Guards and are believed to have seen active service during the siege of Copenhagen in 1658, 1659, and again in the Scanian War of 1675–1679.” Peterson, *THE TREASURY OF THE GUN*, at 230.

“Examples [of Kalthoff-type repeaters] spread throughout Europe wherever there were gunsmiths with sufficient skill and knowledge to make them, and patrons wealthy enough to pay the cost. . . . [A]t least nineteen gunsmiths are known to have made such arms in an area stretching from London on the west to Moscow on the east, and from Copenhagen south to Salzburg. There may well have been even more.”

Peterson, *THE TREASURY OF THE GUN*, at 230.

“The Lorenzoni also was developed during the first half of the Seventeenth Century.” *Id.* It was a magazine-fed Italian repeating pistol that “used gravity to self-reload.” Martin Dougherty, *SMALL ARMS VISUAL ENCYCLOPEDIA* 34 (2011). (In being able to self-reload, Lorenzonis are similar to semiautomatic firearms.) The Lorenzonis’ ammunition capacity was typically around seven shots. The gun’s repeating

mechanism quickly spread throughout Europe and to the colonies, and the mechanism was soon applied to rifles as well.¹⁰

On July 3, 1662, famed London diarist Samuel Pepys wrote about experiencing “a gun to discharge seven times, the best of all devices that ever I saw, and very serviceable, and not a bawble; for it is much approved of, and many thereof made.” 4 THE DIARY OF SAMUEL PEPYS 258 (Henry B. Wheatley ed., 1893).¹¹

Abraham Hill patented the Lorenzoni repeating mechanism in London on March 3, 1664.¹² The following day, Pepys wrote about “several people [] trying a new-fashion gun” that could “shoot off often, one after another, without trouble or danger, very pretty.” 7 THE DIARY OF SAMUEL PEPYS at 61. It is believed that Pepys was referring to a Lorenzoni-style firearm in his March 4, 1664 entry,¹³ and perhaps he also was in his 1662 entry.

¹⁰ Peterson, THE TREASURY OF THE GUN, at 232.

¹¹ Most famous for his compelling diary covering the years 1659–1669, Pepys was also a naval administrator and member of Parliament.

¹² The patent was for a “gun or pistol for small shot carrying seven or eight charges of the same in the stock of the gun . . . ” Clifford Walton, HISTORY OF THE BRITISH STANDING ARMY. A.D. 1660 TO 1700, at 337 (1894).

¹³ Peterson, THE TREASURY OF THE GUN, at 232.

Despite Hill's patent, "[m]any other English gunsmiths also made guns with the Lorenzoni action during the next two or three decades." Peterson, *THE TREASURY OF THE GUN*, at 232. Most notably, famous English gunsmiths John Cookson and John Shaw adopted the Lorenzoni action for their firearms. So did "a host of others throughout the 18th century." Peterson, *ARMS AND ARMOR IN COLONIAL AMERICA* at 215.

"The Kalthoff and Lorenzoni actions . . . were probably the first and certainly the most popular of the early magazine repeaters. But there were many others. Another version, also attributed to the Lorenzoni family, boasted brass tubular magazines beneath the forestock . . . Guns of this type seem to have been made in several parts of Europe during the Eighteenth Century and apparently functioned well." Peterson, *THE TREASURY OF THE GUN*, at 233.

"The Lorenzoni system even found its way to America where records indicate that at least two New England gunsmiths actually manufactured such guns." *Id.* at 232.

C. American colonists began manufacturing repeating arms in the mid-1600s and the Founders embraced repeaters capable of firing more than 10 consecutive rounds.

