UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DELORES RICCI, *et al.*, *Plaintiffs*, v. PHILIP D. MURPHY, in his official capacity as Governor of New Jersey, *et al.*, *Defendants*.	HON. NOEL L. HILLMAN, U.S.D.J. HON. KAREN M. WILLIAMS, U.S.M.J. CIVIL ACTION NO. 20-cv-5800 **CIVIL ACTION** **(ELECTRONICALLY FILED)**

NOTICE OF MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

PLEASE TAKE NOTICE that at the Court's earliest availability, Plaintiffs Delores Ricci and Association of New Jersey Rifle & Pistol Clubs, Inc. (collectively "Plaintiffs") will move the Honorable Noel L. Hillman, U.S.D.J., at the United States Courthouse, Mitchell H. Cohen Building & U.S. Courthouse, 4th & Cooper Streets, Camden, NJ 08101, for an Order granting a temporary restraining order and/or preliminary injunction, pursuant to FED. R. CIV. P. 65 and L. Civ. R. 65.1, enjoining Defendants' enforcement of Executive Order 107 or any related order against outdoor shooting ranges in New Jersey.

PLEASE TAKE FURTHER NOTICE that, in support of the within motion, Plaintiffs rely upon the accompanying documents:

1) Declaration of Delores Ricci,

2) Declaration of Scott Bach,

3) Declaration of Daniel L. Schmutter with accompanying exhibits, and

4) Brief in support.

PLEASE TAKE FURTHER NOTICE that Plaintiffs request oral argument.

PLEASE TAKE FURTHER NOTICE that a proposed form of Order is submitted herewith.

Dated: May 13, 2020

Respectfully submitted,

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PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Constitutions and Statutes

Other Authorities

INTRODUCTION

The United States Constitution was designed to endure through "the various *crises* of human affairs." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis added). Those who wrote it "knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation." *Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizure*), 343 U.S. 579, 650 (1952) (Jackson, J., concurring). And the rights and liberties they passed down to us, and safeguarded in the pages of the charter they wrote, have force not only in good times but also in bad—not only in times of peace and plenty, but also (perhaps especially) in times of crisis.

That is particularly true of the Second Amendment. The right to keep and bear arms safeguarded by that provision, the Supreme Court has explained, was "a *pre-existing* right"—"the natural right of resistance and self-preservation"—that predated the Amendment's adoption in 1791, and, indeed, predated *government itself*, according to the political theory of the Founding. *District of Columbia v. Heller*, 554 U.S. 570, 592, 665 (2008). And it is in times of social upheaval—times of crisis—that the fundamental right of an individual, law-abiding citizen to engage in armed defense of herself, her family, and her home is at its zenith. During the present moment of unprecedented social disruption—when police forces are strained to the breaking point and thousands of prison inmates are being released back onto

the streets—the importance of recognizing and protecting the fundamental right of law-abiding citizens to defend themselves and their families has never been greater.

The Second Amendment right to firearms also protects, at a bare minimum, the right of a law-abiding citizen "to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective." *Ezell v. City of Chicago* (*Ezell I*), 651 F.3d 684, 704 (7th Cir. 2011). Accessibility to shooting ranges is therefore essential to the exercise of Second Amendment rights.

But the Executive Order New Jersey Governor Murphy has adopted and enforced in response to the global COVID-19 pandemic, Executive Order 107 ("EO 107"), "*prohibits* the law-abiding, responsible citizens of [New Jersey] from engaging in target practice in the controlled environment of a firing range." *Id.* at 708 (quotation marks omitted). Under that Order, all shooting ranges in the State must remain closed indefinitely to members and the general public, depriving all typical, law-abiding citizens of the State from exercising their Second Amendment right to train with firearms and therefore to use firearms with adequate proficiency. EO 107 thus, by its text and by its necessary effect, flatly and indefinitely prohibits target practice and training in New Jersey. It is difficult to imagine a restriction more completely antithetical to the Second Amendment's protections.

No one questions the severity of the threat posed by the global COVID-19

outbreak, or the need to take extraordinary measures to contain the virus. But the submission that a blanket order closing all shooting ranges is necessary to protect public health is belied by the text of EO 107 itself and related orders. While EO 107 contains no exemption for shooting ranges, it *does* contain myriad exceptions for a host of retail establishments—including liquor stores, cell phone shops, garden centers, and even marijuana dispensaries. The potential risk to public health posed by these exempted establishments *dwarfs* that of shooting ranges, both in quantity and quality. The number of liquor stores in New Jersey, for example, far exceeds the number of shooting ranges. And given that COVID-19 spreads more readily indoors than outdoors, allowing these indoor retail establishments to operate while ordering even *outdoor* shooting ranges to close is wholly irrational. But now Governor Murphy has taken the irrationality even further: in Executive Order 133, he has allowed for the reopening of *golf courses* and *tennis courts* yet still insists that even outdoor shooting ranges must remain closed.

It is utterly fanciful to acknowledge that individuals can safely frequent liquor stores, golf courses, and tennis courts but then, in the next breath, insist that all outdoor shooting ranges must close in the name of public health. Governor Murphy has not even *tried* to justify that disparate treatment. Nor could he. The Second Amendment enshrines in our highest law that "the right of law-abiding, responsible citizens to use arms in defense of hearth and home" must be "elevate[d] above all

other interests." *Heller*, 554 U.S. at 635. Surely, at the very least, this fundamental right should not be treated any *worse* than liquor stores, golf courses, and tennis courts. This Court should restrain and enjoin Executive Order 107's unnecessary infringement of Second Amendment rights and order Defendants to allow individuals to exercise their constitutional right to train at open-air shooting ranges.

BACKGROUND

I. Executive Order 107 Effectively Bans Firearms Training in New Jersey.

In response to the spread of the COVID-19 virus within the United States, Governor Murphy signed an Executive Order, on March 21, 2020, imposing a variety of extraordinary lockdown measures in New Jersey. *See* Executive Order 107 ("EO 107") (Mar. 21, 2020) (attached as Exhibit 1 to Decl. of Daniel L. Schmutter (May 13, 2020) ("Schmutter Decl.")). EO 107 prohibited nonessential travel, required all citizens to practice "social distancing" measures when in public, limited the use of public transit, and barred "gatherings of individuals." Ex. 1 at 5, 6. In addition, EO 107 directed that "[t]he brick-and-mortar premises of all non-essential retail businesses must close to the public as long as th[e] Order remains in effect." *Id.* at 6. The Order further specified certain outdoor "recreational" and "entertainment" businesses subject to closure: amusement parks, water parks, zoos, and theme parks. *Id.* at 8. Governor Murphy later clarified that "[g]olf courses [were] considered recreational and entertainment businesses that must close to the public."

Press Release, *Governor Murphy and Superintendent Callahan Announce Updates and Clarifications to List of Businesses Permitted to Operate*, STATE OF N.J. GOV. PHIL MURPHY (Mar. 30, 2020), https://bit.ly/2YLidYb (attached as Exhibit 2 to Schmutter Decl.).

