NO. _____

In the Supreme Court of the United States

GABRIEL GRAY, *et al.*,

Petitioners,

v.

KATHY JENNINGS, in her Official Capacity as Attorney General of Delaware, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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September 16, 2024

QUESTION PRESENTED

Whether the infringement of Second Amendment rights constitutes *per se* irreparable injury.

PARTIES TO THE PROCEEDING

This petition arises from three cases consolidated in the district court and the court of appeals.

In the first case, No. 23-1633 in the court of appeals and No. 22-cv-1500 in the district court, Petitioners are Gabriel Gray, William Taylor, DJJAMS LLC, Firearms Policy Coalition, Inc., and Second Amendment Foundation. Petitioners were plaintiffs in the district court and appellants in the court of appeals. The Respondent in the first case is Kathy Jennings, in her official capacity as Attorney General of Delaware, who was the defendant in the district court and appellee in the court of appeals.

In the second case, No. 23-1634 in the court of appeals and No. 23-cv-33 in the district court, Petitioners are Christopher Graham, Owen Stevens, Firearms Policy Coalition, Inc., and Second Amendment Foundation. Petitioners were plaintiffs in the district court and appellants in the court of appeals. Respondent Jennings was also the defendant in the district court and the appellee in the court of appeals in this case.

These two cases were consolidated in the district court and court of appeals with a third case, No. 23-1641 in the court of appeals and No. 22-cv-951 in the district court. In this third case, the plaintiffs in the district court and appellants in the court of appeals were Delaware State Sportsmen's Association, Inc., Bridgeville Rifle & Pistol Club, Ltd., Delaware Rifle and Pistol Club, Delaware Association of Federal Firearms Licensees, Madonna M. Nedza, Cecil Curtis Clements, James E. Hosfelt, Jr., Bruce C. Smith, Vickie Lynn Prickett, and Frank M. Nedza. The

Delaware Department of Safety and Homeland Security, Nathanial McQueen Jr., in his official capacity as Cabinet Secretary of the Delaware Department of Safety and Homeland Security, and Colonel Melizza A. Zebley, in her official capacity as Superintendent of the Delaware State Police, were the defendants in the district court and appellees in the court of appeals in this case. Pursuant to this Court's Rule 12.6, these parties are deemed Respondents in this proceeding.

CORPORATE DISCLOSURE STATEMENT

DJJAMS, LLC, has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

Firearms Policy Coalition, Inc., has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

Second Amendment Foundation has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Gray v. Attorney General Delaware*, No. 23-1633 (3d Cir.) (judgment entered July 15, 2024).
- *Graham v. Attorney General Delaware*, No. 23-1634 (3d Cir.) (judgment entered July 15, 2024).
- *Delaware State Sportsmen's Ass'n v. Delaware Dep't of Safety & Homeland Sec.*, No. 23-1641 (3d Cir.) (judgment entered July 15, 2024).
- *Gray v. Jennings*, No. 22-cv-1500 (D. Del.) (preliminary injunction denied Mar. 27, 2023).
- *Graham v. Jennings*, No. 23-cv-33 (D. Del.) (preliminary injunction denied Mar. 27, 2023).
- *Delaware State Sportsmen's Ass'n v. Delaware Dep't of Safety & Homeland Sec.*, No. 22-cv-951 (D. Del.) (preliminary injunction denied Mar. 27, 2023).

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The Constitution guarantees individual rights that are fundamental and inalienable; it does not promulgate a schedule of compensation the Government must pay if it wishes to restrict speech, engage in unreasonable searches, or ban the possession of common firearms. This Court has accordingly recognized that the rights secured by our fundamental charter belong to a class of "important, but not easily quantifiable, nonpecuniary rights" that are "not readily reducible to monetary valuation." *Uzuegbunam v. Preczewski*, 592 U.S. 279, 141 S. Ct. 792, 800 (2021). And from these two foundational principles a third follows: in a suit for the violation of one of these fundamental constitutional rights, the remedy at law—money damages—is wholly inadequate, due to the intangible nature of the harm that has been suffered. As this Court has stated in the context of the Freedom of Speech, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality). And so long as the other traditional factors are met, *see Winter v. NRDC*, 555 U.S. 7, 32 (2008), that irreparable injury will justify a preliminary injunction putting a halt to the constitutional violation while the case progresses.

The panel below acknowledged that this is the rule that applies under the First Amendment—in step with every other federal court of appeals—but it somehow concluded that it does not apply to the Second Amendment. It accordingly declined to enjoin Delaware's bans on common firearms and magazines (which the State dubs "assault weapons" and "large capacity magazines") *without even inquiring* into

whether those bans are likely unconstitutional, based on Petitioners' failure to establish an irreparable harm other than the loss of their Second Amendment rights. App.19a. That refusal to treat the harm inflicted by the loss of Second Amendment rights as *per se* irreparable squarely conflicts with the decisions of the Seventh and Ninth Circuits, which have held that the irreparability analysis "does not change where the constitutional violation at issue is a Second Amendment violation," *Baird v. Bonta*, 81 F.4th 1036, 1046 (9th Cir. 2023), since "[t]he Second Amendment protects similarly intangible and unquantifiable interests," *Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011). And by treating violations of the First Amendment as inherently irreparable but not violations of the Second, the decision below demotes the right to keep and bear arms to "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 70 (2022) (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality)).

No monetary damages can adequately compensate a plaintiff for the loss of his inalienable constitutional rights. The Framers charged this Court and the Nation's other "independent tribunals of justice" with "resist[ing] every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights," 1 ANNALS OF CONG. 439 (1789) (statement of Rep. James Madison)—not with standing clear of open encroachments so long as the Government pays its way. This Court has repeatedly recognized this principle in the context of the First Amendment, *Tandon v. Newsom*, 593 U.S. 61, 64 (2021) (per curiam);

Roman Catholic Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 19 (2020) (per curiam); *Elrod*, 427 U.S. at 373 (plurality), but it has not explained its reasoning at significant length. The brevity of this Court's decisions on the subject has led to confusion—and now, direct conflict—in the courts of appeals over the principle's nature and scope. This Court should grant the writ and clarify that the loss of Second Amendment freedoms, too, necessarily constitutes irreparable injury.

OPINIONS BELOW

The panel of the Court of Appeals is reported at 108 F.4th 194 and reproduced at App.1a. The order of the District Court declining to grant Petitioners' motion for a preliminary injunction is reported at 664 F. Supp. 3d 584 and reproduced at App.53a.

JURISDICTION

The Court of Appeals issued its judgment on July 15, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant portions of Amendments II and XIV to the United States Constitution and of the Delaware Code are reproduced in the Appendix beginning at App.93a.