Lorenzonis were not the only repeaters manufactured in America. As of the mid-1600s, American repeaters often employed a revolving cylinder that was rotated by hand.¹⁴ “A few repeating arms were made use of in a military way in America,” 1 Charles Winthrop Sawyer, FIREARMS IN AMERICAN HISTORY 28–29 (1910)—for example, there is “record that [Louis de Buade de] Frontenac in 1690 astonished the Iroquois with his three and five shot repeaters.” *Id.* at 29.¹⁵

As is often the case, the cost of the most advanced firearms precluded much of the population from owning them. But “[b]eginning about 1710 commerce brought wealth to some of the merchants in the northern

¹⁴ See, e.g., 2 Charles Winthrop Sawyer, FIREARMS IN AMERICAN HISTORY 5 (1939) (six-shot flintlock); Charles Edward Chapel, GUNS OF THE OLD WEST 202–03 (1961) (revolving snaphance).

¹⁵ Frontenac was the governor of New France at the time. Frontenac’s army was active in 1690, carrying out attacks against English settlements in Schenectady, New York, Fort Loyal, Maine, and Salmon Falls, New Hampshire, then defending against counterattacks, in addition to attacking the Iroquois. See Alan Gallay, COLONIAL WARS OF NORTH AMERICA, 1512–1763, at 240–42 (2015).

Colonies, and with other luxuries fancy firearms began to be in demand.”

Id. at 31.

In September 1722, John Pim, a Boston gunsmith, entertained some Native Americans with a repeater he sold.¹⁶ “[L]oaded but once,” it “was discharged eleven times following, with bullets, in the space of two minutes, each which went through a double door at fifty yards’ distance.”

Samuel Niles, *A Summary Historical Narrative of the Wars in New England, in MASSACHUSETTS HISTORICAL SOCIETY COLLECTIONS*, 4th ser., vol. 5, at 347 (1837).

The most common American repeaters of the early 18th century may have been Lorenzoni variants known as Cooksons. “Many Americans call[ed] this [Lorenzoni] type of magazine repeater a Cookson because the first such gun to receive attention in this country bore the name of the English gunsmith John Cookson.” Peterson, *THE TREASURY OF THE GUN*, at 230. Mimicking the Lorenzoni system, John Cookson of London invented the Cookson repeater in the latter half of the 17th century. *Id.* at 231–32. A Cookson repeater with a 10-round magazine, “believed to

¹⁶ Pim produced other repeaters, including a “six-shot, .52 caliber snap-haunce revolver.” Brown, *FIREARMS IN COLONIAL AMERICA*, at 257.

have found its way into Maryland with one of the early English colonists,” “form[ed] perhaps the capstone of the collection of arms in the National Museum at Washington, D.C.”¹⁷ *The Cookson Gun and the Mortimer Pistols*, AMERICAN RIFLEMAN, vol. 63, at 3, 4 (Sep. 29, 1917).

A Boston gunsmith also named John Cookson, thought to be related to the English gunsmith of the same name, manufactured repeaters in America in the 18th century. The American Cookson advertised a 9-shot repeater in the *Boston Gazette* on April 12 and again on April 26, 1756, explaining that the rifle was,

[M]ade by John Cookson and to be sold at his house in Boston: a handy gun . . . having a Place convenient to hold 9 Bullets, and Powder for 9 Charges and 9 Primings; the said gun will fire 9 Times distinctly, as quick, or as slow as you please
....

Peterson, ARMS AND ARMOR IN COLONIAL AMERICA at 215. “Thus this type of repeating flintlock popular in England from the third quarter of the

¹⁷ “The US National Museum ceased to exist as an administrative entity in 1967, and at that time the National Museum of History and Technology became a separate museum within the [Smithsonian] Institution.” *National Museum of American History*, SMITHSONIAN INSTITUTION ARCHIVES, <https://siarchives.si.edu/history/national-museum-american-history> (last visited Feb. 3, 2020).

17th century, was known and manufactured in Massachusetts early in the 18th century.” *Id.*

In 1777, the Continental Congress ordered one hundred rifles from Joseph Belton,¹⁸ who had informed the Congress that his rifles could “discharge sixteen, or twenty [rounds], in sixteen, ten, or five seconds.” Joseph Belton, *letter to the Continental Congress*, Apr. 11, 1777, in PAPERS OF THE CONTINENTAL CONGRESS, COMPILED 1774–1789, vol. 1 A-B, at 123. Belton demonstrated one such rifle before leading military officers (including General Horatio Gates and Major General Benedict Arnold) and scientists (including David Rittenhouse), who verified that “[h]e discharged Sixteen Balls loaded at one time.” *Id.* at 139.