The Order also included a subjective list of retail establishments deemed "essential," which included not only such businesses as "Grocery stores," "Pharmacies," and "gas stations," but also "alternative treatment centers that dispense medicinal marijuana," "Pet stores," and "Liquor stores." Ex. 1 at 6–7. Defendant Callahan then promulgated an order expanding the list of businesses deemed "essential" under EO 107. Admin. Order No. 2020-5 (Mar. 24, 2020) (attached as Exhibit 3 to Schmutter Decl.). That revised list included mobile phone retail and repair shops, bicycle shops, and garden centers. *Id.* ¶ 1. It did not include firearm or ammunition retailers or gun ranges. *Id.* In response to questions about his closure of gun stores, Governor Murphy stated that "[a] safer society for my taste has fewer guns and not more guns." *See* Alex Napoliello, *Gun Advocates Say Shops Should Reopen Now. Murphy Says No*, NJ.COM (March 25, 2020), https://bit.ly/2JlbRFP (attached as Exhibit 4 to Schmutter Decl.).

EO 107 was soon challenged in multiple suits in this Court as violating the Second and Fourteenth Amendments to the extent that it banned the sale of firearms and ammunition in the State. *See Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Murphy*,

No. 20-3269 (D.N.J.); *Kashinsky v. Murphy*, No. 20-3127 (D.N.J.). Soon after these lawsuits were filed, Governor Murphy backed down and determined that "firearms retailers are permitted to operate—by appointment only and during limited hours—to conduct business which, under law, must be done in person." Ex. 2; *see* Admin. Order No. 2020-6 (Mar. 30, 2020) (attached as Exhibit 5 to Schmutter Decl.). Firing ranges, however, remained closed, so law-abiding citizens of New Jersey could once more acquire firearms but still could not train to gain or maintain proficiency in using them.

Several weeks after Governor Murphy issued EO 107, he issued Executive Order 118 ("EO 118"). *See* Executive Order 118 (Apr. 7, 2020) (attached as Exhibit 6 to Schmutter Decl.). Despite the closure of many outdoor recreational and entertainment businesses, the Governor observed that since EO 107's issuance "public interaction and gatherings at county and state parks throughout the State, including lands under the Department of Environmental Protection's ('DEP') jurisdiction," that were "inconsistent with and threaten[ed] to undermine the social mitigation strategies necessary to limit the spread of COVID-19." *Id.* at 2. Therefore, Governor Murphy concluded that "[a]ll State Parks and Forests and county parks" would need to close to protect public health. *Id.* at 3. The Order defined "State Parks and Forests" to include "all State parks, forests, recreation areas, historic sites, marinas, golf courses, botanical gardens, and other lands, waters, and facilities

assigned to the State Park Service in DEP's Division of Parks and Forestry." *Id.* at 2.

On April 27, Governor Murphy allowed a tiny class of individuals to access shooting ranges, but only for a very limited purpose: to perform training necessary to obtain a license to carry a firearm publicly after licensing officials determined that the person would otherwise meet the stringent qualifications for such a license. *See* Executive Order No. 129 ("EO 129") (Apr. 27, 2020) (attached as Exhibit 7 to Schmutter Decl.). The Order, which seeks to ensure that "security guards" are "able to obtain or renew their permits to carry firearms," *id.* at 3, does nothing for typical, law-abiding citizens of New Jersey who desire to visit a shooting range to obtain and maintain proficiency in using a firearm, as it is virtually impossible for the average New Jerseyan to obtain a carry permit. *See* N.J. STAT. ANN. § 2C:58-4(c) (requiring a carry permit applicant to "specify in detail the urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun"). EO 129 is therefore irrelevant to the typical law-abiding citizens of New Jersey, including Plaintiff Ricci, who remain completely barred from range training.

Approximately three weeks after issuing EO 118, on April 29, 2020, Governor Murphy issued Executive Order 133 ("EO 133"). *See* Executive Order 133 (Apr. 29, 2020) (attached as Exhibit 8 to Schmutter Decl.). That Order noted that since the

issuance of EO 118, the Centers for Disease Control ("CDC") had "issued guidance for visiting parks and recreational facilities" and the State was "no longer seeing an increase in the number of new cases of COVID-19 that are being reported on a daily basis." *Id.* at 3. Because the State had made "continued progress in its fight against COVID-19," the Governor concluded that it was "appropriate to ensure that New Jerseyans can safely enjoy outdoor recreation, with reasonable restrictions that limit the spread of COVID-19, as a way to enhance physical and mental health, while maintaining the overall social distancing and mitigation requirements in place to protect the health, safety, and welfare of New Jersey residents." *Id.* Therefore, Governor Murphy announced that all State Parks and Forests would reopen to the public on May 2, 2020, for a variety of "passive recreational activities," superseding the operative paragraphs of EO 118. *Id.* at 4.

EO 133 likewise permitted the reopening of golf courses "to the public and to members associated with private golf clubs," *id.* at 7, so long as those courses agreed to adopt a variety of social distancing policies, including (1) requiring that reservations and payments be made electronically or over the telephone; (2) staggering tee times to limit the number of persons on the course; (3) restricting the use of golf carts to single occupants; (4) frequently sanitizing high-touch areas such as range buckets and limiting players' ability to touch common surfaces; among others, *id.* at 7–9. But apart from golf courses, Governor Murphy concluded that "the

ongoing pandemic means that other brick and mortar retail and recreation businesses . . . are not ready to be reopened at this time." *Id.* at 4. Shooting ranges—including outdoor shooting ranges—therefore remain closed to members and the general public pending further order by the Governor. EO 133 offered no explanation for why golf courses could reopen, but outdoor shooting ranges could not.

Even more inexplicably, EO 133 also allowed county and municipal officials to reopen public tennis courts. *See* Press Release, *TRANSCRIPT: May 1st, 2020 Coronavirus Briefing Media*, STATE OF N.J. GOVERNOR PHIL MURPHY (May 1, 2020), https://bit.ly/3fE7Z1N (attached to Schmutter Decl. as Exhibit 9). Several local governments have since chosen to reopen their tennis courts.[1] Of course, unlike golf and firearms training, tennis requires individuals to interact through touch—each sharing one or more tennis balls—and thus seems to be particularly conducive to transmitting the virus. To date, the Governor has offered no plausible basis, rooted in public health considerations, that justifies such an exemption.

[1] *See, e.g.*, Carly Baldwin, *Middletown Opens Tennis Courts*, PATCH MEDIA (Apr. 29, 2020), https://bit.ly/2Llqtq0 (attached to Schmutter Decl. as Exhibit 10); Caren Lissner, *Millburn Tennis Courts Open Thursday*, PATCH MEDIA (May 6, 2020), https://bit.ly/2zxFUII (attached to Schmutter Decl. as Exhibit 11); Dawn Miller, *South Brunswick Tennis Courts Reopened*, TAPINTO.NET (May 5, 2020), https://bit.ly/3fElDSI (attached to Schmutter Decl. as Exhibit 12); Twp. Of Berkeley Heights, *Lower Columbia Park Tennis Courts Open in Berkeley Heights, With Restrictions*, TAPINTO.NET (May 9, 2020), https://bit.ly/2WQceP4 (attached to Schmutter Decl. as Exhibit 13).

II. EO 107 Prevents Plaintiffs From Engaging in Constitutionally Protected Training To Use Their Firearms.

Defendants' ban on target practice and firearms training through the closure of shooting ranges infringes Plaintiffs' ability to exercise their Second Amendment rights. Most pointedly, Plaintiff Ricci recently became a first-time firearm owner, having purchased a handgun for self-defense after first obtaining a Handgun Purchase Permit. Declaration of Delores Ricci ¶¶ 6–7 (May 13, 2020) ("Ricci Decl."). She has no prior experience in handling firearms. *Id.* ¶ 6. But in light of the current emergency, she believes it is especially important that she be able to defend herself with a firearm if necessary and that range training is essential to acquiring and maintaining an adequate defense. *Id.* ¶ 10.