STATEMENT

I. Delaware's Bans on Common Firearms and Magazines.

The State of Delaware deems scores of common semiautomatic firearms "assault weapons"—and bans

them outright. DEL. CODE ANN. tit. 11, §§ 1465, 1466. "The list of prohibited firearms is long. It includes (1) forty-four enumerated semi-automatic 'assault long gun[s],' including the AR-15, AK-47, and Uzi, (2) nineteen specifically identified semi-automatic 'assault pistol[s],' and (3) 'copycat weapon[s].' " App.57a (citations omitted); *see* DEL. CODE ANN. tit. 11, §§ 1465(2), (3) & (4). "Copycat weapons" are defined to include any semiautomatic, centerfire rifle that has at least one of the following features:

> 1. A folding or telescoping stock.
>
> 2. Any grip of the weapon, including a pistol grip, a thumbhole stock, or any other stock, the use of which would allow an individual to grip the weapon, resulting in any finger on the trigger hand in addition to the trigger finger being directly below any portion of the action of the weapon when firing.
>
> 3. A forward pistol grip.
>
> 4. A flash suppressor.
>
> 5. A grenade launcher or flare launcher.

DEL. CODE ANN. tit. 11, § 1465(6)(a). "Copycat weapons" also include any semiautomatic pistol that "can accept a detachable magazine" and has at least one of the following features:

> 1. [A]n ability to accept a detachable ammunition magazine that attaches at some location outside of the pistol grip.
>
> 2. A threaded barrel capable of accepting a flash suppressor, forward pistol grip or silencer.
>
> 3. A shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to fire the firearm without being burned, except a slide that encloses the barrel.
>
> 4. A second hand grip.

Id. § 1465(6)(c).

Delaware bans any person from manufacturing, selling, purchasing, receiving, possessing, or transporting into the State one of these firearms, unless they belong to a narrow class of favored individuals such as U.S. Government personnel, members of the armed forces, and law enforcement officers. *Id.* § 1466(a), (b). Ordinary citizens may transport, possess, purchase, or receive the banned firearms only if they lawfully possessed or purchased them before June 30, 2022, and only in specified circumstances. *Id.* § 1466(c)(3).

Delaware also bans common, standard-sized firearm ammunition magazines. The state defines "any ammunition feeding device capable of accepting, or that can readily be converted to hold, more than 17 rounds of ammunition" as a so-called "Large-capacity magazine." *Id.* § 1468(2). Again, it is unlawful for anyone who does not fit within a narrow category of favored, exempt individuals to "manufacture, sell, offer

for sale, purchase, receive, transfer, or possess" one of the banned magazines. *Id.* §§ 1469(a), (c). Unlike with the banned semiautomatic firearms, even individuals who lawfully owned one of the banned magazines before the ban took effect must now dispose of them—by, for example, having the magazine "permanently modified to accept 17 rounds of ammunition or less," or by relinquishing the magazine to the Delaware Department of Safety and Homeland Security through a buyback program. *See id.* §§ 1469(c)(7), (d).

Violation of Delaware's semiautomatic firearm ban is punishable by up to 8 years in prison, *see id.* §§ 1466(d), 4205(b)(4), and results in a lifetime disqualification from owning firearms and ammunition, *see* 18 U.S.C. § 922(g)(1). Violation of Delaware's magazine ban is punishable by a fine of $100 for the first violation, forfeiture of the magazine, and penalties ranging up to 5 years imprisonment for subsequent violations. *See* DEL. CODE ANN. tit. 11, §§ 1469(b), 4205(b)(5).

II. The Bans' Impact on Petitioners.

Petitioners Gray, Taylor, Graham, and Stevens are law-abiding United States citizens and residents of Delaware. Pls'. App'x at 296–97, 621–22, 636–37, *DSSA v. Att'y Gen. of Del.*, No. 23-1633 (3d Cir. July 3, 2023), ECF No. 30-1 ("3d Cir. App'x"). Petitioners Gray and Taylor wish to acquire, possess, and use for lawful purposes the common semiautomatic firearms Delaware bans, and they would do so were it not for the State's ban on that conduct. *Id.* at 296, 621–22. Petitioners Graham and Stevens both own firearms capable of being equipped with greater-than-seventeen-round magazines, and they wish to purchase

such magazines, yet they are forced to refrain from doing so solely because of the State's ban on that conduct. *Id.* at 636–37.

Petitioner DJJAMS LLC is a federally licensed firearm dealer operating in Delaware. *Id.* at 293, 622. Many current and prospective customers wish to purchase the firearms Delaware bans as "assault weapons" from DJJAMS, and DJJAMS wishes to sell those common semiautomatic firearms to them. *Id.* at 622–23. It refrains from doing so only because it reasonably fears enforcement of Delaware's ban on that conduct. *Id.* at 293, 622–23. As a result of the ban, it has been forced to turn away prospective customers wishing to purchase the banned firearms, and it has experienced a notable decline in revenue. *Id.* at 293, 623.

Petitioners Firearms Policy Coalition and Second Amendment Foundation are two associations organized for the purpose of promoting, preserving, and defending constitutional rights, including the right to keep and bear arms. *Id.* at 623–25, 637. Both associations have members in Delaware who wish to purchase and possess the banned semiautomatic firearms and ammunition magazines and would do so but for the challenged provisions. *Id.*

III. The Proceedings Below.

1. Petitioners Gray, Taylor, DJJAMS, Firearms Policy Coalition, and Second Amendment Foundation filed suit challenging Delaware's ban on certain semiautomatic firearms on November 16, 2022. *Id.* at 600–28. Petitioners Graham, Stevens, Firearms Policy Coalition, and Second Amendment Foundation filed suit challenging Delaware's magazine ban on January 12, 2023. *Id.* at 633–57. Both cases were consolidated

with *Delaware State Sportsmen's Ass'n v. Delaware Department of Safety and Homeland Security*, another suit pending in the same court that challenged both the firearms and magazine bans. The district court had jurisdiction over all three consolidated actions under 28 U.S.C. §§ 1331 and 1343.

Prior to consolidation, Petitioners Gray, Taylor, DJJAMS, Firearms Policy Coalition, and Second Amendment Foundation, and the plaintiffs in the *Delaware State Sportsmen's Association* case, had each respectively sought preliminary injunctive relief against the challenged bans. 3d Cir. App'x at 283–84, 629–30. And when their suit against the magazine ban was likewise consolidated with the other two challenges, Petitioners Graham, Stevens, Firearms Policy Coalition, and Second Amendment Foundation joined the pending motion for a preliminary injunction against that ban. *Id.* at 596. On March 27, 2023, the district court entered an opinion and order refusing to preliminarily enjoin either of the challenged bans.

The district court correctly concluded that both the firearm and ammunition bans apply to firearms and ammunition magazines that are protected by the Second Amendment because they are " 'arms' within the meaning of the Second Amendment" and are " 'in common use' for lawful purposes that include self-defense." App.66a–68a, 72a–75a. While these determinations should have mandated judgment for Petitioners under *Heller* and *Bruen*, the district court nonetheless went on to ask whether Delaware could "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." App.75a (quoting *Bruen*, 597 U.S. at 24).