Ultimately, the deal fell through when Belton demanded what the Congress deemed “an extraordinary allowance.” JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 361 (1907). The exchange between Belton and the Continental Congress nevertheless proves that the Founders knew about and embraced repeating arms capable of firing

¹⁸ 7 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 324 (1907).

more than 10 consecutive rounds prior to the ratification of the Second Amendment.

The British similarly recognized the advantage of repeaters, employing the Ferguson Rifle during the Revolutionary War, which “fired six shots in one minute” during a government test on June 1, 1776. Roger Lamb, *AN ORIGINAL AND AUTHENTIC JOURNAL OF OCCURRENCES DURING THE LATE AMERICAN WAR* 309 (1809).

The Nock Volley Gun was another multi-shot firearm introduced during the war. Designed for Britain’s Royal Navy in 1779, it had seven barrels (six outer barrels around a center barrel) that fired simultaneously.¹⁹

When the Second Amendment was ratified, the state-of-the-art repeater was the Girandoni air rifle that could consecutively shoot 21 or 22 rounds in .46 or .49 caliber by utilizing a tubular spring-loaded magazine.²⁰ Although an air gun, the Girandoni was ballistically equal to a powder gun,²¹ and powerful enough to take an elk with a single

¹⁹ Dougherty, *Small Arms Visual Encyclopedia*, at 22–23.

²⁰ Garry, *WEAPONS OF THE LEWIS AND CLARK EXPEDITION*, at 100–01.

²¹ John Plaster, *THE HISTORY OF SNIPING AND SHARPSHOOTING* 69–70 (2008).

shot.²² Indeed, at the time, “there were many gunsmiths in Europe producing compressed air weapons powerful enough to use for big game hunting or as military weapons.” James B. Garry, WEAPONS OF THE LEWIS AND CLARK EXPEDITION 91 (2012). The Girandoni was invented for the Austrian army—1,500 were issued to sharpshooters and remained in service for 25 years, including in the Napoleonic Wars between 1796 and 1815.²³ Isaiah Lukens of Pennsylvania manufactured such rifles,²⁴ along with “many makers in Austria, Russia, Switzerland, England, and various German principalities.” Garry, WEAPONS OF THE LEWIS AND CLARK EXPEDITION, at 99.

Meriwether Lewis is believed to have acquired from Lukens the Girandoni rifle that he famously carried on the Lewis and Clark

²² Jim Supica, et al., TREASURES OF THE NRA NATIONAL FIREARMS MUSEUM 31 (2013).

²³ Gerald Prenderghast, REPEATING AND MULTI-FIRE WEAPONS 100–01 (2018); Garry, WEAPONS OF THE LEWIS AND CLARK EXPEDITION, at 91–94. As a testament to the rifle’s effectiveness, “[t]here are stories that Napoleon had captured air riflemen shot as terrorists, making it hard to recruit men for the air rifle companies.” *Id.* at 92.

²⁴ Nancy McClure, *Treasures from Our West: Lukens Air Rifle*, BUFFALO BILL CENTER FOR THE AMERICAN WEST, Aug. 3, 2014, <https://centerofthewest.org/2014/08/03/treasures-west-lukens-air-rifle/>.

