

New Jersey’s Ammunition Restriction Rings “Hollow”

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I. INTRODUCTION

On January 11, 2022, New Jersey Assembly Minority Leader John DiMaio and Minority Whip Parker Space introduced a bill to eliminate the state's prohibition against the possession of "hollow point" and "dum-dum" ammunition.¹ Assemblymen DiMaio and Space filed similar bills in each of the three prior legislatures.² Four months later, Governor Phil Murphy, speaking shortly after the Uvalde, Texas, school shooting, challenged the legislature to put up "every bill seeking to unravel our gun laws," so the public will know which way their legislators vote, mentioning DiMaio and Space's bill as an attempt to "legaliz[e] hollow-point 'cop killer' bullets."³

Notwithstanding the governor's challenge, the New Jersey Legislature will not likely act on this bill or its future iterations. However, the provision it seeks to overturn may be vulnerable anyway. In June 2022, the Supreme Court handed down its decision in *New York State Rifle & Pistol Association v. Bruen*, which recognized that the right protected by the Second Amendment extends beyond merely possessing firearms in the home for self-defense to include carrying them in public as well.⁴ The Court also rejected the existing method of analyzing Second Amendment claims adopted by many Courts of Appeals after the 2008 landmark case of *D.C. v. Heller*,⁵ upending almost fifteen years of Second Amendment jurisprudence in the process.⁶

Gun control proponents recognize New Jersey as one of the states with the strongest gun control regimes in the country.⁷ Gun rights advocates are looking for easy wins to cement the gains they realized in

¹ See Gen. Assemb. 124, 220th Leg., 2022 Sess. (N.J. 2022).

² See Gen. Assemb. 146, 219th Leg., 2020 Sess. (N.J. 2020); Gen. Assemb. 3746, 218th Leg. (N.J. 2018); Gen. Assemb. 4923, 217th Leg. (N.J. 2017).

³ Phil Murphy, Governor, N.J., Remarks Reaffirming Commitment to Comprehensive Gun Safety Reform in Wake of Uvalde School Shooting (May 25, 2022), https://www.nj.gov/governor/news/addresses/20220525_guns.shtml.

⁴ See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2122 (2022).

⁵ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁶ *Bruen*, 142 S. Ct. at 2126.

⁷ See *Annual Gun Law Scorecard*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/resources/scorecard/> (last visited Aug. 27, 2023) (assigning New Jersey an "A" grade for strong gun laws by gun control advocacy group Giffords Law Center); see also Press Release, State of New Jersey, Governor Murphy Signs Sweeping Gun Safety Package 3.0 to Continue the Fight Against Gun Violence (July 5, 2022), <https://nj.gov/governor/news/news/562022/approved/20220705a.shtml#:~:text=%E2%80%9CThe%20Gun%20Safety%20Package%203.0,causes%20harm%20in%20New%20Jersey> (listing seven gun control bills enacted in response to the Bruen decision).

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Bruen, so it may be open season on the state's bevy of strict gun laws.⁸ New Jersey is the only state to regulate the possession of hollow point ammunition.⁹ This restriction, among others of more national significance, may soon be in the crosshairs.

Unrelated to Second Amendment developments, New Jersey's hollow point restrictions should be further undercut by a recent district court decision, now pending appeal, in an as-applied challenge based on federal supremacy. A group of retired law enforcement officers successfully challenged the law as applied to them, arguing that the federal Law Enforcement Officers Safety Act ("LEOSA") preempts the law.¹⁰ The challengers' success should implicate this law as an Equal Protection violation.

This Comment argues that because of the convergence of the changing Second Amendment legal landscape post-*Bruen*, the Equal Protection question raised by the LEOSA suit, and the ubiquity and popularity of hollow point ammunition in the United States, New Jersey's hollow point ammunition restrictions are low-hanging fruit for gun rights advocates to attack in the courts. While a challenge may have failed before *Bruen*, the more robust Second Amendment protection that decision affords, combined with the LEOSA suit and the functional qualities of hollow point ammunition which undermine the regulatory purpose, a challenger should now succeed in a suit seeking to overturn the law. Part II of this Comment introduces the New Jersey hollow point restrictions and its history, as well as the history of the development and adoption of, and controversy surrounding hollow point rounds. Part III discusses the state of Second Amendment jurisprudence, tracking the development of the means-end scrutiny rejected by *Bruen* and analyzing the new methodology supplied by that decision. Lastly, Part IV discusses the LEOSA preemption suit, and how it could implicate an Equal Protection claim against the hollow point restrictions if the law enforcement challengers ultimately prevail.

⁸ Cf. The Weekly Reload Podcast, *The Second Amendment Foundation's Alan Gottlieb on Filing Gun Cases After Bruen*, THE RELOAD (Aug. 22, 2022), <https://thereload.fireside.fm/the-second-amendment-foundations-alan-gottlieb-on-filing-gun-cases-after-bruen> (discussing the three tiers of cases the gun rights group Second Amendment Foundation is considering in wake of the *Bruen* decision).

⁹ Wisconsin attempted to ban civilian possession of hollow point bullets in 2013, but the bill failed to progress through the legislature. See State Assemb. 221, 2013-2014 Leg., Reg. Sess. (Wis. 2013).

¹⁰ Fed. L. Enf't Officers Ass'n v. Grewal, No. 20-05762, 2022 U.S. Dist. LEXIS 109902 at *15 (D.N.J. June 21, 2022).

II. HOLLOW POINT AMMUNITION RESTRICTION AND BACKGROUND

This Comment discusses the New Jersey provisions prohibiting the possession of hollow point ammunition outside of the home and the legislative and historical milieu in which these provisions developed. To lay a foundation for this discussion, this section explains the history of hollow point ammunition and popular notions about its use.

A. *New Jersey's Statutory Restriction*

In 1978, the New Jersey legislature recodified the state's entire criminal code.¹¹ Among the changes was the addition of Section 2C:39-3(f), which prohibited possession of "dum-dum" or hollow-nose bullets by persons other than law enforcement officers or persons engaged in hunting or target shooting.¹² The legislative reports note that no such prohibition existed in the state prior to the bill's passage, but shed no light on the legislature's intent in adding the provision.¹³ In the intervening decades, the language of this section changed, and now reads in relevant part:

Dum-dum or armor piercing ammunition. (1) Any person, other than a law enforcement officer or persons engaged in activities pursuant to subsection f. of N.J.S.2C:39-6, who knowingly has in his possession any hollow nose or dum-dum bullet . . . is guilty of a crime of the fourth degree.¹⁴

The activities exempted include transporting directly to and from target shooting at a range or rifle or pistol club, while hunting, or a public exhibition for law enforcement or a rifle or pistol club.¹⁵ Section 2C:39-3(g) exempts on duty members of the armed forces.¹⁶ Licensed firearms dealers and guards at nuclear power plants are also partially exempt.¹⁷ Lastly, the law does not prohibit individual New Jersey residents from "keeping such ammunition at his dwelling, premises, or other land owned or possessed by him, or from carrying such ammunition from the place of purchase to said dwelling or land."¹⁸ This law amounts to a public carry prohibition against carrying hollow point ammo.

¹¹ See Sen. 738, 198th Leg., First Sess. (N.J. 1978) (enacted).

¹² See S. JUDICIARY COMM. STATEMENT TO S., S. 198-738, at 9 (N.J. 1978).

¹³ *Id.*

¹⁴ N.J. STAT. ANN. § 2C:39-3(f) (2022).

¹⁵ See N.J. STAT. ANN. § 2C:39-6(f) (2022).

¹⁶ N.J. STAT. ANN. § 2C:39-3(g)(1)(a) (2022).

¹⁷ N.J. STAT. ANN. § 2C:39-3(g)(2) (2022).

¹⁸ *Id.* at (g)(2)(a).

Violation of this law is a felony, exposing a defendant to up to eighteen months of incarceration and forfeiture of the right to possess a firearm.¹⁹ It is illegal in New Jersey to carry a handgun without first obtaining a permit.²⁰ If a permit holder loads her carry gun with hollow point ammunition, rather than traditional, round-nosed cartridges, she risks being put in prison for up to a year and a half and the lifelong revocation of her gun rights. Is carrying hollow point ammunition a serious enough offense to warrant this kind of punishment? New Jersey alone thinks so.

B. Modern Ammunition Definitions

A single unit of ammunition fed into a modern handgun or rifle is interchangeably called a “cartridge” or “round.”²¹ A cartridge consists of the bullet, gunpowder, and primer all held together in a metal case.²² The shape of the bullet is what distinguishes hollow point rounds. Traditional bullets are round- or pointed-nose bullets typically made of a soft lead core encased in a harder metal like copper.²³ The copper jacket, the origin of the name “full metal jacket,” prevents the lead core from expanding, resulting in deeper penetration into the target and a narrower wound channel; this increases the likelihood of the bullet traveling through its target, known as overpenetration.²⁴ When a bullet continues through its intended target, it endangers anyone behind that target. A hollow point bullet, by contrast, has a hollow cavity in the tip, which causes the bullet to expand when it strikes a target.²⁵ This expansion increases the bullet’s drag, slowing it and increasing the likelihood it will remain inside the target.²⁶ Hollow points are also less likely to penetrate standard building materials and are more likely to be stopped by police body armor.²⁷ Hollow point bullets are the most common bullet for law enforcement, and for civilian self-defense and

¹⁹ See N.J. STAT. ANN. § 2C:43-6(a)(4) (2022); 18 U.S.C. § 922(g) (2022).

²⁰ N.J. STAT. ANN. § 2C:39-5(b) (2022).

²¹ NICHOLAS A. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY, E. GREGORY WALLACE & DONALD KILMER, *FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY* 1971 (3d ed. 2021) (ebook). http://firearmsregulation.org/www/FRRP3d_CH20.pdf.