However, Plaintiff Ricci ultimately learned that because of EO 107, all shooting ranges in the State had been forced to close. *Id.* ¶ 8. Accordingly, as a direct result of EO 107, Plaintiff Ricci has been and remains unable to engage in training and target practice since the Order went into effect. *Id*. But for EO 107 and Defendants' actions implementing it, Plaintiff Ricci would travel to an outdoor shooting range forthwith and participate in target practice and training. *Id.* ¶ 9.

Defendants' actions have also injured Plaintiff Association of New Jersey Rifle & Pistol Clubs, Inc. ("ANJRPC"). In addition to representing the interests of law-abiding firearm owners and member clubs, ANJRPC owns and operates a 60-acre outdoor shooting range, Cherry Ridge Range, in Highland Lakes, New Jersey

that provides outdoor target practice and training opportunities to ANJRPC's members. Declaration of Scott Bach ¶ 4 (May 13, 2020) ("Bach Decl."). Since EO 107 took effect, Plaintiff ANJRPC has been forced to stop operating Cherry Ridge Range indefinitely, since it is not deemed an "essential business." *Id.* ¶ 6. Plaintiff ANJRPC has many members, including Plaintiff Ricci, who wish to participate in target practice and training forthwith, and it would allow those members to use its facilities for such practice if it were legally allowed to do so. *Id.* ¶ 8. If allowed to open, ANJRPC would also voluntarily implement sanitary and safety measures, including limiting the number of patrons on the premises at any one time, strictly observing and enforcing social distancing protocols, requiring employees to wear masks or other face coverings, and regularly sanitizing exposed surfaces. *Id*.

Finally, EO 107 has had a similar impact on numerous other members of Plaintiff ANJRPC. Plaintiff ANJRPC is a nonprofit membership association organized for the primary purpose of representing the interests of target shooters, sportsmen, and other law-abiding firearms owners, and defending and advocating their right to keep and bear arms. *Id.* ¶ 2. ANJRPC has many thousands of members in New Jersey, including Plaintiff Ricci, and many of them wish to engage in firearms training at an outdoor shooting range, and would do so forthwith, but are unable to because of EO 107. *Id.* ¶ 3; Ricci Decl. ¶ 9. Likewise, ANJRPC has many member clubs that are unable to allow their members to use their firing ranges for

firearms training because of EO 107 and its continued enforcement. Bach Decl. ¶ 3.

ARGUMENT

A plaintiff seeking preliminary injunctive relief must demonstrate (1) a likelihood of success on the merits and (2) a prospect of irreparable injury if the injunction is not granted. *Reilly v. City of Harrisburg*, 858 F.3d 173, 176 (3d Cir. 2017). In addition, "the district court . . . should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest." *Id.* Here, all four factors favor preliminarily enjoining Defendants from enforcing EO 107 to indefinitely prohibit firearms training at outdoor shooting ranges.[2]

I. Plaintiffs Are Likely To Succeed on the Merits.

Establishing likelihood of success on the merits "requires a showing significantly better than negligible but not necessarily more likely than not." *Id.* at 179. Plaintiffs' Second Amendment challenge is likely to succeed under this standard and preliminary injunctive relief should issue.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall

[2] "These same factors are used to determine a motion for a temporary restraining order," *Miller v. Skumanick*, 605 F. Supp. 2d 634, 641 (M.D. Pa. 2009), *aff'd sub nom. Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010), and the references to a preliminary injunction throughout this brief encompass both forms of relief.

not be infringed." U.S. CONST. amend. II. The Supreme Court has held that this provision "protect[s] an individual right to use arms for self-defense," *Heller*, 554 U.S. at 616, and that because "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty," it applies to the States, *McDonald v. City of Chicago*, 561 U.S. 742, 778, 791 (2010) (plurality opinion).

The Third Circuit has established "a two-pronged approach to Second Amendment challenges." *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). "First, [courts] ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee . . . . [Second,] [i]f it does, [they] evaluate the law under some form of means-end scrutiny." *Id.*[3] The first prong is a "threshold inquiry" into whether the challenged conduct is protected by the right to keep and bear arms. *Id.* Here, the answer to that threshold inquiry is beyond dispute: if the right to keep and bear arms for lawful self-defense is to have any meaning, it must protect the right of firearm owners to obtain and maintain proficiency in using their firearms. EO 107's infringement of this right is unconstitutional under any standard that could conceivably apply.

[3] Plaintiffs reserve their right to argue in subsequent proceedings that a tiers-of-scrutiny approach is never appropriate in Second Amendment cases. *See Heller v. District of Columbia*, 670 F.3d 1244, 1271–85 (D.C. Cir. 2011) (*Heller II*) (Kavanaugh, J., dissenting).

A. The Ban on Target Practice and Training at Shooting Ranges Burdens Conduct Protected by the Second Amendment.

The Second Amendment "protect[s] an individual right to use arms for self-defense," taking "off the table" any "absolute prohibition of handguns held and used for self-defense in the home." *Heller*, 554 U.S. at 616, 636. As federal courts have repeatedly recognized, that unassailable "right to possess firearms for protection implies . . . corresponding right[s]" without which "the core right wouldn't mean much." *Ezell I*, 651 F.3d at 704.

The right to keep and bear arms would mean little indeed without the corresponding right to obtain and maintain proficiency in firearm use. *Id.* at 708. As the Seventh Circuit cogently explained in *Ezell I*, any

> firing-range ban is not merely regulatory; it *prohibits* the 'law-abiding, responsible citizens' . . . from engaging in target practice in the controlled environment of a firing range. This is a serious encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense.

Id. (quoting *Heller*, 554 U.S. at 635). Such a ban on firing ranges works a serious infringement on Second Amendment rights because, as the Second Circuit recently acknowledged, "[p]ossession of firearms without adequate training and skill does nothing to protect, and much to endanger, the gun owner, his or her family, and the general public." *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 883 F.3d 45, 58 (2d Cir. 2018), *vacated and remanded*, No. 18-280, 2020 WL 1978708 (U.S.

Apr. 27, 2020); *see also Teixeira v. County of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (en banc) (noting that the right to keep and bear arms for self-defense would be trivial without the ability to "maintain[] proficiency in firearms use").

The Third Circuit recently endorsed *Ezell I*'s reasoning on this score. In *Drummond v. Township of Robinson*, 784 Fed. Appx. 82 (3d Cir. 2019), the district court had dismissed the plaintiff's Second Amendment challenge to a local zoning ordinance that he alleged violated the Second Amendment by preventing him from opening and operating a gun club. In vacating the district court's judgment, the court of appeals emphasized that the Circuit's two-step *Marzzarella* test requires reviewing courts to perform, at the first step, a textual and historical analysis to determine whether the burdened conduct—"acquiring firearms and maintaining proficiency in their use"—were exercises of Second Amendment rights. *Id.* at 84. And in remanding for the district court to perform that textual and historical analysis, the Court noted that *Ezell I*'s analysis was "illustrative." *Id.* at 84 n.8. On remand, the district court held that the challenged ordinance burdened conduct "within the scope of the Second Amendment's protection," *Drummond v. Robinson Township*, — F. Supp. 3d —, 2020 WL 1248901, at *3 (W.D. Pa. Mar. 16, 2020), but that the ordinance was constitutional primarily because—unlike EO 107—it "provides ample alternative channels for commercial gun range activity," *id.* at *4.