Expedition.²⁵ Lewis mentioned it in his journal 22 times. Sixteen times, Lewis was demonstrating the rifle to impress various Native American tribes encountered on the expedition—often “astonishing” or “surprising” them,²⁶ and making the point that although the expedition was usually outnumbered, the smaller group could defend itself.²⁷

D. Repeating arms with greater than 10-round capacities became some of the most popular arms in the 19th century.

Repeating arms—including those that could fire more than 10 consecutive rounds—became some of America’s most popular arms during the 19th century.²⁸

²⁵ *Id.*

²⁶ See e.g., 6 Meriwether Lewis and William Clark, THE JOURNALS OF THE LEWIS & CLARK EXPEDITION, Jan. 24, 1806 entry, at 233 (Gary Moulton ed., 1983) (“My Air-gun also astonishes them very much, they cannot comprehend it’s [sic] shooting so often and without powder; and think that it is *great medicine* which comprehends every thing that is to them incomprehensible.”).

²⁷ Meriwether Lewis and William Clark, THE JOURNALS OF THE LEWIS & CLARK EXPEDITION (Gary Moulton ed., 1983) (13 vols.).

²⁸ To function properly, repeaters require much closer fittings among their parts than do single-shot firearms. Through the 18th century, gun manufacture was artisanal. By the middle of the 19th century, repeaters were widely available due to a revolution in firearms manufacturing. The federal armories at Springfield, Massachusetts and Harpers Ferry, Virginia, led an industrial revolution in mass production. Machine tools (tools that make other tools), such as jigsaws for cutting wooden gun stocks, allowed firearms to be produced at greater rate, greater

In 1821, the *New York Evening Post* lauded New Yorker Isaiah Jennings for inventing a repeater, “importan[t], both for public and private use,” whose “number of charges may be extended to fifteen or even twenty . . . and may be fired in the space of two seconds to a charge.” “[T]he principle can be added to any musket, rifle, fowling piece, or pistol” to make it capable of firing “from two to twelve times.” *Newly Invented Muskets*, N.Y. EVENING POST, Apr. 10, 1822, *in* 59 Alexander Tilloch, THE PHILOSOPHICAL MAGAZINE AND JOURNAL: COMPREHENDING THE VARIOUS BRANCHES OF SCIENCE, THE LIBERAL AND FINE ARTS, GEOLOGY, AGRICULTURE, MANUFACTURES, AND COMMERCE 467–68 (Richard Taylor ed., 1822). “About 1828 a New York State maker, Reuben Ellis, made military rifles under contract on the Jennings principle.” Winant, FIREARMS CURIOSA, at 174.

uniformity, greater quality, and lower cost. The technological advances from the federal armories were widely shared among American manufacturers. By mid-century, what had begun as the mass production of firearms from interchangeable parts had become globally known as “the American system of manufacture”—a system that encompassed sewing machines, and, eventually typewriters, bicycles, and automobiles. *See, e.g.*, David R. Meyer, NETWORKED MACHINISTS: HIGH-TECHNOLOGY INDUSTRIES IN ANTEBELLUM AMERICA 81–84, 252–62, 279–80 (2006).

In the 1830s, the popular pepperbox handguns were introduced. These pistols had multiple barrels—some as many as 24—that could fire sequentially.²⁹ That same decade, the Bennett and Haviland Rifle used the same concept as the pepperbox. It had 12 individual barrels that fired sequentially.³⁰

Revolvers were also introduced in the 1830s, by Samuel Colt. They fired repeating rounds like the pepperbox, but used a rotating cylinder rather than rotating barrels. Pin-fire revolvers with capacities of up to 21 rounds entered the market in the 1850s.³¹ So did the Walch 12-Shot Navy Revolver, with each of its six chambers holding two rounds that fired separately. It was used in the Civil War and made its way to the western frontier.³² In 1866, the 20-round Josselyn belt-fed chain pistol made its debut. Some later chain pistols had greater capacities.³³

²⁹ Jack Dunlap, AMERICAN BRITISH & CONTINENTAL PEPPERBOX FIREARMS 148–49, 167 (1964); Lewis Winant, PEPPERBOX FIREARMS 7 (1952).

³⁰ Norm Flayderman, FLAYDERMAN'S GUIDE TO ANTIQUE AMERICAN FIREARMS AND THEIR VALUES 711 (9th ed. 2007).