²² *Id.* at 1972.

²³ *Id.* at 1973.

²⁴ *Id.*

²⁵ *Id.* at 1972.

²⁶ Lisa Steele, *Ballistics*, in *SCIENCE FOR LAWYERS* 11 (Eric York Drogin ed., 2008) https://cgi.aware.org/arttruelaw/5450051chap1_abs.pdf.

²⁷ *Id.*

hunting.²⁸ Because they are less expensive, traditional profile bullets are more popular among civilians for target shooting.²⁹

For ease of language, this Comment will call all traditional profile bullets “FMJ,” for full metal jacket, throughout. This is not to imply that hollow points cannot be fully jacketed, or that all round or pointed bullets are, but rather a shorthand to differentiate between the two types as commonly understood.

There is further bullet taxonomy within the FMJ and hollow point categories, and there are a few other types of bullets that are less popular or irrelevant to this discussion. One additional round worth noting is the polymer tipped round. Similar to hollow points, polymer tipped rounds are designed to expand on impact but feature a polymer-filled tip to give the bullet a more traditional profile, which makes it slightly more aerodynamic and less likely to jam in a semi-automatic firearm.³⁰ Although similar in effect to hollow point ammunition, polymer tipped bullets are not considered to be hollow point rounds by New Jersey law enforcement, and are legal to possess outside the narrow exemptions for hollow point.³¹ Nevertheless, the lack of legislative clarity or legal guidance from the attorney general’s office has led to local police arresting civilian concealed carriers with polymer tipped rounds, believing them to be hollow points.³²

C. History of the Hollow Point Bullet

Bullets with hollowed tips first appeared in use for “express rifles,” which were developed to have a long point-blank range for hunters, in the mid-nineteenth century.³³ The cartridges designed for the express rifles featured a hollow point to ensure, combined with the high velocity of the bullet, expansion on impact.³⁴ Hunters favored this type of bullet

²⁸ See JOHNSON ET AL., *supra* note 21, at 1972.

²⁹ See JOHNSON ET AL., *supra* note 21, at 1973; *Hollow Point vs FMJ – Learn their Differences and Best Uses*, AMMO.COM, <https://ammo.com/bullet-type/hollow-point-vs-fmj> (last visited Oct. 2, 2023).

³⁰ *Better Know a Bullet Polymer Tipped*, AMMOFORSALE.COM (Aug. 22, 2021), <https://www.ammoforsale.com/ammo-club/polymer-tipped-ammo>.

³¹ *Firearms Information: Firearms FAQs*, N.J. STATE POLICE, <https://www.nj.gov/njsp/firearms/firearms-faqs.shtml> (last visited Aug. 22, 2022) (“Ammunition lacking a hollow cavity at the tip, such as those with a polymer filling, are not considered to be hollow point ammunition”).

³² See Rebecca Panico, *Brinks Truck Driver Hit With Gun Charges in N.J. Gets Case Dismissed After Outcry*, NJ.COM (Mar. 13, 2020, 1:32 PM), <https://www.nj.com/union/2020/03/nj-man-pulled-over-for-tinted-windows-was-slapped-with-weapons-offenses-prosecutors-just-dropped-his-charges.html>.

³³ See WILLIAM W. GREENER, *THE GUN AND ITS DEVELOPMENT* 632 (9th ed. 1910).

³⁴ *Id.* at 646.

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because the expansion prevented overpenetration, which translated into the energy being used up in their target, inducing what was termed “shock.”³⁵

In the 1870s, and in response to the devastating wounds caused by Minié ball ammunition used during the American Civil War, Swiss doctor Theodor Kocher developed the FMJ bullet.³⁶ Minié balls, made of cast lead, were designed to expand within a rifle barrel to adhere to the rifling for greater accuracy and range than existing muskets, but also had the tendency to expand more and deform on impact.³⁷ Kocher’s bullet was designed to inflict less damage to the target by inhibiting that deformation.³⁸ The new FMJ bullet also accomplished higher velocity, greater accuracy, and weighed less, allowing soldiers to carry more and shoot accurately at greater range.³⁹

The American military was concerned about the decreased lethality of the FMJ round during the Spanish-American War.⁴⁰ The British were similarly frustrated by FMJ bullets’ inefficacy in a conflict in India, with reports of enemy combatants receiving multiple wounds and remaining active in battle.⁴¹ In the mid-1890s, a British Army Captain at an arsenal in the Indian town of Dum Dum developed a soft-pointed version of the FMJ by removing the copper-alloy jacket from the nose of the bullet, exposing the soft lead underneath and allowing for bullet expansion.⁴² The name “dumdum” stuck and became slang for any expanding bullet.⁴³

Controversy soon engulfed the dumdum bullet, and when the great powers met at the Hague Convention in August 1898, they specifically discussed the round.⁴⁴ The Swiss and Dutch representatives charged

³⁵ *Id.* at 646-47.

³⁶ See Matt Robertson, *Terminal Ballistics: How Bullets Wound and Kill*, EVERYDAY MARKSMAN (June 6, 2022), <https://www.everydaymarksman.co/marksmanship/terminal-ballistics>.

³⁷ See GREENER, *supra* note 33, at 614; *Terminal Ballistics*, *supra* note 36.

³⁸ See *Terminal Ballistics*, *supra* note 36.

³⁹ See *Terminal Ballistics*, *supra* note 36.

⁴⁰ See *Terminal Ballistics*, *supra* note 36.

⁴¹ Daniel E. Watters, *The Truth About... Dum Dums: A learned monograph on the origins of a much mis-used term of today*, THE GUN ZONE (Sept. 25, 2008), <http://www.thegunzone.com/dum-dum.html> [<https://web.archive.org/web/20080925190004/http://www.thegunzone.com/dum-dum.html>].

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See WILLIAM ISAAC HULL, THE TWO HAGUE CONFERENCES, AND THEIR CONTRIBUTIONS TO INTERNATIONAL LAW 181 (1908) [<https://archive.org/details/twohagueconferen00hulluoft/page/180/mode/2up>].

that dumdums were “inhuman projectiles which made incurable wounds,” and pressed for the prohibition of all expanding bullets.⁴⁵ The commission ultimately agreed on what became Article IV, Section 3 of the Hague Convention, which prohibited “the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelop which does not entirely cover the core or is pierced with incisions.”⁴⁶ The final declaration was adopted by all but three of the nations attending; Great Britain, Portugal, and the U.S. refused to sign (although Britain and Portugal announced adherence to the declaration in 1907).⁴⁷

Despite never ratifying this provision of the Hague Convention, the U.S. military did not consider adopting hollow point rounds until many years later. In 2015, the U.S. Army announced that it was considering adopting hollow point ammunition as part of its new sidearm system.⁴⁸ Relying on the greater incapacitation and lower risk of over-penetration, the Army argued that this shift in norms was necessary—and in fact the more humane option—in light of the changing nature of combat from the battlefield to urban, asymmetric warfare.⁴⁹

Although the military continued to use FMJ ammunition throughout the twentieth century, police departments across the country began adopting hollow point ammunition in the 1970s, culminating with the New York City Police Department, the largest in the country, in 1998.⁵⁰ As each major department announced the change, the American Civil Liberties Union or its local affiliates protested, arguing that hollow point rounds are more dangerous and deadly to both the intended target and potential innocent bystanders.⁵¹

⁴⁵ *Id.* at 181–82.

⁴⁶ The Hague Convention art. IV, § 3, July 29, 1899, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=F5FF4D9CA7E41925C12563CD0051616B>.

⁴⁷ See HULL, *supra* note 44, at 187.

⁴⁸ See Alex Yablon, *U.S. Army Considers More-Lethal Hollow Point Bullets for New Sidearm*, THE TRACE (July 13, 2015), <https://www.thetrace.org/2015/07/hollow-point-ammunition-us-army> (“There’s a humanitarian interest benefit to the use of bullets that don’t exit, . . . We’ve been interested in them for close-quarters battle with enemies that use civilians as shields or hostages.”).

⁴⁹ *Id.*

⁵⁰ See, e.g., *Hollow Bullets Scored by A.C.L.U.*, N.Y. TIMES, Oct. 27, 1974, at 32 (Listing states in which hollow point ammo had already been adopted by police departments); Michael Cooper, *New York Police Will Start Using Deadlier Bullets*, N.Y. TIMES, July 9, 1998, at A1.

⁵¹ *Id.*

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New Jersey State Police adopted hollow point rounds in 1974, following the fatal shooting of a trooper on the New Jersey Turnpike.⁵²

When the New Jersey State Police began issuing hollow point rounds, they issued a report justifying the change. The report pointed to increases in crime, officer deaths, and to instances of officer shootings in which suspects managed to kill or injure officers after sustaining several shots with the department's prior-issued FMJ .38 Special ammunition.⁵³ After an anecdote about an assailant who, after being shot by a police officer, wounded that officer, fled, engaged in over three hours of exhausting activity, and was later killed by other officers, the report speculated that "with an effective round, there is a strong possibility that he would have been incapacitated and captured without the loss of his life or injury to the officer."⁵⁴ The report provided a thorough analysis of the ballistic advantages of hollow point ammunition, specifically pointing to increased stopping power and decreased likelihood of ricochet, which "adds greatly to the desirability of this ammunition in that it significantly decreases the possibility of inflicting injury to innocent citizens."⁵⁵

Today, because of the same advantages listed by the New Jersey State Police, experts recommend hollow point ammunition for anyone who anticipates using a handgun in self-defense.⁵⁶

D. How Hollow Points Became "Cop Killers"

Hollow point ammunition earned the "cop killer" misnomer in the 1980s with a controversy over the Teflon-coated "KTW bullet" and Winchester "Black Talon" bullet.⁵⁷ The name first appeared with the KTW bullet, which featured a dense brass or tungsten core to help penetrate car windows, after NBC ran a story claiming it could penetrate

⁵² See *Jersey Investigates Police Use Of Bullet Opposed by A.C.L.U.*, N.Y. TIMES, Sept. 26, 1974, at 33.