The traditional understanding and practices of the people of this nation leave

no question that the right to firearm training is protected by the Second Amendment. Indeed, the centrality of firearm training was forthrightly stated by the Supreme Court itself in *Heller*, quoting the following approvingly from a "massively popular" late-nineteenth century treatise:

> [T]o bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order.

Heller, 554 U.S. at 617–18 (quoting Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 271 (1880)) (alteration added). And another source quoted by *Heller* stated that "a citizen who keeps a gun or pistol under judicious precautions, *practises in safe places the use of it*, and in due time teaches his sons to do the same, exercises his individual right." *Id*. at 619 (emphasis added) (quoting Benjamin Vaughan Abbott, *Judge and Jury: A Popular Explanation of the Leading Topics in the Law of the Land* 333 (1880)).

Moreover, very recently, four Justices of the Supreme Court have indicated that they likewise view the right to train in firearm use as "an important corollary to the meaningful exercise of the core right to possess firearms for self-defense." *Ezell I*, 651 F.3d at 708. In *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, No. 18-280, 2020 WL 1978708 (U.S. Apr. 27, 2020), a majority of the Justices found that the petitioner's challenge to a New York City regulation that limited

firearm owners to patronizing only a handful of gun ranges—all located in New York City and only one of which was open to the public—was moot. *See id.* at *1.

Justice Alito, joined by Justices Thomas and Gorsuch, disagreed and addressed the merits of the City's regulation. These three Justices concluded that the right "to take a gun to a range in order to gain and maintain the skill necessary to use it responsibly" was a "necessary concomitant" of the right to keep a firearm in the home for self-defense. *Id.* at *14 (Alito, J., dissenting). In support, Justice Alito quoted *Heller*'s invocation of Cooley's treatise and the Seventh Circuit's pathbreaking decision in *Ezell I*. *See id.* And because the right to take a gun to ranges was "a concomitant of the same right recognized in *Heller*," the dissenting Justices concluded that the City's regulation required a historical precursor to justify the restrictions imposed. *Id.* The City, however, "point[ed] to no evidence of laws in force around the time of the adoption of the Second Amendment" so limiting citizens' rights to practice, so the dissenters found the regulation unconstitutional.

No other Justice contradicted Justice Alito's analysis in *New York State Rifle & Pistol Ass'n*. Indeed, Justice Kavanaugh—who voted with the majority on mootness grounds—nevertheless authored a concurring opinion emphasizing that he "agree[d] with Justice Alito's general analysis of *Heller* and *McDonald*," *id.* at *2 (Kavanaugh, J., concurring), impliedly endorsing Justice Alito's analysis of the concomitant right to practice with a firearm lawfully possessed.

It is also important to put EO 107's restrictions in context. The constitutional right in "learning to handle and use" firearms is especially important in times of national crisis and social upheaval. *Heller*, 554 U.S. at 617–18. "The Second Amendment is a doomsday provision," *Silveira v. Lockyer*, 328 F.3d 567, 570 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc), and in this time of crisis Americans across the Nation are preparing for the worst by acquiring arms for the defense of themselves and their families. The right to self-defense is "the *central component* of the [Second Amendment] right," *Heller*, 554 U.S. at 599 (emphasis added), and it is "a basic right, recognized by many legal systems from ancient times to the present day," *McDonald*, 561 U.S. at 767. Indeed, the right to self-protection and self-preservation was viewed at the Founding as a *natural* right that predates government and is necessarily reserved to the people when government is established. *See Heller*, 554 U.S. at 593–94 (citing, *e.g.*, 1 William Blackstone, *Commentaries* 136, 139–40 (1765)). The importance of the right to self-defense is shown in sharp relief in times of national emergency, such as the present pandemic, when ordinary social routines, practices, and safeguards begin to break down.

The COVID-19 outbreak, and our society's response, have upended social life as we know it, calling into question basic governmental functions and protections that are ordinarily taken for granted. Across the country, for example, police departments have been forced to "make[] major operational changes in preparation

for the continued spread of coronavirus, as they face potential strains in resources and staffing without precedent in modern American history." Alexander Mallin & Luke Barr, *Police Implement Sweeping Policy Changes To Prepare for Coronavirus Spread*, ABC NEWS (Mar. 18, 2020), https://abcn.ws/3bl7sij (attached to Schmutter Decl. as Exhibit 14). Those measures include reducing police response to certain types of crimes and announcements that certain criminal laws will simply not be enforced at the present time. *Id.* Hundreds of police officers in New Jersey have already been infected by COVID-19, and thousands more have been forced to quarantine. *See* Alex Napoliello, *645 N.J. Cops Have Tested Positive for Coronavirus, Another 2,300 in Self-Isolation*, N.J.COM (Apr. 13, 2020), https://bit.ly/2ziCgT8 (attached to Schmutter Decl. as Exhibit 15). Indeed, many States—including New Jersey, as well as California, New York, Ohio, and Texas—have taken the extraordinary and unprecedented step of *releasing* thousands of inmates into the public, due to the coronavirus outbreak. Lucas Manfredi, *Jails Release Thousands of Inmates To Curb Coronavirus Spread*, FOX BUSINESS (Mar. 22, 2020), https://fxn.ws/2UtPRxG (attached to Schmutter Decl. as Exhibit 16); Tracey Tully, *1,000 Inmates Will Be Released From N.J. Jails to Curb Coronavirus Risk*, N.Y. TIMES (Mar. 23, 2020), https://nyti.ms/3akEZJd (attached to Schmutter Decl. as Exhibit 17).

The importance of safeguarding "the natural right of resistance and self-

preservation," *Heller*, 554 U.S. at 594, has never been higher than during this extraordinary moment of social upheaval and unprecedented strain on government resources. Hundreds of thousands of Americans across the Nation have come to the same conclusion: "Gun sales are surging in many U.S. states, especially in those hit hardest by the coronavirus—California, New York and Washington," Kurtis Lee & Anita Chabria, *As the Coronavirus Pandemic Grows, Gun Sales Are Surging in Many States*, L.A. TIMES (Mar. 16, 2020), https://lat.ms/39kNVNt (attached to Schmutter Decl. as Exhibit 18), with dealers reporting "an unusually high proportion of sales . . . to first-time gun buyers," Richard A. Oppel, Jr., *For Some Buyers With Virus Fears, the Priority Isn't Toilet Paper. It's Guns.*, N.Y. TIMES (Mar. 16, 2020), https://nyti.ms/39gfRCc (attached to Schmutter Decl. as Exhibit 19). And federal background checks have surged by at least 36%, to a level higher than "all but two other months since [the FBI] started performing the queries in the late 1990s." *Id.* Indeed, an industry trade group analysis that sought to screen out background checks for non-purchase purposes such as obtaining a carry license found an *80.4%* increase in federal background checks in March 2020 compared to March 2019. *See* Nat'l Shooting Sports Found., *NSSF-Adjusted NICS Background Checks for March 2020*, https://bit.ly/2KcsHXW (attached to Schmutter Decl. as Exhibit 20).

And indeed, these are exactly the circumstances that confront Plaintiff Ricci, who acquired her handgun only in March 2020, shortly after COVID-19 began its

spread across the United States. Ricci Decl. ¶ 7. She has no prior experience with firearms of any kind but believes that the current emergency necessitates that she keep a handgun in her home for self-defense. *Id.* ¶¶ 6, 10. But merely possessing a handgun in the home is not the same as actually being able to *use* it with any level of effectiveness.