It answered that question in the affirmative, concluding that the banned firearms and magazines "implicate dramatic technological change and unprecedented societal concerns," due to the purported "rise in the yearly rate of public mass shootings over the past four decades" and the features that supposedly render the banned arms "exceptionally dangerous." App.79a–82a. It further reasoned that Delaware's ban was "relevantly similar" to a cobbled-together collection of historical laws—including mid-nineteenth-century laws that restricted the carry (but not the possession) of "Bowie knives," and mid–twentieth-century restrictions on "[f]ully automatic" machine guns. App.82a–83a, 85a. Accordingly, the court held that Petitioners were unlikely to succeed on the merits. It also concluded that Petitioners failed to show irreparable harm, rejecting their argument that the deprivation of Second Amendment rights necessarily constitutes an irreparable injury. App.89a–91a.

2. Petitioners and the *Delaware State Sportsmen's Association* plaintiffs all appealed, and their appeals were consolidated in the Third Circuit. On July 14, 2024, that court affirmed. The principal opinion for the panel "express[ed] no view of the merits" of Petitioners' Second Amendment challenge. Instead, the panel concluded that the district court had been correct to refuse a preliminary injunction based solely on the non-merits injunction factors.

The panel primarily based its holding on the conclusion that the challengers failed to demonstrate irreparable harm. It began by recounting at length the history of the preliminary injunction in the English Court of Chancery and at the Founding, concluding that it is "an extraordinary remedy" that, strictly

speaking, "is proper only in the rare case when a preliminary injunction is necessary to preserve the effectiveness of the ordinary adjudicatory process." App.9a, 11a (cleaned up). The panel acknowledged that "our sister circuits have presumed harm in various settings," including the infringement of Second Amendment rights, but it concluded that those decisions "strayed from" the correct understanding of the preliminary injunction. App.11a, 17a.

The panel also recognized that the Third Circuit had indeed deemed "constitutional harms irreparable" in previous cases; but it insisted that those precedents all fell within an "exception to our rule: we presume that First Amendment harms are irreparable." App.17a–18a. That exception, according to the panel, was justified by "[u]nique First Amendment doctrines" and does not apply in the context of any other constitutional rights. *Id.* And given this reframing of the highly limited availability of preliminary injunctive relief, the panel concluded that Petitioners "claim of irreparable harm collapses." App.19a. It further concluded that the remaining equitable factors also militated against preliminary relief, reasoning that "[t]here is always a public interest in prompt execution of the laws" and that "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." App.22a (cleaned up).

3. Judge Roth concurred. In addition to concluding that the non-merits injunction factors weighed against preliminary relief, she would have held that the challenged bans are likely constitutional under the Second Amendment. In her view, "the 'bearable arms' presumptively protected by the Second

Amendment are limited to weapons used explicitly for self-defense," such that if a challenger cannot show that "the weapon in question is suitable for, owned for, and actually used in self-defense," it is not protected at all. App.34a–36a. And even arms that are used for self-defense according to these metrics, Judge Roth maintained, are still not necessarily protected by the Second Amendment: for "even though a weapon might be useful in civilian and military contexts, a weapon that is 'most' suited for military use falls outside the scope of 'Arms' protected by the Second Amendment." App.41a. Judge Roth would have held that under this interpretation of the Second Amendment, "*none* of the" arms or magazines in question are " 'Arms' presumptively protected by the Second Amendment" because they are "most useful as weapons of war." App.42a, 45a.

REASONS FOR GRANTING THE WRIT

I. The Federal Courts of Appeals Are Divided Over Whether the Infringement of Second Amendment Rights Constitutes *Per Se* Irreparable Injury.

The circuit courts of appeals have split over the question presented, with two circuits holding that the infringement of Second Amendment rights necessarily inflicts a harm that is irreparable, and the Third Circuit, through the panel's decision below, holding that the deprivation of Second Amendment freedoms does not inevitably amount to irreparable injury.

A. The Seventh and Ninth Circuits Have Held that the Infringement of Second Amendment Rights Necessarily Constitutes Irreparable Injury.

In *Ezell v. City of Chicago*, the Seventh Circuit preliminarily enjoined a Chicago ordinance that prohibited the construction of firing ranges within city limits. Because "[t]he right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use," *Ezell*, 651 F.3d at 704, the court concluded that the city's ban likely infringed the Second Amendment rights of individuals who wished to train with firearms in Chicago. And it followed that the plaintiffs also suffered irreparable harm:

> 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; and the fear that, if those rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future. 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.

Id. at 699 (cleaned up). "In short," the Seventh Circuit held, "for reasons related to the form of the claim and the substance of the Second Amendment right, the plaintiffs' harm is properly regarded as irreparable

and having no adequate remedy at law." *Id.* at 700. The court thus remanded the case for proceedings on the merits and "with instructions to enter a preliminary injunction." *Id.* at 711.

The Ninth Circuit has similarly held that the infringement of Second Amendment rights constitutes *per se* irreparable harm. In *Baird v. Bonta*, that court considered a Second Amendment challenge to California's handgun licensing regime, which "effectively establishes a statewide ban on open carry by ordinary law-abiding Californians." 81 F.4th at 1039. The district court denied the challengers' request to preliminarily enjoin the ban, and in doing so it "declined to undertake *any* inquiry into [the] likelihood of success on the merits of their Second Amendment challenge," instead merely "concluding that, because the public interest and balance of harms disfavored the issuance of a preliminary injunction, it was 'not necessary' to assess [the] likelihood of success on the merits." *Id.* at 1044. The Ninth Circuit held that this refusal to consider likelihood of success was an abuse of discretion.

"The first [injunction] factor—likelihood of success on the merits—is the most important (and usually decisive) one in cases where a plaintiff brings a constitutional claim," the Ninth Circuit explained. *Id.* at 1041–42. For "[i]f a plaintiff bringing such a claim shows he is likely to prevail on the merits, that showing will almost always demonstrate he is suffering irreparable harm as well," *id.* at 1042, since " 'the deprivation of constitutional rights unquestionably constitutes irreparable injury.' " *Id.* at 1042 (quoting *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 911 (9th Cir. 2014), *abrogated on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S.

214 (2022)). And "[t]his analysis does not change where the constitutional violation at issue is a Second Amendment violation because the right to peaceably bear arms to defend oneself is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.' " *Id.* at 1046 (quoting *McDonald*, 561 U.S. at 780 (plurality)).

B. By Contrast, the Decision Below Held that Infringement of Second Amendment Rights Does Not Necessarily Amount to Irreparable Injury.

The panel below expressly departed from the Seventh and Ninth Circuit's approach, holding that the infringement of Second Amendment rights *does not* necessarily inflict irreparable harm or warrant preliminary injunctive relief. Citing the practice of the English Court of Chancery and Alexander Hamilton's observation that equity acts "in extraordinary cases," the panel held that preliminary injunctions are generally only warranted when needed "to preserve the court's power to render a meaningful decision after a trial on the merits." App.5a–7a, 11a (cleaned up). "Thus," the panel concluded, "the threat of irreparable harm does not automatically trigger a preliminary injunction." App.12a. "Only when the threatened harm would impair the court's ability to grant an effective remedy is there really a need for preliminary relief." *Id*. (cleaned up).