⁵³ See THOMAS TYRELL, DEP'T OF L. & PUB. SAFETY, STATE POLICE AMMUNITION 1-2 (1974).

⁵⁴ *Id.* at 2.

⁵⁵ *Id.* at 4.

⁵⁶ See, e.g., Tom McHale, *Frequently Asked Questions About Ammo: Part 1*, U.S. CONCEALED CARRY ASS'N: (June 16, 2019), https://www.usconcealedcarry.com/blog/frequently-asked-questions-about-ammo-part-1/?_gl=1*1rqp1o*_ga*NTQ3NDU0NzMuMTY2MTI1NjkyNg.*_ga_MFZ3H4HBX9*MTY2MTI1NzExOS4xLjEuMTY2MTI1NzE0MC4zOS4wLjA.&_ga=2.95058975.2073865328.1661256926-54745473.1661256926; accord Massad Ayoob, *The Dangers of Over-Penetrating Bullets*, GUNDIGEST (Apr. 19, 2012), <https://gundigest.com/gear-ammo/reloading/massad-ayoob-the-dangers-of-over-penetrating-bullets>.

⁵⁷ See Steele, *supra* note 26, at 11-12.

police armor.⁵⁸ The “cop killer” moniker was generalized to hollow point ammunition with the Black Talon bullet—which was similarly coated but did not have a hard metal core, and was thus unable to penetrate armor—after they were used in the Long Island Railroad shooting and a spate of California street shootings in 1993.⁵⁹ Winchester pulled Black Talon ammo off the market, but like “dumdum” a century earlier, “cop killer” stuck in the public mind, as evinced by Governor Murphy’s comments above.⁶⁰

Today, police officers almost universally wear body armor.⁶¹ The most common body armors worn by police fall into the National Institute of Justice’s Level IIA, II, or IIIA standards, all of which are designed to stop pistol-caliber bullets.⁶² Hollow point bullets are no greater threat to police than FMJ rounds.⁶³ Calling them “cop killer” bullets is a rhetorical device designed to stigmatize them.

III. THE SECOND AMENDMENT PROTECTS THE RIGHT TO CARRY HOLLOW POINT AMMUNITION

This section will analyze how New Jersey’s hollow point proscription would have fared under post-*Heller*—but pre-*Bruen*—Second Amendment jurisprudence and makes the argument that, while it should have been struck down under that framework, it likely would have been sustained. Next, this section explains the shift resulting from the *Bruen* decision, and how a court should analyze the law under the new historical test enunciated by the majority.

A. Pre-*Bruen* Standard of Review

In 2008, the Supreme Court ruled explicitly, for the first time in *District of Columbia v. Heller*⁶⁴ that the Second Amendment protects an individual’s right to keep and bear arms in the home. The Court explained that self-defense is the “core lawful purpose” of that right, and

⁵⁸ See Steele, *supra* note 26, at 12.

⁵⁹ See David LaPell, *The Myth of the Cop Killer Bullet*, GUNS.COM (Oct. 26, 2011, 11:00 AM), <https://www.guns.com/news/2011/10/26/the-myth-of-the-cop-killer-bullet>.

⁶⁰ *Id.*; Phil Murphy, *supra* note 3.

⁶¹ See HEATH GRANT ET AL., BODY ARMOR USE, CARE, AND PERFORMANCE IN REAL WORLD CONDITIONS: FINDINGS FROM A NATIONAL SURVEY 1, 42 (2012) (reporting that 98.1 percent of police officers surveyed responded that they currently wear body armor).

⁶² *Id.* at 53 (reporting that 88.7 percent of respondents indicated that their body armor is level IIA, II, or IIIA. Fewer than 1 percent had level I, intended only to prevent stabbing and slashing injuries. The remainder had level III or IV armor, intended to protect from high velocity rifle rounds); *Id.* at 115 (explaining armor rating levels).

⁶³ See Steele, *supra* note 26.

⁶⁴ *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

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that it “extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”⁶⁵

But this is not an unlimited right. The *Heller* Court recognized certain longstanding regulations like prohibitions on possession of firearms by felons or the mentally ill, proscriptions on carrying firearms in sensitive places, or laws regulating the commercial sale of arms.⁶⁶ The Court also distinguished regulation between weapons “in common use at the time,” which would be presumptively protected, and “dangerous and unusual weapons,” which may reasonably be limited.⁶⁷ The Court noted that this list of “presumptively lawful” restrictions was not exhaustive.⁶⁸ Two years later, the Court affirmed its ruling in *Heller* and held that the Second Amendment is fully applicable to the states in *McDonald v. City of Chicago*.⁶⁹

Following *Heller*, the U.S. Court of Appeals for the Third Circuit developed a two-part test that was then adopted by nearly every circuit court in *United States v. Marzzarella*.⁷⁰ In *Marzzarella*, the court first asked, “whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee.”⁷¹ If it does not, then the law can be upheld, but if it does the court moves on to “evaluate the law under some form of means-end scrutiny.”⁷²

In *Marzzarella*, the Third Circuit assumed that the defendant’s Second Amendment rights were burdened by the federal prohibition on possessing a weapon that has had the serial number removed because he possessed the defaced pistol in his home.⁷³ The court analogized the tiers of scrutiny applied to First Amendment claims, and determined that because the prohibition in question was not designed to, nor has the effect of prohibiting the possession of any class of firearm it was akin to speech regulations that do not touch the content, but regulate how speech takes place.⁷⁴ The court thus applied intermediate scrutiny and

⁶⁵ *Id.* at 582, 630.

⁶⁶ *Id.* at 626–27.

⁶⁷ *Id.* at 627.

⁶⁸ *Id.* at 627 n.26.

⁶⁹ *McDonald v. City of Chicago*, 561 U.S. 742, 749 (2010).

⁷⁰ *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010); David B. Kopel & Joseph G. Greenlee, *The Federal Circuits’ Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 212 (2017).

⁷¹ *Marzzarella*, 614 F.3d at 89.

⁷² *Id.*

⁷³ *Id.* at 94.

⁷⁴ *Id.* at 97 (“The distinction between limitation on the exercise of protected conduct and regulation of the form in which that conduct occurs also appears in the First Amendment Context. Discrimination against particular messages in a public forum is

upheld the ban deeming it a reasonable fit for the government's significant interest in tracing crime guns without burdening access or function of firearms.⁷⁵

B. Applying the Two-Step Framework to Hollow Point Bullets

How would the two-step analysis work on hollow point ammunition? First, there is the threshold question of whether possessing ammunition is conduct protected by the Second Amendment. Although the Supreme Court has never addressed ammunition directly, precedent and logic indicate that the answer to that question is an unequivocal yes.

Ammunition, while not a weapon in and of itself, is a necessary component for a firearm to function; a gun is little more than a blunt instrument if it does not have bullets to fire. A law that makes it impossible to obtain or use ammunition makes it impossible to use firearms. Similarly, a law that bans the possession or use of ink would presumably violate the First Amendment protection of freedom of the press. The Supreme Court struck down a Minnesota use tax on ink and paper used by newspaper publishers, arguing that the burden on the press overarched the government's purpose of raising revenue.⁷⁶ Just like a special tax on ink and paper burdens a core First Amendment right, New Jersey's restriction burdens the core purpose of self-defense identified in *Heller* and would thus be unconstitutional.⁷⁷

The Court has also historically found an implied right to possess ammunition. In *United States v. Miller*,⁷⁸ the Court stated that the right to possess arms "also implied the possession of ammunition." Justice Clarence Thomas further enunciated the principal of ancillary rights implied by the Second Amendment in his concurring opinion in *Luis v. United States*,⁷⁹ writing that "Constitutional rights . . . implicitly protect

subject to the most exacting scrutiny . . . Regulations of the manner in which that speech takes place, however, receive intermediate scrutiny under the time, place, and manner doctrine").

⁷⁵ *Id.* at 97–99.

⁷⁶ See *Minneapolis Star & Trib. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 586 (1983) ("Standing alone, however, [revenue] cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax that singles out the press.").

⁷⁷ *Cf.* *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008) (holding that the District of Columbia's requirement that firearms be stored in an inoperable condition is unconstitutional).

⁷⁸ *United States v. Miller*, 307 U.S. 174, 180 (1939).

⁷⁹ *Luis v. United States*, 578 U.S. 5, 26 (2016) (Thomas, J., concurring).

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those closely related acts necessary to their exercise.” The presumption that ammunition falls within the Second Amendment even featured in *Heller’s* reasoning. The Court considered eighteenth century gunpowder storage laws without making a distinction between these laws and laws regulating arms themselves.⁸⁰

1. The First Step in the Two-Step Analysis

Having established that ammunition is covered by the Second Amendment protection, the first step of the two-factor test is to determine whether New Jersey’s hollow point restriction imposes a burden on the right to obtain and possess ammunition. To answer this question, one must consider the presumptively lawful regulations allowed in *Heller*, specifically the regulation of weapons that are “dangerous and unusual.”

The right protected by the Second Amendment does not apply to all weapons, only those typically possessed by law-abiding citizens for lawful purposes.⁸¹ The converse of this “common use” principle the *Heller* Court derived from *Miller* is that there is a historical tradition of prohibiting “dangerous and unusual weapons.”⁸² If hollow point ammo is “dangerous and unusual,” this historical tradition stops the analysis at step one.

Outside of New Jersey, hollow point ammunition is in common use; in fact, it is regarded as the preferred ammunition for self-defense.⁸³ Hollow point ammunition is commonly used by law enforcement at all levels of government and citizens, and as we have seen above, has been the standard issue ammunition for police in New Jersey since 1974.⁸⁴

⁸⁰ See *Heller*, 554 U.S. at 632.