³¹ Supica, TREASURES OF THE NRA NATIONAL FIREARMS MUSEUM, at 48–49; Winant, PEPPERBOX FIREARMS, at 67–70.

³² Chapel, GUNS OF THE OLD WEST, at 188–89.

³³ Winant, FIREARMS CURIOSA, at 204, 206.

Alexander Hall's rifle with a 15-round rotating cylinder was introduced in the 1850s.³⁴ In 1851, Parry Porter created a rifle with a 38-shot canister magazine. The Porter Rifle could fire 60 shots in 60 seconds.³⁵ In 1855, Joseph Enouy invented a 42-shot Ferris Wheel pistol.³⁶

In 1855, an alliance between Daniel Wesson (later, of Smith & Wesson) and Oliver Winchester led to a series of famous lever-action repeating rifles. First came the 30-shot Volcanic Rifle, which an 1859 advertisement boasted could be loaded then fired 30 times within a minute.³⁷

Then came the 16-shot Henry Rifle in 1861. Tested at the Washington Navy Yard in 1862, "187 shots were fired in three minutes and thirty-six seconds (not counting reloading time), and one full fifteen-shot magazine was fired in only 10.8 seconds . . . hits were made from as far away as 348

³⁴ Flayderman, FLAYDERMAN'S GUIDE TO ANTIQUE AMERICAN FIREARMS AND THEIR VALUES, at 713, 716.

³⁵ *A New Gun Patent*, ATHENS (TENN.) POST, Feb. 25, 1853, <http://bit.ly/2tmWUbS> (reprinted from N.Y. Post); 2 Sawyer, FIREARMS IN AMERICAN HISTORY, at 147.

³⁶ Winant, FIREARMS CURIOSA, at 208.

³⁷ Harold F. Williamson, WINCHESTER: THE GUN THAT WON THE WEST 26–27 (1952).

feet, at an 18-inch-square target. . . . The report noted, ‘It is manifest from the above experiment that this gun may be fired with great rapidity.’” R.L. Wilson, *WINCHESTER: AN AMERICAN LEGEND* 11–12 (1991).³⁸ “Advertisements claimed a penetration of eight inches at one hundred yards, five inches at four hundred yards, and power to kill at a thousand yards.” Peterson, *THE TREASURY OF THE GUN*, at 240.

“[F]ueled by the Civil War market, the first Henrys were in the field by mid-1862.” *Id.* at 11. Indeed, one of the most famous testimonials of the Henry came from Captain James M. Wilson of the 12th Kentucky Cavalry, who used a Henry Rifle to kill seven of his Confederate neighbors who broke into his home and ambushed his family. Wilson praised the rifle’s 16-round capacity: “When attacked alone by seven guerillas I found it (Henry Rifle) to be particularly useful not only in regard to its fatal precision, but also in the number of shots held in reserve for immediate action in case of an overwhelming force.” H.W.S.

³⁸ The earlier repeating rifles sometimes had reliability problems, but these were solved with the 1861 Henry and 1866 Winchester—and both models are still made today.

Cleveland, HINTS TO RIFLEMEN 181 (1864). Soon after, Wilson's entire command was armed with Henry rifles.³⁹

The Henry evolved into the 18-shot Winchester Model 1866, which was touted as having a capacity of “eighteen charges, which can be fired in nine seconds.” Louis A. Garavaglia & Charles G. Worman, FIREARMS OF THE AMERICAN WEST 1866–1894, at 128 (1985). Another advertisement contained pictures of Model 1866 rifles underneath the heading, “Two shots a second.” Peterson, THE TREASURY OF THE GUN, at 234–35.