The panel accordingly rejected the proposition—which it acknowledged was accepted by many of its "sister circuits"—that "constitutional harms" are *per se* "irreparable." App.17a. That principle, it contended, "would trample on traditional principles of

equity," "collapse[ ] the four [preliminary injunction] factors into one," and lead to "rushed judgment" on the merits. App.14a–16a. While the panel conceded that constitutional harms *are indeed considered irreparable* in the First Amendment context, it concluded that this practice was an "exception to our rule" that is "limit[ed] . . . to the First Amendment" and warranted by "[u]nique First Amendment doctrines." App.18a–19a. No such principle, it held, applies in Second Amendment cases.

The federal courts of appeals that have addressed this question have thus divided 2-1 over whether the infringement of Second Amendment rights *per se* constitutes irreparable harm. That split in authority impacts the relief available in cases seeking to vindicate the fundamental right to keep and bear arms, and it is intolerable. Given this division in the lower courts, a law-abiding citizen who challenges an Illinois or California law banning him from keeping or carrying common firearms may obtain preliminary relief allowing him to exercise his constitutional right to protect his home and family while the case is litigated, while a plaintiff in Delaware or New Jersey may not. This Court should grant certiorari and resolve this conflict in the lower courts.

II. The Decision Below Conflicts with this Court's Decisions by Subjecting the Second Amendment to a Different, and Less Protective, Body of Rules than Other Constitutional Rights.

This Court established in *McDonald* and reaffirmed in *Bruen* 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." *Bruen*, 597 U.S. at 70 (quoting *McDonald*, 561 U.S. at 780 (plurality)). The decision below explicitly flouts that principle, refusing to give Second Amendment challengers the benefit of the same principles that unquestionably apply under the First Amendment. This Court should grant review and repudiate this latest attempt to demote the Second Amendment to second-class status.

This Court has made clear that the infringement of First Amendment rights constitutes a *per se* irreparable injury that, other things being equal, justifies preliminary injunctive relief. The Court first established that principle in the plurality opinion in *Elrod v. Burns*, concluding that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." 427 U.S. at 373. And more recently, the Court reaffirmed the principle in two per curiam opinions arising out of the COVID-19 pandemic.

First, a majority of Justices in *Roman Catholic Diocese of Brooklyn v. Cuomo* preliminarily enjoined New York's COVID-19 restrictions on public worship after concluding that "[t]here can be no question that the challenged restrictions, if enforced, will cause irreparable harm." 592 U.S. at 19 (per curiam) (citing *Elrod*, 427 U.S. at 373 (plurality)); *accord id.* at 26 (Gorsuch, J., concurring) (rejecting the argument that even if the challenged restrictions "do violate the Constitution . . . we should stay our hand all the same"); *id.* at 31 (Kavanaugh, J., concurring) ("the applicants have shown[ ] . . . irreparable harm"). And likewise, the Court enjoined California's similar restrictions on religious exercise during the pandemic in *Tandon v.*

Newsom, again concluding that the challengers were "irreparably harmed by the loss of free exercise rights for even minimal periods of time." 593 U.S. at 64 (per curiam) (cleaned up).

Indeed, the panel below *acknowledged this rule*, conceding that "we presume that First Amendment harms are irreparable," yet it refused to apply the same principle to Second Amendment harms. App.18a. That result "subject[s]" the right to keep and bear arms to a different and less protective "body of rules than the other Bill of Rights guarantees," *Bruen*, 597 U.S. at 70 (quoting *McDonald*, 561 U.S. at 780 (plurality)), contrary to this Court's repeated instructions.

The proposition that the infringement of substantive constitutional rights inflicts harm that is *per se* irreparable, far from "trampl[ing] on traditional principles of equity," App.16a, flows directly from them. From the dawn of the English Court of Chancery onward, "[t]he universal test of the jurisdiction, admitted alike by the courts of England and of the United States, is the inadequacy of the legal remedy of damages." 4 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1341 (3d ed. 1905). And one paradigmatic scenario where the available remedies at law are inadequate has always been cases involving harm that is "intangible" in some sense, "the pecuniary value of which cannot be certainly estimated." *Id.* § 1347.

Thus, as Justice Story recounted in his influential treatise, injunctive relief would issue "in the case of a copyright," where infringement may "be injuring [the holder] to an incalculable extent" and "mere

damages would give no adequate relief." 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 236–37 (13th ed. 1886). Likewise, "[a]nother intangible kind of property which will be protected from invasion by injunction is 'good-will,' " where again "[t]he legal remedy would be inadequate, for it would always be very difficult, if not impossible, to estimate the pecuniary damages upon any certain basis." POMEROY, *supra*, at § 1355 & n.2. And similar reasoning has long justified injunctive relief or specific performance in cases involving the breach of contracts for unique parcels of land, F.W. MAITLAND, EQUITY AND THE FORMS OF ACTION 237–38 (1920), unique goods such as "rare china or the like," *id.* at 239; *see also* POMEROY, *supra*, at § 1402, or unique services, such as a performance "by an eminent actor, singer, artist, and the like," *id.* § 1343. In all such cases, the unique nature of the property or service in question means that the harm caused by the breach includes an intangible component—above and beyond the "market value" of the goods, property, or services, MAITLAND, *supra*, at 238—making it "impossible to arrive at a legal measure of damages at all," POMEROY, *supra*, at § 1403, and thus rendering "the remedy at law of damages . . . wholly inadequate," *id.* § 1343.

The longstanding recognition by the courts that the infringement of constitutional rights inflicts harm that is *per se* irreparable flows from the very same principles. The Constitution and its amendments mark out rights that are *intangible and inalienable* in nature; they do not set forth a table of monetary tariffs that the Government must pay if it wishes to engage in certain conduct. As this Court has explained, constitutional rights are "noneconomic" and

"nonpecuniary rights," and their violation thus inflicts a harm that is "not readily reducible to monetary valuation." *Uzuegbunam*, 141 S. Ct. at 800. An American citizen who is restricted from engaging in political speech is obviously harmed, but the harm is an intangible one, not a sum certain.

The availability of preliminary injunctive relief in constitutional rights cases also flows from the longstanding principle that legal remedies are inadequate for *continuing* wrongs. As Justice Story explained, while repeated or ongoing violations could in theory be "recompensed by repeated actions," "yet a Court of Equity will interpose" because of "the very circumstance, that without such interposition the party can do nothing but repeatedly resort to law." STORY, *supra*, at 211. Thus courts historically would enjoin an ongoing public nuisance because legal remedies "can only dispose of the present nuisance, and for future acts new prosecutions must be brought." *Id.* at 225. And equity would similarly interpose itself in cases where a private trespass was not "only contingent [and] temporary" but was "continued so long as to become a nuisance." *Id.* at 229.

The harm inflicted by an ongoing constitutional violation is irreparable in the very same way. A plaintiff restrained from engaging in protected speech, or from worshiping freely, is not injured at a single, discrete point in time that could be remedied by a claim for damages—even *assuming* that the injury was tangible and economic in nature. No, such a plaintiff is injured continuously, every day that the unconstitutional restriction is in effect. "If indeed Courts of Equity did not interfere in cases of this sort, there would

. . . be a great failure of justice in the country." *Id.* at 234.