⁸¹ *Id.* at 625 (interpreting *Miller’s* upholding the National Firearms Act’s restriction on short-barreled shotguns).

⁸² *Id.* at 627.

⁸³ See Michael R. Crites, *Hollow Point vs FMJ: A Comparison*, AM. FIREARMS, <https://www.americanfirearms.org/hollow-point-vs-fmj-comparison> (last visited Oct. 2, 2023). Accord *The Best Self Defense Ammo – Our Picks in Top Calibers*, AMMOToGo.COM (Aug. 25, 2022), <https://www.ammunitontogo.com/lodge/best-self-defense-ammo> (last visited Oct. 2, 2023) (“A consistently expanding self[-]defense round is an attackers worst enemy. . . [t]his explains why FMJ ammunition generally isn’t considered a great choice for self[-]defense, no real expansion takes place.”); Nate Parker, *Concealed Carry Ammunition: 5 Key Features*, USA CARRY (Apr. 2, 2019), <https://www.usacarry.com/concealed-carry-ammunition> (last visited Oct. 2, 2023) (explaining that reliable expansion is preferable because it mitigates the risk of over-penetrating a target in a real world scenario); See generally Chris Baker, *Handgun Self-Defense Ammunition Ballistics Test*, LUCKY GUNNER (Oct. 15, 2015), <https://www.luckygunner.com/labs/self-defense-ammo-ballistic-tests> (last visited Oct. 13, 2023) (explaining expansion criteria for ballistics test performance).

⁸⁴ See Steele, *supra* note 26 at 11; TYRELL, *supra* note 53, at 12.

While criminals may also have access to hollow points and use them, there is very little data about what ammunition they prefer to use, but anecdotal evidence suggests they prefer less expensive FMJ rounds.⁸⁵ New Jersey publishes monthly data on gun crime, reporting the manufacturer and caliber of guns recovered, but does not publish information on the ammunition used in crimes.⁸⁶ New Jersey's civilians may own hollow point ammunition in the home.⁸⁷ There are nearly one-and-a-half million New Jerseyans who live in a home where firearms are typically kept; presumably at least some of them choose to use hollow point ammunition for home defense.⁸⁸ It seems clear that hollow point ammunition is commonly owned by law-abiding citizens for lawful purposes.

The state may argue that hollow point ammunition is more lethal than FMJ, allowing classification as “dangerous and unusual.” But in studies performed by medical examiners, hollow point ammunition has not shown to be more lethal than FMJ rounds.⁸⁹ The critical factors in bullet lethality are where the victim is hit and the size of the permanent wound channel which allows for bleeding or damage to a vital organ.⁹⁰ Handgun ammunition, unlike higher-velocity rifle rounds, lacks the velocity to create large temporary cavities, so handgun-caliber hollow point bullets only slightly increase the diameter of the wound channel.⁹¹ Using a higher caliber bullet accomplishes the same effect. And, as mentioned above, even if more dangerous to the target, hollow point ammunition is *less dangerous* from the perspective of bystanders because it is less likely to completely pass through its target and more prone to be stopped by common building materials and police body armor.⁹² This public-safety benefit was one of the rationales the state used to support equipping police with hollow point rounds in 1974.⁹³

The Supreme Court rejected similar “dangerous and unusual” reasoning for stun guns in *Caetano v. Massachusetts*.⁹⁴ The Court

⁸⁵ See Greg Ellifritz, *Criminals and the Guns They Carry*, ACTIVE RESPONSE TRAINING, <https://www.activeresponsetraining.net/criminals-and-the-guns-they-carry> (last visited Oct. 2, 2023).

⁸⁶ NJGUNSTAT, <https://nj.gov/njsp/njgunstat/index.shtml> (last visited Aug. 27, 2022).

⁸⁷ N.J. STAT. ANN. § 2C:39-3(g)(2)(a) (2022).

⁸⁸ MICHAEL D. ANESTIS & DANIEL SEMENZA, RUTGERS N.J. GUN VIOLENCE RSCH. CTR., 2022 REPORT ON FIREARMS IN NEW JERSEY (2022).

⁸⁹ See Steele, *supra* note 26, at 11.

⁹⁰ See *Terminal Ballistics*, *supra* note 36.

⁹¹ See *Terminal Ballistics*, *supra* note 36.

⁹² See Steele, *supra* note 26, at 11.

⁹³ See TYRELL, *supra* note 53, at 6.

⁹⁴ See *Caetano v. Mass.*, 577 U.S. 411, 411–12 (2016) (per curiam).

overturned Massachusetts' ban on stun guns because they are not "unusual," and did not reach the question of whether they are dangerous.⁹⁵ Justice Samuel Alito, in his concurring opinion, asserted that the "and" in "dangerous and unusual" is conjunctive.⁹⁶ Lethal weapons, by definition are dangerous; even assuming that hollow point ammunition is dangerous, its ubiquity and popularity undermine its classification as "dangerous *and* unusual."

There are some analogous Second Amendment cases from the Third Circuit that may guide the first step's analysis of hollow point ammunition. In *Marzzarella*, the court declined to rule that firearms with defaced serial numbers are "dangerous and unusual" because the lack of a serial number did not make the firearm function more lethally.⁹⁷ However, the court, believing the statute would pass constitutional muster even under strict scrutiny, declined to determine whether the defendant's right to bear arms was infringed.⁹⁸ Serial number tracing, the court reasoned, serves a vital law enforcement interest in gathering information from recovered firearms, an interest the court deemed compelling enough to overcome strict scrutiny regardless of whether the law was a burden on the Second Amendment right.⁹⁹

A more direct analog is New Jersey's ban on large capacity magazines ("LCMs"). Both ammunition and magazines are necessary for the proper function of a firearm, and both LCMs and hollow point bullets raise the issue of a more-or-less dangerous version of a weapon's component. To decide on the propriety of a preliminary injunction against the ban the Third Circuit in *Association of New Jersey Rifle and Pistol Clubs v. Attorney General New Jersey*¹⁰⁰ (hereinafter "*ANJRPC*") considered evidence that the use of LCMs resulted in increased fatalities and injuries in mass shootings. Here, the court chose not to label LCMs as "dangerous and unusual," which would have short-circuited the first step.¹⁰¹ Instead, the court determined that the ban did not burden the core Second Amendment right to self-defense in earnest because: (1) it did not categorically ban a class of weapon, only a subset of magazines; (2) the court held that LCMs were not well-suited for self-defense; (3)

⁹⁵ *Id.*

⁹⁶ *Id.* at 417 (Alito, J., concurring).

⁹⁷ *See* U.S. v. Marzzarella, 614 F.3d 85, 95 (3d Cir. 2010).

⁹⁸ *Id.* at 95, 99.

⁹⁹ *Id.* at 99.

¹⁰⁰ *Association of N.J. Rifle & Pistol Clubs v. Att'y Gen. N.J.*, 910 F.3d 106, 112–13 (3d Cir. 2018) [hereinafter "*ANJRPC*"].

¹⁰¹ *Id.* at 117–18.

the ban does not “effectively disarm individuals or substantially affect their ability to defend themselves;” (4) the ban does not render firearms incapable of operating; and (5) possession of a firearm in the home for self-defense is not unlimited, or else any type of firearm possessed in the home would be protected.¹⁰² The Third Circuit later upheld the LCM ban when it returned on appeal from summary judgment.¹⁰³

The hollow point/FMJ distinction is like the LCM/magazine distinction in that both hinge on the degree of lethality imputed to an individual part of a firearm. Whether LCMs are more dangerous than ten-round magazines is a question of degree, as is the ballistic character of a hollow point’s expansion compared to the characteristics of FMJ bullets. The intended use of hollow point ammunition for self-defense, however, should distinguish it from how the court perceived LCMs and ruled in *ANJRPC*. The court in *ANJRPC* noted that it lacked evidence about defensive use of LCMs, and that using LCMs might encourage defenders to shoot indiscriminately and result in “severe adverse consequences for innocent bystanders.”¹⁰⁴ By contrast, a court confronted with the hollow point restrictions would certainly have evidence about defensive use for hollow points; many commercially available hollow point rounds are advertised and sold specifically as self-defense rounds.¹⁰⁵ New Jersey’s own findings that hollow point rounds are safer because of decreased risk of overpenetration and ricochet are relevant too.¹⁰⁶ Additionally, it is unlikely that hollow point ammunition will encourage indiscriminate shooting; the purpose of achieving better stopping power is to end a firefight faster, with fewer shots. Whereas having more ammunition might encourage wild shooting, having better ammunition likely encourages a more judicious approach. Therefore, a hypothetical pre-*Bruen* court should have found under this framework that the Second Amendment’s core right of self-defense is burdened by the hollow point prohibition.

2. The Second Step in the Two-Step Analysis

The second step determined the level of scrutiny by querying how severely the challenged law burdens the core Second Amendment right

¹⁰² *Id.*

¹⁰³ See *Association of N.J. Rifle & Pistol Clubs v. Att’y Gen. N.J.*, 974 F.3d 237, 248 (3d Cir. 2020), *vacated*, 142 S. Ct. 2894 (2022) [hereinafter “*ANJRPC II*”].

¹⁰⁴ *ANJRPC*, 910 F.3d at 112.

¹⁰⁵ See, e.g., Baker, *supra* note 83 (testing various defensive hollow point cartridges advertised for defense such as “Remington Ultimate Defense,” “Magtech Guardian Gold,” and “Liberty Ammunition Civil Defense”).