“The Indians labeled these guns the ‘many-shots’ or ‘heap-firing.’” Wilson, WINCHESTER: AN AMERICAN LEGEND, at 32. In 1876, Native American tribes used the Model 1866 and Henry rifles in their victory at the Battle of Little Bighorn, also known as “Custer’s Last Stand.” *Id.*

“One of the most popular of all Winchester arms, the Model 1866 was widely used in opening the West and, in company with the Model 1873, is the most deserving of Winchesters to claim the legend ‘The Gun That Won the West.’” *Id.* at 22. Over 170,000 Model 1866s were produced. And

³⁹ Andrew L. Bresnan, *The Henry Repeating Rifle*, RAREWINCHESTERS.COM, Aug. 17, 2007, https://www.rarewinchesters.com/articles/art_hen_00.shtml.

over 720,000 Model 1873s were produced by 1919.⁴⁰ “Easily one of the most treasured endorsements of the 1873 was from Colonel William F. ‘Buffalo Bill’ Cody,” who praised the firearm’s versatility. Flayderman, **FLAYDERMAN’S GUIDE TO ANTIQUE AMERICAN FIREARMS AND THEIR VALUES**, at 55.⁴¹ Magazine capacity for the Model 1873 ranged from 6 to 25.⁴²

The Evans Repeating Rifle, manufactured in Maine, was also introduced in 1873; its innovative rotary helical magazine held 34 rounds.⁴³

Winchester’s other iconic 19th-century rifles were the Model 1886, and then the Model 1892, made legendary by Annie Oakley, and later by John

⁴⁰ Flayderman, **FLAYDERMAN’S GUIDE TO ANTIQUE AMERICAN FIREARMS AND THEIR VALUES**, at 306–09.

⁴¹ *Id.* at 55.

⁴² Arthur Pirkle, **WINCHESTER LEVER ACTION REPEATING FIREARMS: THE MODELS OF 1866, 1873 & 1876**, at 107 (2010).

⁴³ Dwight Demeritt, **MAINE MADE GUNS & THEIR MAKERS** 293–95 (rev. ed. 1997); Flayderman, **FLAYDERMAN’S GUIDE TO ANTIQUE AMERICAN FIREARMS AND THEIR VALUES**, at 694.

Wayne.⁴⁴ These arms had a capacity of 15 rounds.⁴⁵ Over a million were produced from 1892 to 1941.⁴⁶

The most famous pump-action rifle of the 19th century was the Colt Lightning, introduced in 1884. It could fire 15 rounds.⁴⁷

The first functional semiautomatic firearm was the Mannlicher Model 85 rifle, invented in 1885.⁴⁸ Mannlicher introduced new models in 1891, 1893, and 1895.⁴⁹ Additionally, numerous semiautomatic handguns utilizing detachable magazines were introduced before the turn of the century: including the Mauser C96,⁵⁰ Bergmann Simplex,⁵¹ Borchardt

⁴⁴ *Model 1892 Rifles and Carbines*, WINCHESTER REPEATING ARMS, <http://bit.ly/2tn03IN> (last visited Feb. 3, 2020).

⁴⁵ *Id.*

⁴⁶ Flayderman, FLAYDERMAN'S GUIDE TO ANTIQUE AMERICAN FIREARMS AND THEIR VALUES, at 307–12..

⁴⁷ *Id.* at 122.

⁴⁸ U.S. NAVY SEAL SNIPER TRAINING PROGRAM 87 (2011).

⁴⁹ John Walter, RIFLES OF THE WORLD 568-69 (3rd ed. 2006).

⁵⁰ Dougherty, SMALL ARMS VISUAL ENCYCLOPEDIA at 84.

⁵¹ *Id.* at 85.

M1894,⁵² Borchardt C-93,⁵³ Fabrique Nationale M1899,⁵⁴ Mannlicher M1896 and M1897,⁵⁵ Luger M1898 and M1899,⁵⁶ Roth-Theodorovic M1895, M1897, and M1898,⁵⁷ and the Schwarzlose M1898.⁵⁸ Many of these were issued with magazines greater than 10 rounds, including Luger's M1899, which could be purchased with 32-round magazines.⁵⁹

Thus, by the late 19th century, semiautomatic firearms were in use, and repeating arms that could rapidly fire more than 10 rounds had been popular for decades.