As Americans across the country are demonstrating, the basic, fundamental right of armed self-defense has never been more important than it is today. And as many Americans—including Plaintiff Ricci—are purchasing firearms for the first time in their adult lives, the need for firearm training has perhaps never been more acute. EO 107's mandated closure of all shooting ranges in the State thus unquestionably burdens conduct protected by the Second Amendment.

B. Because It Constitutes a Flat Ban on the Exercise of a Second Amendment Right, EO 107 Is Categorically Unconstitutional.

The necessary function of EO 107 is to impose a flat, categorical ban on the public's exercise of the constitutionally protected right to train in the use of firearms through controlled target practice and training. By its plain language, EO 107 requires "[t]he brick-and-mortar premises of all non-essential retail businesses" and certain outdoor "recreational" and "entertainment" businesses "[to] close to the public as long as this Order remains in effect"—and the enumerated, subjective list of "essential" businesses does not include shooting ranges (though it does exempt such establishments as "Liquor stores," and "alternative treatment centers that

dispense medicinal marijuana"). Ex. 1 at 5–7.

While the closure of brick-and-mortar retail establishments may not cut off New Jersey citizens' supplies of necessary goods, given the availability of e-commerce and delivery services, its effect on firearm range training is to totally foreclose it to typical law-abiding citizens. Governor Murphy's ban is total and applies to *all* firing ranges (subject to the irrelevant exceptions in EO 129, discussed above). It is far more draconian than the New York City regulation disparaged by four Justices in *New York State Rifle & Pistol Ass'n*, which permitted access to firing ranges located within the City. And it is likewise far more sweeping than the zoning regime upheld in *Drummond*, which "provide[d] ample alternative channels for commercial gun range activity . . . within the Township as a whole." 2020 WL 1248901, at *4. EO 107 instead has the effect of eliminating "commercial gun range activity" *within an entire State*. It thus represents a prohibition of shooting range activity over an unprecedented geographic expanse.

The totality of the prohibition is further evident from the fact that EO 107 closes off shooting ranges to *all persons* (again, aside from the minuscule class covered by EO 129) within the State. And when the State "*prohibits* the law-abiding, responsible citizens of [the State] from engaging in target practice in the controlled environment of a firing range," it commits a "serious encroachment" on the right to keep and bear arms. *Ezell I*, 651 F.3d at 708. Worse yet, the effects of this prohibition

reverberate into individuals' hearths and homes—the place "where the need for defense of self, family, and property is most acute." *Heller*, 554 U.S. at 628. Without the ability to train at a range, gun owners are handicapped in their ability to effectively protect themselves.

EO 107's application to shooting ranges thus amounts to the following: a flat ban on *all* controlled training and target practice, by virtually *any* person, *anywhere* in the state. And most relevant here, EO 107 completely deprives Plaintiff Ricci from exercising her constitutional right to train with firearms. It is harder to imagine a more direct, frontal assault on the Second Amendment.

Given that Governor Murphy has completely prohibited typical, law-abiding citizens from training with their firearms, *Heller* makes the next analytical steps clear. Because the Second Amendment "elevates" the right to self-defense "above all other interests," infringements upon this "core protection" must be held unconstitutional categorically, not "subjected to a freestanding 'interest-balancing' approach." *Id.* at 634–35. Defendants' prohibition on the right of law-abiding citizens to maintain proficiency in firearms use for self-defense is precisely such an infringement of Second Amendment rights. It is flatly unconstitutional.

Heller requires *per se* invalidation of bans that strike at the heart of the Second Amendment. In *Heller*, the Supreme Court declined the invitation to analyze the ban on the right to keep arms at issue there under "an interest-balancing inquiry" based

on the "approach . . . the Court has applied . . . in various constitutional contexts, including election-law cases, speech cases, and due process cases," *id.* at 689–90 (Breyer, J., dissenting). Instead, the Court ruled that the right to keep and bear arms was "elevate[d] above all other interests" the moment that the People chose to enshrine it in the Constitution's text, *id.* at 635 (majority opinion). And in *McDonald*, the Court reaffirmed that *Heller* had deliberately and "expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing." 561 U.S. at 785. This reasoning applies equally to the ban on range training at issue here.

The flat unconstitutionality of New Jersey's ban on firearm training under *Heller* is reinforced by subsequent Supreme Court precedent. In *McDonald*, the Supreme Court described *Heller*'s holding as a simple syllogism: having "found that [the Second Amendment] right applies to handguns," the Court therefore "concluded" that "citizens must be permitted to use handguns for the core lawful purpose of self-defense." *Id.* at 767–68 (quotation marks and brackets omitted). Then, in *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016), the Court summarily and unanimously reversed a decision of the Massachusetts Supreme Judicial Court that had departed from this approach in upholding a ban on stun guns. *Id.* at 1027–28. The Massachusetts court got the message: "Having received guidance from the Supreme Court in *Caetano II*, we now conclude that stun guns are 'arms' within the

protection of the Second Amendment. Therefore, under the Second Amendment, the possession of stun guns may be regulated, but not absolutely banned." *Ramirez v. Commonwealth*, 94 N.E.3d 809, 815 (Mass. 2018). In like manner, New Jersey's attempt to ban its citizens from training with firearms lawfully obtained and possessed is an option that the Second Amendment simply takes "off the table." *Heller*, 554 U.S. at 636.

Likewise, Justice Alito—who authored the Court's opinion in *McDonald*—recently reiterated in *New York State Rifle & Pistol Ass'n* that even a regulation falling short of an absolute ban—one requiring residents to practice only at a handful of ranges within the City's limits—likely was categorically unconstitutional unless the City could offer evidence showing "that municipalities during the founding era" engaged in similar regulation. 2020 WL 1978708, at *14; *see also Heller*, 631–34 (explaining why the District of Columbia's handgun ban could not be justified based on "founding-era historical precedent," including "various restrictive laws in the colonial period"); *Heller II*, 670 F.3d at 1273 (Kavanaugh, J., dissenting) (explaining that *Heller I* invalidated the District's law because "handguns had not traditionally been banned"). Defendants have not—and cannot—point to any analogous state-wide prohibitions on firearm practice that existed at the Founding—or at any other time in this nation's history, for that matter. That's enough to doom EO 107.

To be sure, the Third Circuit generally requires restrictions on Second

Amendment rights to be scrutinized under "some form of means-end scrutiny," *Marzzarella*, 614 F.3d at 89, but such scrutiny is not necessary or appropriate here, where the restriction in question is a flat, categorical ban on the practice of *any* firearm training by *any* member of the general public at *any* shooting range within the State. That is why other circuits that have adopted a tiers-of-scrutiny analysis as the default form of analysis for most Second Amendment challenges nevertheless apply *Heller*'s categorical approach to " 'complete prohibition[s]' of Second Amendment rights." *Wrenn v. District of Columbia*, 864 F.3d 650, 665 (D.C. Cir. 2017) (quoting *Heller*, 554 U.S. at 629); *see also Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (striking down ban on carrying arms categorically despite circuit precedent applying levels-of-scrutiny analysis in other Second Amendment cases). EO 107 operates as just such a "compete prohibition," and it thus must be struck down at a minimum as applied to outdoor ranges without any further analysis.