¹⁰⁶ See TYRELL, *supra* note 53, at 6.

defined in *Heller*: the right to self-defense in the home.¹⁰⁷ If this specific right was burdened, strict scrutiny applies, otherwise the Third Circuit considered intermediate scrutiny appropriate.¹⁰⁸ In *Marzzarella*, the court enumerated the limited condition that would trigger strict scrutiny under its reading of *Heller*, holding that “[a]t its core, the Second Amendment protects the right of law-abiding citizens to possess non-dangerous weapons for self-defense in the home.”¹⁰⁹ Three years later, the Third Circuit declined to extend the right of self-defense past the home in *Drake v. Filko*.¹¹⁰

Whereas strict scrutiny requires the government to prove the challenged regulation is “narrowly tailored to promote a compelling Government interest,”¹¹¹ intermediate scrutiny only requires the government show a substantial interest and that “‘the fit’ between the asserted interest and the challenged law need not be ‘perfect,’ but . . . may not burden more conduct than is reasonably necessary” (adjustments and internal quotations omitted).¹¹² Each time the Third Circuit applied intermediate scrutiny to a regulation challenged under the Second Amendment, it upheld the challenged law. *Marzzarella* upheld a federal law prohibiting the erasure of a firearm’s serial number.¹¹³ *Drake* upheld New Jersey’s requirement that an applicant for a permit to carry a firearm demonstrate “justifiable need” for issuance of a permit.¹¹⁴ The court in *ANJRPC* upheld New Jersey’s restriction on LCMs.¹¹⁵

Under the two-step framework, it is likely that the hollow point restriction would have been subject to intermediate scrutiny and upheld. First, the prohibition does not apply in the home.¹¹⁶ Because *Marzzarella* and *Drake* limited the scope of the core right to self-defense in the home, the prohibition on carrying hollow point ammunition outside of the home is not a severe burden on the core right as

¹⁰⁷ See *ANJRPC*, 910 F.3d at 117.

¹⁰⁸ *Id.* (citing *Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013); *U.S. v. Marzzarella*, 614 F.3d 85, 92 (3d Cir. 2010)).

¹⁰⁹ *Marzzarella*, 614 F.3d at 92.

¹¹⁰ *Drake*, 724 F.3d at 431 (“[W]e decline to definitively declare that the individual right to bear arms for the purpose of self-defense extends beyond the home, the ‘core’ of the right as identified by *Heller*.”).

¹¹¹ *U.S. v. Playboy Ent. Grp.*, 529 U.S. 803, 813 (2000).

¹¹² *Drake*, 724 F.3d at 436.

¹¹³ See *Marzzarella*, 614 F.3d at 87.

¹¹⁴ See *Drake*, 724 F.3d at 440.

¹¹⁵ See *ANJRPC*, 910 F.3d at 110.

¹¹⁶ See N.J. STAT. ANN. § 2C:39-3(g)(2)(a) (“Nothing in paragraph (1) of subsection f. of this section shall be construed to prevent a person from keeping such ammunition at his dwelling, premises or other land owned or possessed by him.”).

understood by the Third Circuit pre-*Bruen*. Any law-abiding New Jerseyan can still protect her home with hollow point ammunition. Next, the state need only supply the court with a substantial government interest—perhaps the desire to prevent lethal shootings—and a court could have found that this restriction is reasonably tailored to that end. Further, the existence of polymer tipped bullets undercuts the alleged burden. If a licensed pistol carrier can use ammunition that is functionally the same, there is little burden even if the court saw fit to extend the right to self-defense beyond the home. At the same time, it also undermines the strength of the government interest. If a licensed carrier can use ammo that achieves the same results as barred rounds, why make people felons for possessing one but not the other?

The Ninth Circuit case of *Jackson v. City & County of San Francisco* would likely have informed a challenge to New Jersey's law. *Jackson* concerned San Francisco's ban on the sale of expanding ammunition within city limits.¹¹⁷ In analyzing this restriction, the Ninth Circuit determined that ammunition is covered by the Second Amendment and ammunition sale restrictions may burden the right of self-defense.¹¹⁸ However, the court held that the burden is indirect and insubstantial as it banned the sale of ammunition but not the possession and use by San Franciscans, who were free to buy expanding ammunition outside the city.¹¹⁹ The court thus applied intermediate scrutiny and held that the restriction is a reasonable fit to San Francisco's legitimate interest "in reducing the likelihood that shooting victims in San Francisco will die of their injuries."¹²⁰

Interestingly, the *Jackson* court noted that the ordinance was less burdensome than New Jersey's hollow point restriction because it merely affected the sale of ammunition, rather than subjecting individuals to criminal prosecution for possessing it outside the home.¹²¹ The Ninth Circuit did not comment on whether such a restriction would be beyond constitutional propriety. Under this analysis, the court upheld San Francisco's restriction.¹²² Had a challenge to New Jersey's law made it to federal court prior to *Bruen*, the Third Circuit would not have had a difficult time upholding the law under its own prior precedent and analogy to *Jackson*.

¹¹⁷ S.F., CAL., POLICE CODE art. 9, § 613.10(g).

¹¹⁸ See *Jackson v. City & Cnty. of S.F.*, 746 F.3d 953, 968 (9th Cir. 2014).

¹¹⁹ *Id.* at 968.

¹²⁰ *Id.* at 968–69.

¹²¹ *Id.* at 969–70.

¹²² *Id.* at 970.

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C. The Post-Bruen Analysis

In June 2022, the Supreme Court released its *Bruen* opinion, overturning New York’s restrictive “proper cause” requirement for a permit to carry a firearm.¹²³ In doing so, the Court upended more than a decade of Second Amendment jurisprudence and scholarship.¹²⁴

Writing for the majority, Justice Thomas rejected the two-part test favored by most courts of appeals as “one step too many.”¹²⁵ Instead of applying means-end scrutiny, the Court held that the proper analysis in Second Amendment challenges involves a historical inquiry based on “this Nation’s historical tradition of firearm regulation.”¹²⁶ Courts must instead determine through analogical reasoning whether modern and historical regulations are “relevantly similar,” with the burden to demonstrate that modern regulations fall within the historical tradition falling on the government.¹²⁷ The court will not do the government’s work and search for an analog to assist in upholding a challenged law.¹²⁸

In abandoning the idea of means-end balancing, the Court noted that the Second Amendment itself “is the very *product* of an interest balancing by the people, and it surely elevates above all other interests the right of law abiding, responsible citizens to use arms for self-defense” (internal quotations omitted), this is why it is the historical traditions of the American people that must be deferred to rather than the determinations of legislatures.¹²⁹ The Court believed this historical standard brings the Second Amendment in line with the protection of other enumerated rights, like the requirement that the government bear the burden of proving that speech falls outside the category of protected speech, the scope of the Confrontation Clause, or alleged Establishment Clause violations.¹³⁰ This adherence to historical tradition is more administrable—according to the Court—than applying means-end scrutiny because it removes from judges the role of “mak[ing] difficult empirical judgements about the costs and benefits of firearms restrictions, especially given their lack of expertise in the field” (internal quotations omitted).¹³¹

¹²³ See N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2122 (2022).

¹²⁴ See Josh Blackman, *Bruen Bids Farewell To The Two-Step Test*, REASON: THE VOLOKH CONSPIRACY (June 26, 2022, 4:16 PM), <https://reason.com/volokh/2022/06/26/bruen-bids-farewell-to-the-two-step-test>.

¹²⁵ *Bruen*, 142 S. Ct. at 2127.

¹²⁶ *Id.* at 2126.

¹²⁷ *Id.* at 2129–30, 2132.

¹²⁸ See *id.* at 2150.

¹²⁹ *Id.* at 2131.

¹³⁰ *Id.* at 2130.

¹³¹ N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2130 (2022).

Notwithstanding this new method of review, *Bruen* is not an expansive nullification of gun control. A single paragraph in the majority opinion left open the possibility of upholding many firearm regulations under the new standard.¹³² Justice Thomas wrote that a “more nuanced approach” may be necessary in “cases implicating unprecedented societal concerns or dramatic technological changes.”¹³³ This ambiguous formulation may be a keyhole large enough to run a train through in defense against varied Second Amendment claims. A court need only deem mass shootings or gun violence an “unprecedented societal concern,” or designate so-called assault weapons or other technological advances as the byproducts of “dramatic technological change.”¹³⁴ In March 2023, this maneuver prevented a preliminary injunction against Delaware’s assault weapons and LCM bans.¹³⁵ Judge Andrews of the District of Delaware determined that the regulated “assault weapons” and LCMs are arms covered by the Second Amendment and that there is no adequate historical law analogous to support the restrictions, but found that they represent exactly the “dramatic technological change,” and “unprecedented societal concern,” carved out in *Bruen*.¹³⁶ It is likely that if the *Bruen* majority intended this paragraph to be more limited, it will be forced to clarify its language in future cases.

To further underscore that *Bruen* is not meant to be a death knell to gun control, both Justice Alito and Justice Brett Kavanaugh, writing in separate concurrences, reaffirmed *Heller* and *McDonald*’s recognition of “longstanding prohibitions,” and the “dangerous and unusual weapons,” distinction.¹³⁷ While the new historical review standard will probe the former, the Court will also likely need to flesh out the latter. Justice Alito’s *Caetano* concurrence may point to a more limited interpretation of “dangerous and unusual,” but *Caetano*’s short opinion based on a low-

¹³² See Josh Blackman, *Bruen’s Originalist Analogical Reasoning Applies a Presumption of Liberty*, REASON: THE VOLOKH CONSPIRACY (June 27, 2022, 1:40 AM), <https://reason.com/volokh/2022/06/27/bruens-originalist-analogical-reasoning-applies-a-presumption-of-liberty>.

¹³³ *Bruen*, 142 S. Ct. at 2132.

¹³⁴ See Blackman, *supra* note 132.

¹³⁵ Del. State Sportsmen’s Ass’n v. Del. Dep’t of Safety & Homeland Sec., No. 22-951, memorandum op. at 20–23, 31 (D. Del. filed Mar. 27, 2023).