⁵² *Springfield Armory Museum – Collection Record*, REDISCOV.COM, <http://ww2.rediscov.com/spring/VFPCGI.exe?IDCFile=/spring/DETAILS.IDC,SPECIFIC=9707,DATABASE=objects>.

⁵³ Leonardo Antaris, *In the Beginning: Semi-Automatic Pistols of the 19th Century*, AMERICAN RIFLEMAN, Jan. 4, 2018.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Jean-Noel Mouret, PISTOLS AND REVOLVERS 126–27 (1993); Supica, TREASURES OF THE NRA NATIONAL FIREARMS MUSEUM, at 86.

IV. New Jersey's restriction on magazine capacity has no historical justification.

Heller takes account of whether a given gun control is “longstanding” and is based on “historical tradition.” 554 U.S. at 626–27. As the Court elucidated in *Heller* and *McDonald*, the most significant periods for historical analysis are when the Second and Fourteenth Amendments were ratified—because a core purpose of the Fourteenth Amendment was to make the individual right to keep and bear arms enforceable against state and local governments. *Heller*, 554 U.S. at 625–28; *McDonald*, 561 U.S. at 769–85.

When the Second Amendment was ratified in 1791, repeating arms were already three centuries old. The state-of-the-art as of 1791 was a 22-shot rifle. By 1868, when the Fourteenth Amendment was ratified, the 16-shot Henry Rifle and the 18-shot Winchester Model 1866 were growing ever more popular, becoming American legends. Americans had also seen 24-barreled pistols, 12-barreled rifles, 21-shot revolvers, 20-round belt-fed chain pistols, 42-shot Ferris Wheel pistols, and rifles capable of firing 60 shots in 60 seconds.

By the end of the 19th century, semiautomatics were on the market. Since then, there have been many improvements in manufacturing that

have reduced cost while increasing durability, accuracy, and reliability.

But firearms' core operating systems have not changed much.

During a seven-year period of the alcohol prohibition era, six states enacted restrictions involving ammunition capacity. *See* 1927 R.I. Pub. Laws 256, §§ 1, 4 (banning sales of guns that fire more than 12 shots semiautomatically without reloading); 1927 Mich. Pub. Acts ch. 372, § 3 (banning sales of firearms “which can be fired more than sixteen times without reloading”); 1933 Minn. Laws ch. 190 (banning “machine gun[s]” and including in the definition semiautomatics “which have been changed, altered or modified to increase the magazine capacity from the original design as manufactured by the manufacturers”); 1933 Ohio Laws 189 (license needed for semiautomatics with capacity of more than 18); 1933 Cal. Laws, ch. 450 (licensing system for machine guns, defined to include semiautomatics with detachable magazines of more than 10 rounds); 1934 Va. Acts ch. 96 s137, §§ 1(a), 4(d) (defining machine guns as anything able to fire more than 16 times without reloading, and prohibiting possession for an “offensive or aggressive purpose”; presumption of such purpose when possessed outside one’s residence or

place of business, or possessed by an alien; registration required for “machine gun” pistols of calibers larger than .30 or 7.62mm).

All these statutes were repealed, sometimes in stages. *See* 1959 Mich. Pub. Acts 249, 250 (sales ban applies to only actual machine guns); 1959 R.I. Acts & Resolves 260, 263 (exempting .22 caliber and raising limit for other calibers to 14); 1975 R.I. Pub. Laws 738, 738–39, 742 (sales ban applies to only actual machine guns); 1963 Minn. Sess. L. ch. 753, at 1229 (following federal law by defining “machine gun” as automatics only); 1965 Stats. of Calif., ch. 33, at 913 (“machine gun” fires more than one shot “by a single function of the trigger”); 1972 Ohio Laws 1866 (exempting .22 caliber; for other calibers, license required for only 32 or more rounds); H.R. 234, 2013–2014 Leg., 130th Sess. § 2 (Ohio 2014) (full repeal); 1975 Va. Acts, ch. 14, at 67 (defining “machine gun” as automatics only).