The panel below thought that "[u]nique First Amendment doctrines" justify "limit[ing] the principle to the First Amendment," App.18a–19a but that is not so. The panel invoked the "heavy presumption against prior restraints," claiming that this indicated an understanding that "First Amendment activity, like weekly worship and political speech, can be especially time-sensitive." App.18a (cleaned up). But even assuming that something like this consideration is part of what underlies the principle that First Amendment harms are *per se* irreparable, that does not justify refusing to grant the Second Amendment the benefit of the same principle, since the rights protected by that provision *can also* "be especially time-sensitive." *Id.*

"The Second Amendment protects [the] right to bear firearms *for* self-defense—a right that can be infringed upon whether or not plaintiffs are ever actually called upon to use their weapons to defend themselves." *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 150 (D.D.C. 2016), *aff'd sub nom. Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017). Neither the plaintiffs challenging a law that likely violates the Second Amendment nor a court deciding whether to enjoin it has any way of knowing *when* the plaintiffs will be "called upon to use their weapons to defend themselves." *Id.* But such an occasion could arise at any time—including during the pendency of the suit—and if and when it does arise, it necessitates the most acutely "time-sensitive" activity possible: immediate armed self-defense "of one's home and family." *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008) (internal quotation marks omitted). A law-

abiding citizen facing a home invader will find little comfort in the fact that he retains the possibility of obtaining a permanent injunction allowing him to keep and bear arms *at the end of his lawsuit*, or that he (or his estate) may later be able to seek compensatory money damages.

The panel's second reason for limiting the principle of *per se* irreparable harm to First Amendment cases—the courts' historic "deference to sincere religious belief," App.19a—is even less persuasive. As an initial matter, this consideration fails utterly to justify the principle in the context where it first arose: the First Amendment's Free Speech Clause. *See Elrod*, 427 U.S. at 373 (plurality). Moreover, the panel majority never explains why this deference to the sincerity of religious belief has anything at all to do with the availability of preliminary injunctive relief. Yes, "courts will not second-guess the[ ] centrality" of "a believer's religious scruples," App.19a, but how does that bear on the question whether the believer should continue to suffer an infringement of those scruples while the suit goes forward? In all events, whatever weight this consideration has in rendering an injury to First Amendment rights *per se* irreparable, similar principles apply to the Second Amendment. The right to keep and bear arms, too, is "intangible and unquantifiable" and "cannot be compensated by damages." *Ezell*, 651 F.3d at 699. And the Second Amendment, too, "takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634.

Indeed, this final point illustrates perhaps the most pernicious consequence of the panel's decision: a

return to the subjective balancing approach applied by the lower courts for over a decade after *Heller* until it was finally interred by *Bruen*. Under that once-ubiquitous "two-step approach," courts routinely balanced away Second Amendment rights by "defer[ing]" to the Government's determinations about "the costs and benefits of firearms restrictions," *Bruen*, 597 U.S. at 25–26 (quoting *McDonald*, 561 U.S. at 790–91 (plurality)), in open defiance of this Court's instruction that a Second Amendment "guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all," *Heller*, 554 U.S. at 634. The Court did away with this balancing approach in *Bruen*, but the decision below affirmatively invites courts to withhold relief in Second Amendment cases based on precisely the same balancing exercise. Even where a challenged restriction obviously burdens conduct protected by the Second Amendment's text in a way unjustified by history, all a court need do to justify denying an injunction is find that the challenger's Second Amendment rights are unimportant or not time sensitive, invoke the supposed threat to public safety that would ensue were the restriction enjoined, and—hey Presto!—"arrive[ ] at [its] interest-balanced answer" and decline relief. *Id.*

Worse still, the panel's reasoning appears to lead to the conclusion that such a balancing exercise could justify even the refusal of a *permanent* injunction at the conclusion of the case. The panel insisted that its analysis "d[id] not decide . . . whether the challengers should get a permanent injunction if they win on the merits" and suggested that the test for "permanent injunctions" was somehow different because it "focus[es] not on preserving the case and avoiding interim

harms, but on whether the remedy at law is adequate." App.21a. But that attempt to create a cleavage between the preliminary and permanent injunction standards is flatly contrary to settled law.

As this Court has held time and again, "[t]he standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987); *accord Winter*, 555 U.S. at 32. And because both types of injunction unquestionably require a showing of irreparable harm, the panel's reasoning that Second Amendment harms cannot be deemed *per se* irreparable would appear to lead inexorably to the denial of permanent injunctions as well as preliminary ones, notwithstanding its empty protestations to the contrary.

The panel's decision thus necessarily erects a "hierarchy among[ ] constitutional rights," *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 628 (1989)—treating the First Amendment as a cherished heir and relegating the Second to the status of an ill-favored cousin. The Court should grant review and repudiate this attempt to subject the Second Amendment "to an entirely different body of rules than the other Bill of Rights guarantees." *Bruen*, 597 U.S. at 70 (quoting *McDonald*, 561 U.S. at 780 (plurality).

III. This Case Presents an Ideal Opportunity to Resolve the Conflict and Confusion in the Lower Courts Over the Extent to Which Constitutional Violations Inflict *Per Se* Irreparable Harm.

This case also provides the Court with an opportunity to address a broader issue in constitutional litigation: how courts should analyze the irreparable harm injunction factor in constitutional challenges more generally. As noted, this Court has made clear that First Amendment violations inflict *per se* irreparable harm, *see Roman Catholic Diocese of Brooklyn*, 592 U.S. at 19 (per curiam); *Elrod*, 427 U.S. at 373 (plurality), and all of the regional courts of appeals have applied the principle in that context to at least some extent, *see Vaquería Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 484 (1st Cir. 2009); *New York Mag. v. Metropolitan Transp. Auth.*, 136 F.3d 123, 127 (2d Cir. 1998); *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 178 (3d Cir. 2002); *Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003); *Ingebretsen ex rel. Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996); *Tucker v. City of Fairfield*, 398 F.3d 457, 464 (6th Cir. 2005); *National People's Action v. Village of Wilmette*, 914 F.2d 1008, 1013 (7th Cir. 1990); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999); *Brown v. California Dep't of Transp.*, 321 F.3d 1217, 1225 (9th Cir. 2003); *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1235 (10th Cir. 2005); *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303 (D.C. Cir. 2006).

But this Court's discussions of this proposition have been relatively brief, and as a result, beyond this clear and unanimous core principle, there is much conflict and confusion in the lower federal courts. Most prominently, the circuits disagree over which constitutional rights benefit from the principle. The panel below, of course, held that *only* First Amendment harms are necessarily irreparable, App.19a, and the Eleventh Circuit has suggested that the principle may be limited to the First Amendment and the right to privacy, *see Siegel v. LePore*, 234 F.3d 1163, 1178 (11th Cir. 2000).