¹³⁶ *Id.* at 23.

¹³⁷ See *Bruen*, 142 S. Ct. at 2156 (Alito, J., concurring); *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring).

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stakes controversy (Massachusetts' stun gun ban) leaves room for further clarification.¹³⁸

1. Under the *Bruen* Standard, New Jersey's Hollow Point Restriction Should Be Overturned

Bruen, a case about the right to carry a gun in public, is not directly analogous to regulations concerning what type of weapons people may possess.¹³⁹ While it does not immediately put New Jersey's law into jeopardy, it does supply the analytical framework a court must now use to decide its constitutionality.

First, *Bruen* erased the distinction between the home and the public relied on in *Drake*, holding that the Second Amendment is not limited to the home.¹⁴⁰ Like the right to carry a pistol at issue in *Bruen*, hollow point ammunition is clearly "in common use" for self-defense. The Court held that the right to "bear arms" naturally encompasses public carry.¹⁴¹ Just as *Bruen*'s analysis began with the presumption of the petitioners' right to carry a handgun in public, an analysis of New Jersey's hollow point restriction should begin with a similar presumption.¹⁴²

Importantly, there is no determinative historical analog for New Jersey's hollow point restriction. This law, passed in 1978, is the first of its kind in the U.S.¹⁴³ One can hardly describe this as "longstanding," especially considering that the law struck down in *Bruen* came into effect in 1905, almost three-quarters of a century earlier.¹⁴⁴ Neither can it be described as within the tradition of historical regulation of firearms, as New Jersey is the only state with such a prohibition.

To find something truly resembling a historical equivalent, New Jersey would have to look back to 1548, when King Edward VI banned shooting "hayle shott" for persons with insufficient income to qualify to own handguns.¹⁴⁵ "Hail shot" consists of several small pellets loaded in

¹³⁸ See generally *Caetano v. Mass.*, 577 U.S. 411 (2016) (reversing Supreme Judicial Court of Massachusetts' decision to uphold the state's stun gun ban as contradictory to precedent).

¹³⁹ See *Bruen*, 142 S. Ct. at 2156 (Alito, J., concurring) ("Our holding decides nothing about . . . the kinds of weapons that people may possess.").

¹⁴⁰ *Id.* at 2134 ("Nothing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms.").

¹⁴¹ *Id.*

¹⁴² *Id.* at 2135.

¹⁴³ See S. JUDICIARY COMM. STATEMENT TO S., S. 198–738, at 9 (N.J. 1978).

¹⁴⁴ See *Bruen*, 142 S. Ct. at 2122.

¹⁴⁵ See JOHNSON ET. AL., *supra* note 21, at 2119 (online Chapter 22, http://firearmsregulation.org/www/FRRP3d_CH22.pdf).

a cartridge, rather than a single bullet, which we now call “shotgun balls” or simply “shot,” and which was primarily used for bird hunting and self-defense.¹⁴⁶ This prohibition was repealed a decade later under Philip and Mary’s reorganization of the militia, but may have been revived another half-century later by King James I.¹⁴⁷ Whether or not the ban survived in England, it did not find its way to the American colonies, where everyone was able to hunt and there were no income-based limits on the possession of weapons.¹⁴⁸

Like New Jersey’s hollow point restriction, this law regulated what type of ammunition was available to most people, making it a “relevantly similar” regulation.¹⁴⁹ However, the Court in *Bruen* warned against overreliance on pre-founding English history, laws too temporally and culturally remote from the founding, and laws of single application that were not adopted broadly in the states.¹⁵⁰ The Court further suggests that in comparing current and historic regulations, the central consideration is “whether [they] impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified.”¹⁵¹

While it is easy to draw comparable burdens between the two laws, comparable justification is less clear. As discussed above, New Jersey’s prohibition on carrying hollow point ammunition spawned in an era of belief in the increased danger of hollow point ammo, and at the same time as police forces around the country were adopting the round for duty guns. The “hail shot” restriction comes from a period in history where the British monarchy was worried about the decline of professionalism of longbowmen and an increase in the illegal hunting of the King’s game.¹⁵² This could mean the justification was to prevent illegal hunting, leaving self-defense available to English peasants with ball ammunition, an interpretation that would be more consistent with the Second Amendment’s protection of the right to self-defense. It could also mean that the Crown was determined to hinder the right of self-defense of a large portion of its subjects.

¹⁴⁶ See JOHNSON ET. AL., *supra* note 21, at 2119 (online Chapter 22, http://firearmsregulation.org/www/FRRP3d_CH22.pdf).

¹⁴⁷ See JOHNSON ET. AL., *supra* note 21, at 2119-20 (online Chapter 22, http://firearmsregulation.org/www/FRRP3d_CH22.pdf).

¹⁴⁸ See JOHNSON ET. AL., *supra* note 21, at 2125 (online Chapter 22, http://firearmsregulation.org/www/FRRP3d_CH22.pdf).

¹⁴⁹ Cf. *Bruen*, 142 S. Ct. at 2132-33.

¹⁵⁰ See *Bruen*, 142 S. Ct. at 2139, 2144, 2153.

¹⁵¹ *Id.* at 2133.

¹⁵² See JOHNSON ET. AL., *supra* note 21, at 2114 (online Chapter 22, http://firearmsregulation.org/www/FRRP3d_CH22.pdf).

Where there are multiple plausible interpretations, the Court held that it would favor the one most consistent with the Second Amendment's command, absent proof supplied by the government.¹⁵³ Here, the bias would favor the hunting interpretation, making these two laws improper analogs. As noted above, New Jersey's hollow point restriction exempts someone while hunting.¹⁵⁴ The only purpose remaining for the hollow point restriction is to prevent someone from carrying the ammunition for use in self-defense outside the home, directly implicating the Second Amendment's core right of self-defense, which *Bruen* understands to exist outside the home. A mere hunting regulation does not provide solid footing for a law meant to curtail a person's right to armed self-defense. Because the "hail shot" law is so historically remote and seemingly irrelevant, both because it never transferred to the colonies and logically relies on an unrelated justification, it would not shed light on what the founders understood the text of the Second Amendment to mean at the time of ratification and would not justify New Jersey's prohibition based on "longstanding prohibitions."¹⁵⁵

A similar appeal to the Hague Convention's prohibition of expanding ammunition would fail as well. A treaty from the turn of the twentieth century to which the United States was not a signatory can hardly qualify as evidence of America's longstanding tradition of firearms regulation.

Without a claim on America's historical tradition of firearm regulation, New Jersey may look to defining hollow point ammunition as "dangerous and unusual." However, following the logic of Justice Alito's *Caetano* concurrence, this cannot be so easily applied. While the legislature in 1978 may have considered hollow point ammunition to be "dangerous and unusual" when they included the provision in their new criminal code, the prevalence of use and popularity of hollow point bullets underscores that they are "in common use."

¹⁵³ See *Bruen*, 142 S. Ct. at 2141 n.11 (discussing the dual interpretations of the Statute of Northampton in the context of whether it established a *mens rea* element in its prohibition of carrying weapons).

¹⁵⁴ See N.J. STAT. ANN. § 2C:39-3(f) (exempting "persons engaged in activities pursuant to subsection f. of N.J. STAT. ANN. § 2C:39-6(f)"); N.J. STAT. ANN. § 2C:39-6(f)(2) ("A person carrying . . . in the woods or fields or upon the waters of this State for the purposes of hunting, target practice or fishing, provided that the firearm or knife is legal and appropriate for hunting or fishing purposes in this State and the person has in his possession a valid hunting license.").

¹⁵⁵ Cf. *Bruen*, 142 S. Ct. at 2143–44 (dismissing a 1686 East New Jersey prohibition on the concealed carry of "pocket pistols" that was overturned at most eight years later, as irrelevant to Second Amendment interpretation).

The *Bruen* Court looked to *Heller* in affirming that “[t]he Second Amendment protects only the carrying of weapons that are those ‘in common use at the time,’ as opposed to those that ‘are highly unusual in society at large.’”¹⁵⁶ Confronted with colonial statutes that banned the concealed carry of handguns as “dangerous and unusual weapons,” the Court distinguished handguns as in common use today, calling them “the quintessential self-defense weapon.”¹⁵⁷ If the handgun is protected as the “quintessential self-defense weapon,” then hollow point ammunition, favored by police and the public alike, is the quintessential self-defense round.

New Jersey may appeal to the “unprecedented societal concerns or dramatic technological changes.” The former rings hollow because New Jersey is an outlier in regulating the carry of hollow point rounds, and it does not seem to track crime use data to be able to argue that hollow point use in gun violence represents an “unprecedented societal concern.” Asserting that hollow point bullets represent a “dramatic technological change” from founding and post-Civil War era ammunition may present a more attractive pathway but is similarly unavailing.

Historical ammunition, in functional effect, is more like hollow point ammunition than FMJ. Spherical musket balls used during the Revolutionary War were typically .61 caliber—roughly 15.5 millimeters—a significantly greater girth than that of a modern 9mm bullet.¹⁵⁸ This wider projectile would have caused a wider, and thus more harmful, wound channel.¹⁵⁹ The Civil War era shift to Minié balls was due in part to their tendency to expand and deform, causing them to lose kinetic energy quickly with devastating results.¹⁶⁰ As discussed above, FMJ was developed to prevent the kind of expansion that was a feature of both the munitions before it and modern hollow point ammunition. In that context, larger wound channels and bullets that expand or deform would not be a dramatic departure from the technology available to the founders and the ratifiers of the Fourteenth Amendment.

The Third Circuit hewed closely to *Bruen*’s standard in its June 2023 decision on felon-in-possession laws, finding en banc that

¹⁵⁶ *Id.* at 2143.