None of the state laws prohibited possession of standard firearms and their magazines. California and Ohio had licensing systems. Ohio did not require a license to purchase any firearm or magazine; a license was needed for only the simultaneous purchase of the magazine and the

relevant firearm.⁶⁰ Rhode Island and Michigan limited sales, but not possession. Minnesota had no capacity limit, and forbade only altering firearms from how they had been manufactured. Virginia's law forbade carry of some arms in public places, and registered some handguns.

Only the District of Columbia banned possession. A 1932 law banned any firearm that "shoots automatically or semiautomatically more than twelve shots without reloading." Pub. L. No. 72-275, §§ 1, 8, 47 Stat. 650, 650, 652. Soon after Home Rule was granted, the District in 1975 prohibited functional firearms in the home, and handguns altogether. When the *Heller* Court ruled these prohibitions unconstitutional, the District enacted a new ban on magazines capable of holding more than 10 rounds. 2008 District of Columbia Laws 17-372 (Act 17-708). Thus, only the District of Columbia banned the possession of arms. Only California's law limited magazine capacity to 10 rounds, and that was a licensing system, not a prohibition.

None of the above laws are "longstanding," for all have been repealed. After all, something that is "longstanding" has two characteristics: being

⁶⁰ See David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 ALBANY L. REV. 849, 865 (2015).

“long” and being “standing.” 1 SHORTER OXFORD ENGLISH DICTIONARY 1625 (1993) (“adj. Of long standing; that has existed a long time, not recent.”).

As for modern bans, like New Jersey’s, the District of Columbia’s handgun ban was 33 years old when the Supreme Court struck it down in *Heller*; proving that 33 years is not “longstanding.” The earliest modern magazine ban is New Jersey’s 15-round limit enacted in 1990. Act of May 30, 1990, ch. 32, §§ 2C:39-1(y), -3(j), 1990 N.J. Laws 217, 221, 235 (codified at N.J. Stat. Ann. § 2C:39-1(y), -3(j) (West 2014)). Because all magazine bans are newer than the handgun ban struck down in *Heller*, no magazine ban can be considered longstanding.

CONCLUSION

The decision below should be reversed, and New Jersey’s ban on common and historically protected arms should be held unconstitutional.

Respectfully submitted,

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APPENDIX

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Nicholas J. Johnson is a Professor of Law at Fordham University, School of Law. He is co-author of the first law school textbook on the

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Oregon, Pennsylvania, Texas, and West Virginia; and by the Oregon Supreme Court, Oregon Court of Appeals, and Washington Supreme Court.

Joseph E. Olson is an emeritus Professor of Law at Mitchell Hamline School of Law, where he taught Second Amendment, business law, and tax law. His scholarship on the right to arms was cited by *District of Columbia v. Heller*, and also by the Ninth Circuit, Eastern District of New York, and Washington Supreme Court. His articles on the right have appeared in the *Stanford Law and Policy Review*, *Georgetown Journal of Law & Public Policy*, and *Michigan Journal of Law Reform*.

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by the First, Third, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits; by federal district courts in Wisconsin, Illinois, and Texas; and by the Supreme Courts of Kentucky and Oregon.

E. Gregory Wallace is a Professor of Law at Campbell University School of Law, where his constitutional law courses include a course on the Second Amendment. He recently published an article on “Assault Weapon” Myths in the *Heller* symposium issue of the Southern Illinois Law Journal. He has spoken on Second Amendment issues in various law school symposia and recently supervised the Campbell Symposium on the tenth anniversary of the Heller decision. He is co-author of forthcoming online supplemental chapters in the Johnson, et al., *Firearms Law* textbook.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 6,415 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(f).

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Dated this 3rd day of February 2020.

*/s/ Joseph G.S. Greenlee
Joseph G.S. Greenlee
Counsel for Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2020, I served the foregoing brief via the CM/ECF system for the United States Court of Appeals for the Third Circuit, which will distribute the brief to all attorneys of record in this case. No privacy redactions were necessary.

Dated this 3rd day of February 2020.

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