C. Defendants' Ban on Firearm Training at Outdoor Shooting Ranges Fails Any Level of Heightened Constitutional Scrutiny.

1. Strict Scrutiny Should Apply.

Even if this Court concludes that Defendants' ban on firearms training at outdoor shooting ranges is not *categorically* unconstitutional, the ban must at least be subjected to the highest level of constitutional scrutiny. As the Supreme Court has explained, "strict judicial scrutiny [is] required" whenever a law "impinges upon a fundamental right explicitly or implicitly protected by the Constitution." *San*

Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973). And the right to bear arms is not only specifically enumerated in the constitutional text but also was counted "among those fundamental rights necessary to our system of ordered liberty" by "those who drafted and ratified the Bill of Rights." *McDonald*, 561 U.S. at 768, 778. Applying anything less than strict scrutiny would relegate the Second Amendment to "a second-class right." *Id.* at 780 (plurality opinion).

This conclusion is in accord with precedent. Even *Marzzarella* recognized that firearm regulations fall along a continuum, with laws like the District of Columbia's handgun ban falling "at the far end of the spectrum of infringement." 614 F.3d at 97. That was because the District of Columbia law "did not just regulate possession of handguns; it prohibited it, even for the stated fundamental interest protected by the right—the defense of hearth and home." *Id.* So while *Marzzarella* maintained that laws imposing burdens that "do[] not severely limit the possession of firearms" "should be evaluated under intermediate scrutiny," the Court left open whether "the Second Amendment can trigger more than one particular standard of scrutiny." *Id.*

Because the right to "[r]ange training . . . . lies close to the core of the individual right of armed defense," *Ezell v. City of Chicago* (*Ezell II*), 846 F.3d 888, 893 (7th Cir. 2017), and because EO 107 *prohibits* that right, it severely limits the effective use of firearms for self-defense in the home and therefore clearly lies "at the far end of the spectrum of infringement," *Marzzarella*, 614 F.3d at 97; *see also*

Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. of N.J., 910 F.3d 106, 117 (3d Cir. 2018) ("The applicable level of scrutiny is dictated by whether the challenged regulation burdens the core Second Amendment right. If the core Second Amendment right is burdened, then strict scrutiny applies . . . .").

Therefore, even if EO 107 is not categorically unconstitutional, it warrants review under the most exacting scrutiny. That is what a Virginia trial judge reasoned in a recent challenge to Governor Northam's executive order closing indoor shooting ranges. *See Lynchburg Range & Training, LLC v. Northam*, CL20000333, slip letter op. at 4 (Va. Cir. Ct. Apr. 27, 2020) ("If the Court were to use a level of scrutiny, the Court would find that proper training and practice at a range . . . is fundamental to the right to keep and bear arms . . . . Accordingly, the Court would apply strict scrutiny and find that the Order fails because the total closing of all indoor gun ranges is not narrowly tailored."). This Court should do the same.

2. The Ban on Firearm Training Fails Heightened Scrutiny.

Ultimately, determining the correct standard of scrutiny is immaterial, because Defendants' actions are unconstitutional under any level of heightened scrutiny. (Rational basis review is not an option. *See Heller* 554 U.S. at 628 n.27.)

Even under intermediate scrutiny, the State "must assert a significant, substantial, or important interest; there must also be a reasonable fit between that asserted interest and the challenged law, such that the law does not burden more

conduct than is reasonably necessary." *Ass'n of N.J. Rifle & Pistol Clubs, Inc.*, 910 F.3d at 119 (quotation omitted). Even assuming EO 107's closure of shooting ranges was undertaken to promote public health, the State Defendants cannot carry their burden because EO 107 suffers from an utter lack of tailoring.

That is shown by EO 107's exemptions. While the outdoor shootings ranges necessary to ensure the exercise of Plaintiffs' constitutional rights are not deemed "essential retail businesses," under the Order, Defendants *have* included exemptions for a variety of establishments, including "alternative treatment centers that dispense medicinal marijuana," "Liquor stores," "Bicycle shops," "Mobile phone retail . . . shops," and "garden centers." Ex. 1 at 5–6; Ex. 3 ¶ 1. By sheer numbers alone, these establishments pose a threat to public health that is multiples greater than any threat posed by firearm ranges: there are approximately 2,260 liquor stores in New Jersey,[4] for example, and thousands of houses of Worship statewide, which is many multiples the number of outdoor firing ranges in the State. *See* Bach Decl. ¶ 4.

Moreover, as far as Plaintiffs are aware, there is no constitutional right to a bottle of hard liquor, six-pack of beer, or the latest iPhone. And medical marijuana facilities operate in open and flagrant violation of federal law. *See* 21 U.S.C. § 812. Yet the retail establishments vending these goods have been deemed "essential," by

[4] MARATHON STRATEGIES, LIQUOR STORE DENSITY BY STATE 4 (2014), https://bit.ly/2WDXwe1 (attached to Schmutter Decl. as Exhibit 21).

New Jersey, even while shooting ranges—which enable the right to effective self-defense protected by the Second Amendment—have not. In stark contrast, meanwhile, the federal government, seemingly recognizing the critical role that shooting ranges play in actualizing the guarantee of the Second Amendment, has deemed as part of the "essential critical infrastructure workforce" "[w]orkers supporting the operation of firearm, or ammunition product manufacturers, retailers, importers, distributors, *and shooting ranges*." Christopher C. Krebs, Director, Cybersecurity & Infrastructure Security Agency, Advisory Memorandum On Identification of Essential Critical Infrastructure Workers During COVID-19 Response 8, U.S. DEP'T OF HOMELAND SEC. (Apr. 17, 2020) (emphasis added), https://bit.ly/3b8KTg9 (attached to Schmutter Decl. as Exhibit 22).

Other of EO 107's exemptions, while perhaps justifiable on their own terms, show that Defendants have erected a hierarchy of constitutional values—with the Second Amendment relegated to the very bottom rung. The Order specifically allows travel "for any educational, religious, or political reason"—presumably out of concern that banning these activities would raise serious First Amendment concerns. Ex. 1 at 5. By failing to show similar solicitude to the right to keep and bear arms, New Jersey has in effect imposed an impermissible "hierarchy of constitutional values," *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982)—in direct contravention of the Supreme

Court's instruction that the Second Amendment may not be treated "as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees," *McDonald*, 561 U.S. at 780 (plurality opinion).

And perhaps more than anything else, EO 133—reopening New Jersey's parks, forests, golf courses, and tennis courts—demonstrates the rank illogic behind Governor Murphy's classifications. It is no surprise, especially in light of the CDC's own recognition that parks and other outdoor spaces can be safely visited, *see* Ex. 8 at 3, that Governor Murphy reopened the State's parks and golf courses. What makes no sense, however, is the Governor's decision to open *only those* venues, even though shooting ranges share the central attribute justifying reopening: they are open spaces that allow persons to avoid close contact with others while engaging in productive activity. And, unlike golf courses and tennis courts, they facilitate the exercise of a constitutional right and fall within the federal government's own list of "essential" infrastructure. *See* Ex 22 at 8. They should remain open.

Therefore, at bottom, Governor Murphy's insistence on closing outdoor shooting ranges is irrational twice over. First, outdoor shooting ranges in New Jersey continue to face indefinite closure, even though any indoor "essential business" is likely to pose a greater risk of spreading COVID-19. And second, outdoor shooting ranges remain closed even though comparable outdoor spaces like golf courses—which, at best, are equally likely venues for the virus to spread—have been permitted

to reopen. This unfavorable treatment of shooting ranges is all the more inexplicable given that ranges like Cherry Ridge Range can—and would—undertake the same mitigation measures—enforcing social distancing protocols, requiring employees to wear masks, and sanitizing exposed surfaces, etc.— that justified reopening golf courses and tennis courts in the State. The State has not, and surely could not, offer any plausible explanation supporting the disparate treatment of shooting ranges expressed in its laws.