Other circuits, by contrast, have applied the principle in challenges under the Fourth Amendment, *see Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992); *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983), the Eighth Amendment, *see Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996), the right to privacy, *see Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B Nov. 1981), *abrogated on other grounds by Dobbs*, 597 U.S. 214; *Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 867 (8th Cir. 1977), *abrogated on other grounds by Dobbs*, 597 U.S. 214, the Equal Protection Clause, *see Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 745–46 (2d Cir. 2000), the Supremacy Clause, *see American Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1058–59 (9th Cir. 2009), and of course the Second Amendment, *see Baird*, 81 F.4th 1046; *Ezell*, 651 F.3d at 699–700. Indeed, a few cases have stated that the principle applies universally in any constitutional challenge. *See Baird*, 81 F.4th at 1050; *ACLU of Ky. v. McCreary Cnty.*, 354 F.3d 438, 445 (6th Cir. 2003), *aff'd*, 545 U.S. 844 (2005);

Monterey Mech. Co. v. Wilson, 125 F.3d 702, 715 (9th Cir. 1997); *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984).

The circuit courts also disagree over whether only *certain types* of constitutional claims are *per se* irreparable. Most cases state the principle as generally applicable. *See, e.g.*, *Tucker*, 398 F.3d at 464; *Cate*, 707 F.2d at 1188. But the Second Circuit has held in the First Amendment context that only "a rule or regulation that directly limits speech" triggers the principle, while "in instances where a plaintiff alleges injury from a rule or regulation that may only potentially affect speech, the plaintiff must establish a causal link between the injunction sought and the alleged injury." *Bronx Household of Faith v. Board of Educ. of N.Y.C.*, 331 F.3d 342, 349–50 (2d Cir. 2003). And the Seventh Circuit has declined to apply the principle to constitutional claims that could in fact be readily reduced to monetary damages—such as claims arising out of the loss of tangible employment benefits, *Ciechon v. City of Chicago*, 634 F.2d 1055, 1057–58 (7th Cir. 1980), or claims giving rise to "a constitutional tort [analogous] to (other) personal-injury litigation," *Campbell v. Miller*, 373 F.3d 834, 835 (7th Cir. 2004).

Finally, and perhaps most fundamentally, there is confusion in the courts of appeals over the principle's nature and justification. As discussed above, the principle, correctly understood, flows from the recognition that the harm inflicted by the infringement of substantive constitutional rights is intangible and thus not reducible to a sum of money or compensable by monetary damages. That is consistent with this Court's decisions, *see, e.g.*, *Tandon*, 593 U.S. at 64 (per

curiam), and with the opinions of those circuits that have most thoroughly articulated the principle's rationale, *see Chaplaincy of Full Gospel Churches*, 454 F.3d at 303 (given the "inchoate, one-way nature of Establishment Clause violations," it "is unclear what, exactly, movants alleging an Establishment Clause violation could show to differentiate between establishments that inflict irreparable harm and those that do not"); *Pacific Frontier*, 414 F.3d at 1236 ("Commercial speech merits First Amendment protection not simply because it enables sellers to hawk their wares and gain a profit, but because it equips consumers with valuable information and because it contributes to the efficiency of a market economy. . . . Therefore, the injury incurred through the deprivation of commercial speech rights cannot be quantified solely in terms of transaction costs and lost profits to a single market participant."); *Cate*, 707 F.2d at 1189 (presumption justified by "the intangible nature of the benefits flowing from the exercise of those rights"); *accord Ezell*, 651 F.3d at 699.

But the panel below adopted a different understanding of the principle, one that casts it more as a categorical "presumption" of the kind this Court rejected in *eBay Inc. v. MercExchange, LLC* as inconsistent with the "equitable discretion" historically possessed by the courts. 547 U.S. 388, 391–92 (2006); *see* App.16a–17a. Under this view, rather than simply recognizing the intangible and nonpecuniary nature of constitutional rights, the principle deeming the violation of those rights irreparable at law instead represents some sort of evidentiary presumption that *relieves plaintiffs of the burden* of establishing irreparable harm in such cases, thereby "collaps[ing] the four

[injunction] factors into one" and rending injunctive relief "automatic." App.5a, 14a. And some other cases also frame the principle as a "presumption," in a way that perhaps reflects, or at least lends itself to, this misunderstanding. *See, e.g.*, *Pacific Frontier*, 414 F.3d at 1235–36; *Bronx Household of Faith*, 331 F.3d at 349.

This conflict and confusion among the lower courts over the nature and contours of the principle that the infringement of substantive constitutional rights inflicts harm that is *per se* irreparable is perhaps unsurprising. This Court's cases applying the principle are terse, and the Court has not yet articulated its justification or scope at any length. Yet settling these questions is a matter of enormous import. *Ex parte Young* actions seeking "to enjoin unconstitutional actions by state and federal officers" have become the standard model for vindication of constitutional rights in modern federal litigation, *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015), yet the courts remain divided over the proper application in constitutional litigation of one of the crucial elements necessary for injunctive relief. The Court should grant the writ so that it can bring needed clarity to this important area of law.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for writ of certiorari.

September 16, 2024

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, JULY 15, 2024

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 23-1633, 23-1634 & 23-1641

DELAWARE STATE SPORTSMEN'S ASSOCIATION, INC.; BRIDGEVILLE RIFLE & PISTOL CLUB, LTD.; DELAWARE RIFLE & PISTOL CLUB; DELAWARE ASSOCIATION OF FEDERAL FIREARMS LICENSEES; MADONNA M. NEDZA; CECIL CURTIS CLEMENTS; JAMES E. HOSFELT, JR.; BRUCE C. SMITH; VICKIE LYNN PRICKETT; FRANK M. NEDZA,

Appellants in No. 23-1641

v.

DELAWARE DEPARTMENT OF SAFETY & HOMELAND SECURITY; CABINET SECRETARY, DELAWARE DEPARTMENT OF SAFETY & HOMELAND SECURITY; SUPERINTENDENT, DELAWARE STATE POLICE GABRIEL GRAY; WILLIAM TAYLOR; DJJAMS LLC; FIREARMS POLICY COALITION, INC.; SECOND AMENDMENT FOUNDATION,

Appellants in No. 23-1633

Appendix A

v.

ATTORNEY GENERAL OF DELAWARE
CHRISTOPHER GRAHAM; OWEN STEVENS;
FIREARMS POLICY COALITION, INC.; SECOND
AMENDMENT FOUNDATION,

Appellants in No. 23-1634

v.

ATTORNEY GENERAL OF DELAWARE

On Appeal from the United States District
Court for the District of Delaware.
(D.C. Nos. 1:22-cv-00951; 1:22-cv-01500; 1:23-cv-00033).
District Judge: Honorable Richard G. Andrews.

March 11, 2024, Argued
July 15, 2024, Filed

Before: BIBAS, MONTGOMERY-REEVES, and ROTH,
Circuit Judges.

OPINION OF THE COURT

BIBAS, *Circuit Judge*.

A preliminary injunction is not a shortcut to the merits. Before granting one, a district court must also weigh the equities, the public interest, and the threat of irreparable harm. Yet the challengers here urge us to

leapfrog these careful considerations and just resolve the case. They argue that, if a plaintiff will likely succeed on the merits of a constitutional claim, a court *must* grant a preliminary injunction. Not so. This equitable remedy is never automatic: It always involves a district court's sound discretion. Key to that discretion is whether an alleged injury jeopardizes the court's ability to see a case through.