¹⁵⁷ *Id.*

¹⁵⁸ See Harry Schenawolf, *Rifles and Groove-bored Muskets in the American Revolution*, REVOLUTIONARY WAR J. (July 18, 2015), <https://www.revolutionarywarjournal.com/rifles-in-the-revolutionary-war>.

¹⁵⁹ See *Terminal Ballistics*, *supra* note 36.

¹⁶⁰ See *Terminal Ballistics*, *supra* note 36.

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preventing a felon convicted of welfare fraud from purchasing a firearm was not in the legal tradition of American gun regulation.¹⁶¹ There will eventually be an instructive example for how the Third Circuit applies this standard to hardware; after releasing the *Bruen* decision, the Court vacated and remanded *ANJRPC*, the case challenging New Jersey's LCM ban, for reconsideration.¹⁶² The Third Circuit remanded to the District Court,¹⁶³ where it was consolidated with two other cases¹⁶⁴ and awaits trial.

Finally, the existence of functionally equivalent polymer tipped ammunition should have no bearing on a *Bruen* analysis, as the Court abandoned the two-step analysis adopted in the wake of *Heller*. Whereas before *Bruen*, the functionally similar rounds would indicate a lesser burden, or none at all, on the Second Amendment right, *Bruen*'s framework looks only to whether the challenged law is supported by the historical tradition of America's regulation of arms.¹⁶⁵ There is no inherent interest balancing that weighs governmental interests. Justice Thomas rejected outright the formulation of "ask[ing] whether [a] statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important government interests," suggested in Justice Stephen Breyer's dissent.¹⁶⁶

Because New Jersey will bear the burden of proving that restrictions on the public carry of hollow point ammunition is within the historical tradition of American firearm regulation and because hollow point ammunition is "in common use" for self-defense, it is likely that under *Bruen*'s standard of review, this provision would be struck down as burdening the core right protected by the Second Amendment, that of armed self-defense.

IV. FEDERAL SUPREMACY OVER N.J.'S HOLLOW POINT BAN AS APPLIED TO RETIRED POLICE IMPLICATES AN EQUAL PROTECTION VIOLATION

A recent case challenging New Jersey's hollow point ammunition restrictions as applied to retired law enforcement officers may open another avenue of attack for gun rights advocates. A group of retired

¹⁶¹ See *Range v. Att'y Gen. U.S.*, 64 F.4th 96, 106 (3d Cir. June 6, 2023) (en banc).

¹⁶² *ANJRPC II*, 974 F.3d 237 (3d Cir. 2020), *vacated sub nom.* Association of N.J. Rifle & Pistol Clubs, Inc. v. Bruck, 142 S. Ct. 2894 (2022).

¹⁶³ Association of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J., No. 19-3142 (3d Cir. Aug. 25, 2022).

¹⁶⁴ Association of N.J. Rifle & Pistol Clubs, Inc. v. Platkin, No. 3:18-cv-10507, at 9 (D.N.J. Feb. 6, 2023) (consolidating with *Cheeseman v. Platkin*, No. 1:22-cv-4360, and *Ellman v. Platkin*, No. 3:22-cv-4397).

¹⁶⁵ See *Bruen*, 142 S. Ct. at 2127.

¹⁶⁶ *Id.* at 2129.

officers challenged the law as applied to them claiming it is preempted by the Federal Law Enforcement Officer Safety Act (“LEOSA”) and prevailed on their claim in the District of New Jersey.¹⁶⁷ The case is now pending appeal at the Third Circuit Court of Appeals.¹⁶⁸

The officers made no Second Amendment claims, so their possible victory is not generally applicable. However, non-enforcement of the hollow point restriction may spawn a violation of the Fourteenth Amendment’s Equal Protection Clause.¹⁶⁹ This section discusses LEOSA, how it supersedes the New Jersey law, and how an Equal Protection analysis based on the retired officers “as applied” victory should proceed.

A. LEOSA Supersedes State Firearms Regulations For Active and Retired Law Enforcement Officers

LEOSA is designed to allow certain current and former law enforcement officers to carry firearms by preempting state and local restrictions.¹⁷⁰ The act specifically allows that: “Notwithstanding any other provision of any State or any political subdivision thereof, an individual who is a qualified law enforcement officer and who is carrying the identification required ... may carry a concealed firearm.”¹⁷¹

The act also includes a definition of “firearm,” which “includes ammunition not expressly prohibited by Federal law or subject to the provisions of the National Firearms Act.”¹⁷² Hollow point ammunition is not prohibited by federal law. Federal law prohibits armor piercing ammunition—handgun ammunition made from, or with a core made from certain hard metals—under the Law Enforcement Officer Protection Act of 1985.¹⁷³ The Gun Control Act of 1968 also prohibits the possession of any ammunition by “prohibited persons,” but an officer covered under LEOSA will not fall under that category.¹⁷⁴

¹⁶⁷ See Fed. L. Enf’t Officers Ass’n v. Grewal, No. 20-05762 (ZNQ) (TJB), 2022 U.S. Dist. LEXIS 109902 at *2–3.

¹⁶⁸ Fed. L. Enf’t Officers Ass’n v. Grewal, No. 20-05762 (ZNQ) (TJB), 2022 U.S. Dist. LEXIS 109902, *sub nom.* Fed. L. Enf’t Officers Ass’n v. Att’y Gen. N.J., No. 22-2209 (3d Cir. filed July 1, 2022).

¹⁶⁹ See U.S. CONST. amend XIV § 1.

¹⁷⁰ See Royce de R. Barondes, *Contumacious Responses to Firearms Legislation (LEOSA) Balancing Federalism Concerns*, 56 HOUS. L. REV. 1, 4 (2018).

¹⁷¹ 18 U.S.C. § 926C(a) (2022).

¹⁷² 18 U.S.C. § 926C(e)(2) (2022).

¹⁷³ See 18 U.S.C. § 921(a)(17)(B) (2022); 18 U.S.C. § 922(a)(7)-(8) (2022).

¹⁷⁴ See 18 U.S.C. § 922(d) (2022).

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Even though LEOSA's language covers hollow point ammunition, New Jersey does not recognize an exception to its law for retired law enforcement officers covered by LEOSA.¹⁷⁵ New Jersey does not recognize several private rights established in LEOSA, preferring to submit qualified officers and qualified retired officers to its own statutory scheme.¹⁷⁶ As a result, a group of retired federal and local law enforcement officers filed suit in federal court to enjoin enforcement of New Jersey's enforcement of its permitting regime for a license to carry a firearm and the hollow point ammunition restriction as applied to retired law enforcement officers.¹⁷⁷ The plaintiffs asserted that LEOSA preempts these two laws.¹⁷⁸

The plaintiffs prevailed at the District Court, with the court agreeing that the conflict between LEOSA and the New Jersey provisions must be settled in favor of LEOSA, and enjoined enforcement against covered retired law enforcement officers.¹⁷⁹ New Jersey filed its appeal in July 2022, and the case is still pending.

B. The Retired Officers' Success Implicates the Equal Protection Clause

If the retired officers are ultimately successful, the unequal enforcement of New Jersey's hollow point restriction should raise a claim based on the Fourteenth Amendment's Equal Protection Clause. The clause guarantees that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."¹⁸⁰ This guarantee directs state governments to treat all similarly situated persons alike.¹⁸¹ An ordinary citizen who possesses a permit to carry a firearm should be able to claim that she is similarly situated to a retired police officer, and the state's unequal application of its hollow point restriction runs afoul of equal protection.

To prevail on an equal protection claim, a plaintiff must show both that the state has treated her differently than a similarly situated group, and that the state's explanation for the discrimination does not satisfy the applicable level of scrutiny.¹⁸² If a statute discriminates on the basis

¹⁷⁵ See Fed. L. Enf't Officers Ass'n v. Grewal, No. 20-05762 (ZNQ) (TJB), 2022 U.S. Dist. LEXIS 109902 at *9 (D.N.J. June 21, 2022).

¹⁷⁶ See Barondes, *supra* note 170, at 24–28.

¹⁷⁷ See *Grewal*, LEXIS 109902 at *12.

¹⁷⁸ *Id.* at *15.

¹⁷⁹ *Id.* at *50–51, *64.

¹⁸⁰ U.S. CONST. amend XIV § 1.

¹⁸¹ See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

¹⁸² See *Real Alt., Inc. v. Sec'y of U.S. Dep't of Health & Hum. Serv.*, 867 F.3d 338, 348 (3d. Cir 2017) (citing *City of Cleburne*).

of membership in a protected class or implicates a personal right protected by the Constitution, it is subject to strict scrutiny.¹⁸³ If the discrimination is not based on those categories, rational basis review applies, and the law will be sustained if the discrimination is rationally related to a legitimate state interest.¹⁸⁴

In the case of New Jersey's hollow point restriction, we have similarly situated groups in retired police officers and citizens who are licensed to carry a firearm. As a threshold question, a court would have to determine whether those two groups are similarly situated. Again, *ANJRPC* provides some guidance on how the Third Circuit might find an answer.

The Third Circuit rejected an equal protection claim against the LCM ban by denying the plaintiffs in *ANJRPC* were similarly situated to retired police.¹⁸⁵ The text of New Jersey's LCM ban includes an exception for active and retired police officers.¹⁸⁶ The groups in that case were retired officers and the general public, and the court reasoned that because police officers are required to engage in training and regular requalification with their firearms, active and retired police have training and experience that distinguishes them from the general public.¹⁸⁷ Because retired law enforcement officers were deemed not to be similarly situated to the general public, the court found no violation of the Equal Protection Clause.¹⁸⁸

Distinguishing retired police should be more difficult in a challenge to the hollow point restriction. The strongest challenge would come in the form of an as-applied challenge from civilians licensed to carry firearms in New Jersey, not the general public. Non-licensed civilians, who cannot legally carry a firearm outside of their home in New Jersey, would have a hard time demonstrating how they are similarly situated to retired police. However, to receive a license to carry, an applicant must demonstrate familiarity with the safe handling and use of handguns by submitting evidence of completed firearms trainings, including use of force trainings.¹⁸⁹ All permits to carry must be renewed

¹⁸³ See *City of Cleburne*, 473 U.S. at 440.