Compounding the irrationality of the Governor's exemptions, EO 133 allows county and municipal officials to reopen public tennis courts. *See* Exs. 8, 9. There is absolutely no reason to think that tennis is somehow a safer activity than range shooting when it comes to transmitting the coronavirus. Unlike golf or firearms training, tennis is an interactive activity that requires participants to physically interact with each other. Even if tennis players are always able to maintain social distancing of 6 feet apart, tennis involves hitting a ball back and forth. This requires both tennis players to touch the same ball, whether to serve it, retrieve it, etc. This mutual touching of the same ball provides a significantly greater chance of spreading the virus than that implicated by marksmanship practice, where participants touch only their own equipment. Again, the State Defendants have not—and cannot—possibly justify why shooting ranges must remain closed throughout New Jersey.

As the Sixth Circuit recently noted when confronting a challenge to a

gubernatorial order that prohibited faith-based gatherings to stave the spread of COVID-19, stay-at-home orders of the kind issued by the Governor here raise constitutional problems when "many of the serial exemptions for [some] activities pose comparable public health risks to [constitutionally protected activities]." *Maryville Baptist Church, Inc. v. Beshear*, No. 20-5427, 2020 WL 2111316, at *3 (6th Cir. May 2, 2020) (per curiam). Such a regulatory patchwork is problematic precisely because "restrictions inexplicably applied to one group and exempted from another do little to further [the goal of lessening the spread of the virus] and do much to burden [constitutionally protected] freedom." *Id.* at *4. Plaintiffs respectfully ask this Court to recognize these same dangers.

Where a challenged law is drastically under-inclusive in the way that EO 107 is—failing to regulate activity that, by the Government's own account of the interest justifying the law, ought to be regulated *a fortiori*—that raises serious doubts about whether the challenged restriction is necessary. No one doubts the seriousness of the threat posed by the COVID-19 pandemic, or the importance of "flattening the curve." But if—as New Jersey has concluded—these public-health interests may be served while allowing Buy-Rite Wine & Liquor to remain open and permitting Farmstead Golf and Country Club to welcome back its members, it cannot be maintained that outdoor shooting ranges must be closed in the name of public health.

Even under intermediate scrutiny, a law cannot burden substantially more

constitutionally protected conduct than necessary to achieve the State's interest. *See McCullen v. Coakley*, 134 S. Ct. 2518, 2540 (2014). In *McCullen*, for example, the Supreme Court struck down a Massachusetts "buffer zone" law forbidding certain types of speech outside of abortion clinics, reasoning that the State had failed to show that regulations substantially less restrictive than such an extreme prophylactic measure were not just as "capable of serving its interests." *Id.* at 494. Massachusetts's law, the Court noted, was "truly exceptional," and the State was able to "identify no other State with a law" that was comparable, raising the "concern that the Commonwealth has too readily forgone options that could serve its interests just as well." *Id.* at 490. And even in the context of intermediate scrutiny, the Court concluded, the State must "show[] that it seriously undertook to address the problem with less intrusive tools readily available to it," or at least, "that it considered different methods that other jurisdictions have found effective." *Id.* at 494. This requirement, the Court explained, "prevents the government from too readily sacrificing speech for efficiency." *Id.* at 490 (brackets and quotation marks omitted).

Governor Murphy's closure of shooting ranges flunks intermediate scrutiny under the very same reasoning. While New Jersey concluded that less intrusive measures were sufficient to safeguard public health in the context of pet stores, liquor stores, golf courses, and tennis courts, it did not similarly exempt shooting ranges—even though the federal government recognized their essential role during

a pandemic. *See* Ex. 22 at 8. And even apart from a simple exemption, as in *McCullen*, there are other, far less-restrictive means available for achieving the State's professed goals. New Jersey could have, for example, (1) limited the number of people allowed on the premises of a shooting range at any one time to maintain social distancing; and (2) mandated enhanced sanitizing procedures for shooting ranges that remained open. *See* Ex. 8 at 7–9 (listing a variety of social-distancing and sanitation measures for golf courses seeking to reopen). Employing these methods may be less simple than a flat ban. But while nakedly suppressing constitutionally protected conduct "is sometimes the path of least resistance," intermediate scrutiny's tailoring requirement is designed precisely to "prevent[] the government from too readily sacrificing [constitutional rights] for efficiency." *McCullen*, 573 U.S. at 486 (brackets and quotation marks omitted); *see also Bruni v. City of Pittsburgh*, 824 F.3d 353, 371 (3d Cir. 2016).

This same tailoring problem has already been recognized during this pandemic with respect to the closure of firearm retailers. As Justice Wecht of the Pennsylvania Supreme Court explained in his description of the inadequate tailoring behind Pennsylvania's emergency order there:

> [J]ust as the Governor has permitted restaurants to offer take-out service but restricted dine-in options, the Governor may limit the patronage of firearm retailers to the completion of the portions of a transfer that must be conducted in-person. Such an accommodation may be effectuated while preserving sensible restrictions designed to slow the spread of COVID-19, but nonetheless provide a legal avenue

> for the purchase and sale of firearms, thus avoiding an impermissible intrusion upon a fundamental constitutional right.

Civil Rights Defense Firm, P.C. v. Wolf, — A.3d —, 2020 WL 1329008, at *2 (Pa. Mar. 22, 2020) (Wecht, J., concurring in part and dissenting in part).

This same need for accommodation exists here. To sustain EO 107's application to outdoor shooting ranges under intermediate scrutiny, Defendants must show that the Governor's ban on firearm training is reasonably necessary to protect public health: (1) even though it has allowed other establishments and venues—both indoors and outdoors—including liquor stores, marijuana dispensaries, garden centers, golf courses, and tennis courts to remain open; and (2) even though a variety of measures are available to protect the public health *while allowing* law-abiding New Jersey citizens to continue to exercise their Second Amendment rights.

The bottom line is this: If outdoor firing ranges can adopt reasonable, tailored social-distancing measures and enhanced sanitation—as ANJRPC has offered to do at Cherry Ridge Range, *see* Bach Decl. ¶ 8—Defendants cannot show that their outright *ban* on firearm training at shooting ranges is necessary to advance public safety. Plaintiffs are therefore likely to succeed on the merits of their Second Amendment challenge.

II. Plaintiffs Face Irreparable Harm Absent a Preliminary Injunction.

The conclusion that Plaintiffs are likely to succeed on their Second Amendment claim compels the conclusion that they face continuing irreparable

injury absent injunctive relief. It is well-accepted that the deprivation of a constitutional right constitutes irreparable harm. *See, e.g.*, *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 113 (3d Cir. 2013). The Third Circuit has recognized this rule for a variety of constitutional rights. *See, e.g.*, *id.* (First Amendment); *Lewis v. Kugler*, 446 F.2d 1343, 1350 (3d Cir. 1971) (Fourth Amendment). Rights under the Second Amendment should be treated no differently. *See McDonald*, 561 U.S. at 780.

> The loss of a First Amendment right is frequently presumed to cause irreparable harm based on the intangible nature of the benefits flowing from the exercise of those rights. . . . The Second Amendment protects similarly intangible and unquantifiable interests. *Heller* held that the Amendment's central component is the right to possess firearms for protection. Infringements of this right cannot be compensated by damages.