Delaware residents and organizations challenged a pair of new state gun laws in federal court. Then they moved to preliminarily enjoin enforcement of those laws. But the injury they allege does not threaten the court's ability to decide the case or to give meaningful relief later on. We will thus affirm the District Court's order denying a preliminary injunction.

I. Appellants Challenge Two Delaware Gun Restrictions

In mid-2022, Delaware passed a package of gun laws. One law bans having, making, buying, selling, transporting, or receiving an "assault weapon." Del. Code Ann. tit. 11, § 1466(a). "[A]ssault weapon[s]" include dozens of specific semiautomatic long guns and pistols, plus certain types of "copycat weapon[s]." § 1465(2)-(6). Another law bans having, making, buying, selling, or receiving a magazine that can hold more than seventeen rounds. §§ 1468(2), 1469(a). The assault-weapon ban (though not the large-magazine ban) grandfathers in guns already owned but limits carrying them publicly. § 1466(c)(3). Neither ban applies to members of the military or law enforcement. §§ 1466(b)(1), 1469(c)(1)-(4).

Soon after these bans became law, the Delaware State Sportsmen's Association challenged them in federal court. Four months later, it sought a preliminary injunction based on the Second and Fourteenth Amendments. The next day, Gabriel Gray filed a similar suit and soon sought a preliminary injunction. Two months after that, Christopher Graham challenged only the large-magazine ban.

After consolidating these three cases, the District Court held a preliminary-injunction hearing. The challengers put on no live witnesses, nor did they offer any evidence that Delaware had tried to enforce these laws or take away their magazines. All they submitted were declarations from three Delaware residents and one Delaware gun dealer who want to buy or sell assault weapons and large magazines. They offered no details about how they would be harmed.

In March 2023, on that limited "evidentiary record," the District Court denied the preliminary injunction. JA 8 & n.2. It found that the challengers were not likely to succeed on the merits because both bans "are consistent with the Nation's historical tradition of firearm regulation." JA 34. It also refused to presume that all Second Amendment harms are irreparable. Rather, because Delaware's laws "regulate[ ] only a subset of semi-automatic weapons," the challengers "retain ample effective alternatives" to defend themselves. JA 35. Because the challengers had not borne their burden of showing a likelihood of success or irreparable harm, the District Court did not reach the other preliminary-injunction factors.

After denying the preliminary injunction, the District Court started preparing for a November 2023 trial. Instead of proceeding to trial, the challengers chose to appeal and put the District Court proceedings on hold. We heard argument in March 2024.

We review the District Court's factual findings for clear error, its legal rulings de novo, and its ultimate decision for abuse of discretion. *Del. Strong Fams. v. Att'y Gen. of Del.*, 793 F.3d 304, 308 (3d Cir. 2015). At this early stage, we review deferentially because the "denial of a preliminary injunction is almost always based on an abbreviated set of facts, requiring a delicate balancing that is the responsibility of the district judge." *Marxe v. Jackson*, 833 F.2d 1121, 1125 (3d Cir. 1987) (cleaned up).

The challengers focus on the merits. If they are right on those, they argue, they should get an injunction because all constitutional harm is supposedly irreparable and the equities and public interest track the merits. But that is not how equity works. Preliminary injunctions are not automatic. Rather, tradition and precedent have long reserved them for extraordinary situations. We see nothing extraordinary here.

II. Preliminary Injunctions Are Extraordinary Remedies

A. Chancery's limits at the Founding still cabin equitable relief

The judicial power extends to cases in equity. U.S. Const. art. III, § 2, cl. 1. During the debates over

ratifying the Constitution, Anti-Federalists worried that equitable jurisdiction would give federal judges unchecked discretion. Brutus, *No. XI*, N.Y. J., Jan. 31, 1788, *reprinted in* 2 *The Complete Anti-Federalist* 417, 419-20 (Storing ed., 1981) (¶¶ 2.9.137-38). The Federal Farmer thought it "very dangerous" to give the same judge both legal and equitable power, because "if the law restrain him, he is only to step into his shoes of equity, and give what judgment his reason or opinion may dictate." Letter No. 3 (Oct. 10, 1787), *reprinted in id.* at 234, 244 (¶ 2.8.42). As equity was a royal power to absolve violations of law, they worried that granting the courts equitable power would leave them unbounded by law.

In response, Alexander Hamilton assuaged those legitimate concerns. He explained that "[t]he great and primary use of a court of equity is to give relief *in extraordinary cases*, which are *exceptions* to general rules." *The Federalist No. 83*, at 505 (Rossiter ed., 1961) (footnote omitted). Looking to Blackstone's *Commentaries*, Hamilton insisted "that the principles by which that relief is governed are now reduced to a regular system." *Id.* at 505 n.*. By the Founding, that system had stabilized into "the practice of the Court of Chancery in England." Letter from Timothy Pickering to Charles Tillinghast (Dec. 24, 1787), *in* 4 *The Founders' Constitution* 231 (Kurland & Lerner eds., 1987).

Hamilton's understanding of equity prevailed. Congress gave Article III courts concurrent jurisdiction with state courts over civil suits in equity. Judiciary Act of 1789, ch. XX, § 11, 1 Stat. 73, 78. The Supreme Court

later described this equitable jurisdiction as constrained by the "body of doctrine" that Chancery applied to "suits in equity" at the Founding. *Atlas Life Ins. Co. v. W.I.S., Inc.*, 306 U.S. 563, 568, 59 S. Ct. 657, 83 L. Ed. 987 (1939). Even after the merger of law and equity, "the substantive principles of Courts of Chancery remain unaffected" to this day. *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 382, 69 S. Ct. 606, 93 L. Ed. 741 n.26 (1949); *see also Petrella v. MGM, Inc.*, 572 U.S. 663, 678, 134 S. Ct. 1962, 188 L. Ed. 2d 979 (2014). "[W]hether the authority comes from a statute or the Constitution, district courts' authority to provide equitable relief is meaningfully constrained. This authority must comply with longstanding principles of equity that predate this country's founding." *Trump v. Hawaii*, 585 U.S. 667, 716, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018) (Thomas, J., concurring).

B. For good reason, injunctions were and still are extraordinary relief

Injunctions fall within this equitable framework. The English Court of Chancery enjoined parties sparingly. When a plaintiff's claim did not fit within one of the narrow commonlaw writs, he could petition the King for relief through his chancellor. *See* Douglas Laycock, *The Death of the Irreparable Injury Rule* 19-20 (1991). Over time, the chancellor's power developed into the Court of Chancery. *Id.* To keep equity from swallowing up the common-law courts, Chancery could enjoin parties only when there was no adequate remedy at law. *Id.*

Following Chancery's supplemental role, early American law reserved injunctions for exceptional cases. Justice Joseph Story, for instance, feared that because injunction procedure is "summary," it is "liab[le] to abuse." 2 *Commentaries on Equity Jurisprudence as Administered in England and America* § 959a, at 227 (2d ed. 1839). Courts must use "extreme caution" and "appl[y] [injunctions] only in very clear cases." *Id.* Professor James P. Holcombe took an even narrower view. Because injunctions can irreparably injure parties, courts must use "great caution," granting them "only in cases[ ] where [they are] *clearly indispensable* to the ends of justice." *An Introduction to Equity Jurisprudence, on the Basis of Story's Commentaries* 150 (1846) (emphasis added).