¹⁸⁴ *Id.* at 439–40.

¹⁸⁵ See *ANJRPC*, 910 F.3d 106, 125–26 (3d Cir. 2018).

¹⁸⁶ See N.J. STAT. ANN. § 2C:39-17 (2022) (“Notwithstanding [N.J. STAT. ANN. § 2C:39-3(j)], a retired law enforcement officer who is authorized to possess and carry a handgun . . . may possess and carry a large capacity ammunition magazine which is capable of holding up to 15 rounds of ammunition.”).

¹⁸⁷ *ANJRPC*, 910 F.3d at 125; see *Kolbe v. Hogan*, 813 F.3d 160, 188 (4th Cir. 2016) (considering retired police exemption from Maryland assault weapons ban).

¹⁸⁸ See *ANJRPC*, 910 F.3d at 125–26.

¹⁸⁹ See N.J. STAT. ANN. § 2C:58-4(g).

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every two years and require a “renewed demonstration of thorough familiarity with the safe handling and use of handguns.”¹⁹⁰ To maintain their licenses to carry, retired officers also must submit evidence of taking an approved firearms training and requalification.¹⁹¹ This narrowing from general public to licensed carriers creates a much more similarly situated group that will be harder to dismiss without further consideration; both licensed carriers and retired officers are mandated to train and requalify at the same interval. Further, New Jersey implicitly indicated that the two are similarly situated when it drafted the hollow point restriction, which lacks a carve-out for retired police. If the legislature did not see fit to distinguish between retired police and licensed carriers, neither should a court.

If the court finds the similarly situated group, which aligns with the regulatory realities and the legislature’s intent, the next question is which level of scrutiny to apply, strict or rational basis. If the court, using a *Bruen* analysis, finds that the discrimination implicated a constitutionally protected right, strict scrutiny applies and New Jersey must demonstrate a compelling state interest in restricting civilians from carrying hollow point ammunition.¹⁹² A plaintiff would argue—and based on *Bruen*’s framework, a court should find—that this is the proper level of scrutiny, and it would be quite a hurdle due to the common use of hollow point ammunition outside New Jersey.

C. Rational Basis and Judicial Estoppel

A court may, however, consider the hollow point restriction merely one on the “manner by which one carrie[s] arms,” and thus permissible.¹⁹³ In this case, rational basis could apply. Nevertheless, even under rational basis review, the hollow point restriction should fail because New Jersey presents no rational basis for the unequal treatment. Other Equal Protection challenges to gun control laws that exempted retired police failed precisely because the legislature saw fit to carve out the exception, and courts were able to find a rational basis for those decisions.¹⁹⁴

New Jersey’s defense of the hollow point restriction as applied to retired law enforcement officers flies close to the issue of judicial

¹⁹⁰ N.J. STAT. ANN. § 2C:58-4(a); N.J. ADMIN. CODE § 13:54-2.9.

¹⁹¹ See N.J. STAT. ANN. § 2C:39-6(l) (2022).

¹⁹² See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

¹⁹³ See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2156 (2022) (discussing reasonable limits on the Second Amendment).

¹⁹⁴ See, e.g., *ANRPC*, 910 F.3d 106, 125 (3d Cir. 2018); *Gallinger v. Becerra*, 898 F.3d 1012, 1015 (9th Cir. 2018); *Kolbe v. Hogan*, 813 F.3d 160, 168 (4th Cir. 2016).

estoppel. Judicial estoppel is an equitable doctrine to prevent a party from “assum[ing] inconsistent or mutually contradictory positions with respect to the same matter in the same or a successive series of suits,” so as not to be “playing ‘fast and loose with the courts’ which has been emphasized as an evil the courts should not tolerate.”¹⁹⁵ The Supreme Court broadly summarized the elements of a judicial estoppel analysis as: (1) a party must argue a position that is “clearly inconsistent” with its earlier position; (2) the party must have succeeded in persuading a court to accept that party’s earlier position; and (3) whether the party asserting an inconsistent position “would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.”¹⁹⁶ The Court hedged, stating that in outlining the factors, it was not establishing “inflexible prerequisites or an exhaustive formula.”¹⁹⁷ This leaves some play in the joints of an ill-defined doctrine, where courts have applied judicial estoppel even when a party advancing inconsistent positions lost the first case.¹⁹⁸ While New Jersey would easily qualify for the first factor, if the officers prevail, a challenger could fail at the second. However, the unfair detriment imposed by the state’s potential flip-flop is significant; the risk of making otherwise law-abiding citizens felons for carrying the wrong ammunition. The about-face required for New Jersey to argue both that it should be allowed to impose hollow point restrictions on retired law enforcement officers, and that retired law enforcement officers should be singled out for exemption calls for judicial estoppel. “A party’s cavalier switch of position from one case to the next . . . is inimical to the integrity of the judicial system, regardless of whether the court affirmatively relies on the representation.”¹⁹⁹

Here, New Jersey’s lawmakers *intended* to treat retired officers and civilians licensed to carry a firearm alike, and the State is defending a lawsuit in federal court intent on maintaining that status quo. The legislature had more than two decades from LEOSA’s passage to exempt retired officers from hollow point restrictions. The legislature understood the efficacy of such carve-outs, one was included in the state’s LCM ban, which, as discussed above, survived an Equal Protection challenge.²⁰⁰ If the retired officer’s victory leaves a rump statute, a court should not read into it the benefit of a manufactured

¹⁹⁵ Scarano v. Cent. R.R. Co., 203 F.2d 510, 513 (3d Cir. 1953) (internal quotations and citations omitted).

¹⁹⁶ N.H. v. Me., 532 U.S. 742, 750–51 (2001).

¹⁹⁷ *Id.* at 751.

¹⁹⁸ See David S. Coale, *A New Framework for Judicial Estoppel*, 18 REV. LITIG. 1, 6 (1999).

¹⁹⁹ AFN, Inc. v. Schlott, Inc., 798 F. Supp. 219, 227 n.12 (D.N.J. 1992).

²⁰⁰ See N.J. STAT. ANN. § 2C:39-17 (2022).

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justification for the distinction New Jersey is fighting hard to prevent. Rational basis review is the most deferential standard, even allowing for the court to consider justifications not offered by the state.²⁰¹ It would be farcical, however, for a court to supply a rational basis for a discrimination the state not only did not consider, but in fact resisted.

This presents the opportunity for the court to reign in the extreme deference of rational basis review and adopt a more rigorous standard. Professor Gerald Gunther identified a model for heightened rational basis in his analysis of the Burger Court's Equal Protection cases.²⁰² This rational basis with "bite" means that a court "would be less willing to supply justifying rationales by exercising its imagination," and assess whether the means used by a legislature "have substantial basis in actuality, not merely in conjecture."²⁰³ This evaluation must be based on the evidence presented to a court, not "judicial hypothesizing."²⁰⁴ Since Gunther proposed this model, only a small number of rational basis claims have succeeded.²⁰⁵ However, these cases have left little evidence of a unifying principle of when to apply a more searching review.²⁰⁶ *Lawrence v. Texas*, in which the Court did not identify whether the right it adjudicated was fundamental and avoided naming the scrutiny it employed, may stand for the proposition that rational basis requires a more substantive review.²⁰⁷ The Court in *Lawrence* overturned a Texas statute criminalizing homosexual sex, noting that it "furthers no legitimate state interest."²⁰⁸ The implication that the government bears the burden of justifying its interest with a concrete societal harm—not just any conceivable purpose—arises naturally from this decision.²⁰⁹

Applied to New Jersey's hollow point restrictions, this heightened analysis would require the State to demonstrate a real legislative purpose for the discrimination between retired police and licensed civilian carriers. The fact that New Jersey not only chose not to make that discrimination—but actively defended submitting retired officers

²⁰¹ See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-88 (1955).

²⁰² See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-24 (1972).

²⁰³ *Id.* at 21.

²⁰⁴ *Id.*

²⁰⁵ See generally Robert C. Farrel, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357 (1999).

²⁰⁶ See *id.* at 415.

²⁰⁷ See J. Kelly Strader & Lindsey Hay, *Lewd Stings: Extending Lawrence v. Texas to Discriminatory Enforcement*, 56 AM. CRIM. L. REV. 465, 476-77 (2019).

²⁰⁸ *Lawrence v. Tex.*, 539 U.S. 558, 578 (2003).

²⁰⁹ See Strader & Hay, *supra* note 207, at 477-78.

to the same restrictions as civilian licensees—should hamstring its ability to successfully argue that a valid legislative purpose exists. The failure of the hollow point provision to exempt retired law enforcement officers should be its own poison pill.

V. CONCLUSION

Because of the potentially momentous shift in Second Amendment jurisprudence instigated by *Bruen*, gun rights advocates have a lot of options for possible victories. New Jersey stands alone in banning its residents from carrying hollow point ammunition, despite common use of the round in the rest of the country among both law enforcement and civilians. This, plus the more exacting analytical framework supplied by *Bruen*, means that New Jersey's hollow point restriction could easily find itself on the chopping block.

The Equal Protection claim generated by the LEOSA case should also undercut this law's footings. Even if a court finds its way to a deferential review, it should be of no moment. New Jersey intended to treat retired police and civilians licensed to carry a handgun the same, the law should as well.

Because of the convergence of the new Second Amendment review and the possibility of the Equal Protection challenge, this singular New Jersey restriction is likely to be low hanging fruit for impact litigators seeking incremental gains for gun rights.