Ezell I, 651 F.3d at 699 (quotation marks and citation omitted). Each day Defendants' unconstitutional ban on firearm training continues, Plaintiff Ricci and others like her risk physical injury because they are unable to engage in range training. That injury cannot be compensated through money damages. *See id.*

III. The Balance of the Equities Favors Preliminary Injunctive Relief.

The public interest and balance of equities likewise favor Plaintiffs given that they are likely to succeed on the merits of their constitutional claims. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights," *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998), for "the

enforcement of an unconstitutional law vindicates no public interest," *K.A. ex rel. Ayers*, 710 F.3d at 114; *see also Wrenn*, 864 F.3d at 667. On the other side of the scale, Defendants suffer little harm, as they have no valid interest in enforcing New Jersey's unconstitutional ban on range training and, as explained above, there is no substantial reason demonstrating it is needed to safeguard public health.

IV. The Court Should Waive Bond or Set Bond at a Nominal Amount.

While Federal Rule of Civil Procedure 65 provides that "[t]he court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined," the Third Circuit has recognized that the district court may sometimes dispense with that requirement. *Temple Univ. v. White*, 941 F.2d 201, 219 (3d Cir. 1991). In "noncommercial cases" such as this one, the Court should "balance . . . the equities of the potential hardships that each party would suffer as a result of a preliminary injunction" and may excuse the bond on that basis. *Elliott v. Kiesewetter*, 98 F.3d 47, 59–60 (3d Cir. 1996). "The court should also consider whether the applicant seeks to enforce a federal right and, if so, whether imposing the bond requirement would unduly interfere with that right." *Borough of Palmyra, Bd. of Educ. v. F.C. ex rel. R.C.*, 2 F. Supp. 2d 637, 646 (D.N.J. 1998). Here, Defendants will not suffer costs and damages from the proposed preliminary injunction, while imposing a more than *de minimis* bond would unduly interfere with

Plaintiffs' Second Amendment Rights. Plaintiffs should therefore not be required to post security or should be required to post only a nominal amount.

V. The Court Should Enter a Permanent Injunction.

For the foregoing reasons, Plaintiffs are entitled to a preliminary injunction restraining the enforcement of EO 107; and because the claims in this case require no further factual development, permanent injunctive relief is likewise appropriate. Federal Rule of Civil Procedure 65(a)(2) authorizes a court considering a motion for preliminary injunctive relief to "advance the trial on the merits and consolidate it with the hearing" on the motion for preliminary relief in appropriate cases. *See also DeLeon v. Susquehanna Cmty. Sch. Dist.*, 747 F.2d 149, 152 n.6 (3d Cir. 1984); *Getzes v. Mackereth*, No. 13-cv-2067, 2013 WL 5882040, at *2 (M.D. Pa. Oct. 30, 2013). Courts have repeatedly held that such consolidation is appropriate where "no factual or legal disputes will remain once the Court resolves the preliminary injunction motion," *Morris v. District of Columbia*, 38 F. Supp. 3d 57, 62 n.1 (D.D.C. 2014), such that "the eventual outcome on the merits is plain at the preliminary injunction stage," *Curtis 1000, Inc. v. Suess*, 24 F.3d 941, 945 (7th Cir. 1994); *accord Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1102 (9th Cir. 1998), *abrogated on other grounds Dream Palace v. County of Maricopa*, 384 F.3d 990 (9th Cir. 2004).

That is the case here. The facts relevant to Plaintiffs' challenge—that

Defendants have promulgated and are enforcing EO 107, that it contains exemptions for some establishments but not shooting ranges, and that it flatly bars ordinary, law-abiding citizens from engaging in training needed to hone their firearm skills—are not plausibly in dispute. Rather, whether Plaintiffs will prevail turns entirely on this Court's resolution of the constitutional questions presented above—questions that the Court should resolve in Plaintiffs' favor as a matter of law. Accordingly, "the merits of the plaintiffs' challenge are certain and don't turn on disputed facts," and the Court should enter final judgment and permanent, not merely preliminary, injunctive relief. *Wrenn*, 864 F.3d at 667; *see also Moore*, 702 F.3d at 942.

CONCLUSION

For the foregoing reasons, the Court should restrain and enjoin the enforcement of EO 107 against outdoor shooting ranges and patrons visiting them.

Dated: May 13, 2020

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DELORES RICCI, *et al.*, *Plaintiffs*, v. PHILIP D. MURPHY, in his official capacity as Governor of New Jersey, *et al.*, *Defendants*.	HON. NOEL L. HILLMAN, U.S.D.J. HON. KAREN M. WILLIAMS, U.S.M.J. CIVIL ACTION NO. 20-cv-5800 **CIVIL ACTION** **(ELECTRONICALLY FILED)**

ORDER GRANTING TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

THIS MATTER having been opened to the Court upon the application of Hartman & Winnicki, P.C., attorneys for Plaintiffs, for a temporary restraining order and/or preliminary injunction pursuant to FED. R. CIV. P. 65 and L. Civ. R. 65.1 enjoining Defendants' enforcement of Executive Order 107 against outdoor shooting ranges; and the Court having considered the submissions of counsel; and for good cause having been shown;

IT IS on this___ day of _____ , 2020, **ORDERED AS FOLLOWS**:

1. Plaintiffs' Motion is hereby granted in its entirety and without bond;

2. Until further order of this Court, Defendants, their officers, agents, servants, employees, and attorneys, and other persons who are in active concert or

participation with the foregoing are restrained and enjoined from enforcing any portion of Executive Order 107 or any related order against outdoor shooting ranges in New Jersey and patrons visiting them.

_____

Hon. Noel L. Hillman
U.S.D.J.

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**Pro hac vice* application forthcoming

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DELORES RICCI, *et al.*, *Plaintiffs,* v. PHILIP D. MURPHY, in his official capacity as Governor of New Jersey, *et al.*, *Defendants.*	HON. NOEL L. HILLMAN, U.S.D.J. HON. KAREN M. WILLIAMS, U.S.M.J. CIVIL ACTION NO. 20-cv-5800 **CIVIL ACTION** **(ELECTRONICALLY FILED)**

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2020, I electronically filed the following documents with the Clerk of the Court using the CM/ECF system:

1. Notice of Motion For a Temporary Restraining Order and/or Preliminary Injunction;
2. Declaration of Delores Ricci
3. Declaration of Scott Bach
4. Declaration of Daniel L. Schmutter with accompanying exhibits
5. Brief in Support of Motion
6. Proposed Form of Order; and
7. Certificate of Service.

I further certify that on or about May 14, 2020, one courtesy copy of each of the foregoing documents, marked as "Courtesy Copy," will be sent by regular mail to chambers.

I further certify that one copy of the foregoing documents is being served as follows on the 13th day of May 2020 upon the following counsel for Defendants:

Stuart Feinblatt, Esq.
Deputy Attorney General
New Jersey Dep't of Law & Public Safety
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Joseph Fanaroff, Esq.
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Attorneys for Defendants Philip D. Murphy,
Gurbir S. Grewal, and Patrick J. Callahan

All by email to
NJAG.ElectronicService.CivilMatters@law.njoag.gov
with consent in lieu of paper copies.

I hereby certify that the foregoing statements are true. I understand that if any of the foregoing statements made by me are willfully false that I am subject to punishment.

May 13, 2020

s/ Daniel L. Schmutter
DANIEL L. SCHMUTTER

Attorney for Plaintiffs