The Supreme Court largely agreed with Holcombe's narrow view. As it explained, "issuing an injunction" requires "great[ ] caution, deliberation, and sound discretion." *Truly v. Wanzer*, 46 U.S. (5 How.) 141, 142, 12 L. Ed. 88 (1847) (quoting *Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. 821, 827, F. Cas. No. 1617 (C.C.D.N.J. 1830)). Injunctions themselves can inflict harm. Thus, a court should not grant an injunction unless the plaintiff's right is clear, his impending injury is great, and only an injunction can avert that injury. *Id.* at 142-43.

Preliminary injunctions raise further problems. For one, "many preliminary injunctions [are] granted hurriedly and on the basis of very limited evidence." *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 1015 (10th Cir. 2004) (en banc) (McConnell, J., concurring). Time pressures limit adversarial testing.

Affidavits drafted by lawyers are poor substitutes for discovery, live testimony, and cross-examination. And when challengers sue to enjoin enforcement of a new law, courts must forecast how the law will work.

Plus, this hasty process makes the district court jump to conclusions. A preliminary injunction "forces a party to act or desist from acting, not because the law requires it, but because the law *might* require it." *Id.* at 1014-15. In this sense, it is like "judgment and execution before trial." *Herman v. Dixon*, 393 Pa. 33, 141 A.2d 576, 577 (Pa. 1958).

Finally, forecasting the merits risks prejudging them. The trial process forces judges to keep open minds, considering questions from every angle before deciding. Preliminary relief short-circuits that process, freezing first impressions in place. True, judges will not always stick with those impressions—and the system trusts judges to update them as a case proceeds—but this flexibility becomes harder when an impression solidifies into a preliminary ruling. Even if judges keep an open mind, the parties and the public may see their tentative forecasts as the writing on the wall.

For all these reasons, a preliminary injunction "is an extraordinary remedy[ ] [that] should be granted only in limited circumstances." *Mallet & Co. v. Lacayo*, 16 F.4th 364, 391 (3d Cir. 2021) (internal quotation marks omitted). Unless the need for one in a particular case outweighs these risks, the court should not grant one.

III. Preliminary Injunctions Protect Courts' Power to Adjudicate

A. Preliminary injunctions' primary purpose is to keep cases alive until trial

Despite these inherent risks, preliminary injunctions are occasionally warranted. At this stage, "before there has been a trial on the merits, the function of the court is *not* to take whatever steps are necessary to prevent irreparable harm, but primarily to keep things as they were, until the court is able to determine the parties' respective legal rights." *O Centro*, 389 F.3d at 1012 (McConnell, J., concurring) (emphasis added). "Traditional equity practice held that the *sole* purpose of a preliminary injunction was to preserve the status quo during the pendency of litigation." *Id.* (collecting mid-nineteenth-through mid-twentieth-century cases).

The Supreme Court has recognized this limited purpose, as have we. The "purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Starbucks Corp. v. McKinney*, 144 S. Ct. 1570, 1576, 219 L. Ed. 2d 99 (2024) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981)); *see also Ortho Pharm. Corp. v. Amgen, Inc.*, 882 F.2d 806, 813-14 (3d Cir. 1989); *Warner Bros. Pictures v. Gittone*, 110 F.2d 292, 293 (3d Cir. 1940) (per curiam). The goal is to ensure that, at the end of the case, the court can still grant an adequate remedy.

Our sister circuits concur. Preliminary injunctions exist "ultimately to preserve the court's ability to render a meaningful judgment on the merits." *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir. 2003), *abrogated on other grounds by eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006); *accord Meis v. Sanitas Serv. Corp.*, 511 F.2d 655, 656 (5th Cir. 1975). That relief is proper only in "the rare case when a preliminary injunction is necessary to preserve the effectiveness of the ordinary adjudicatory process." *McKinney ex rel. NLRB v. S. Bakeries, LLC*, 786 F.3d 1119, 1124 (8th Cir. 2015). In short, "the most compelling reason" to grant a preliminary injunction is "to preserve the court's power to render a meaningful decision after a trial on the merits." 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2947, at 112, 114 (3d ed. 2013).

B. Preventing interim harm is at the service of preserving the case

Though courts recognize this primary purpose, they have strayed from it and started using preliminary injunctions just to prevent harm. To be sure, harm prevention has become a valid reason to grant a preliminary injunction. *See id.* §§ 2948, 2948.1. But that "is not [its] paramount purpose." *O Centro*, 389 F.3d at 977 (Murphy, J., concurring) (citing 11A Wright & Miller § 2947). "The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff." *Yakus v. United States*,

321 U.S. 414, 440, 64 S. Ct. 660, 88 L. Ed. 834 (1944). "Only when the threatened harm would impair the court's ability to grant an effective remedy is there really a need for preliminary relief." 11A Wright & Miller § 2948.1, at 129.

Thus, the threat of irreparable harm does not automatically trigger a preliminary injunction. Sometimes, harm threatens to moot a case, as when one party's conduct could destroy the property under dispute, kill the other party, or drive it into bankruptcy, "for otherwise a favorable final judgment might well be useless." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932, 95 S. Ct. 2561, 45 L. Ed. 2d 648 (1975). Much more often, though, even nonpecuniary injury does not rise to that level.

The recent drift from preserving cases to preventing interim harm can stunt litigation. This extraordinary remedy has become ordinary. All too often, "the preliminary injunction [becomes] the whole ball game." *Winter v. NRDC*, 555 U.S. 7, 33, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008) (internal quotation marks omitted). That shortcut exceeds injunctions' limits. The "purpose of such interim equitable relief is not to conclusively determine the rights of the parties." *Trump v. Int'l Refugee Assistance Project*, 582 U.S. 571, 580, 137 S. Ct. 2080, 198 L. Ed. 2d 643 (2017) (citing *Camenisch*, 451 U.S. at 395). Rather, it is supposed to be "only a prediction about the merits of the case." *United States v. Loc. 560 (I.B.T.)*, 974 F.2d 315, 330 (3d Cir. 1992).

Case preservation is thus the main reason that the benefits of a preliminary injunction may outweigh its

risks. Courts may withhold this extraordinary remedy if a plaintiff's alleged injury does not threaten to moot the case. That approach is often, perhaps usually, the wiser course.

IV. The District Court Properly Denied the Preliminary Injunction

Though district courts have sound discretion to grant or deny preliminary injunctions, precedent guides this discretion. Four canonical guideposts are (1) the likelihood of success on the merits; (2) the risk of irreparable injury absent preliminary relief; (3) the balance of equities; and (4) the public interest. *Winter*, 555 U.S. at 20. The first two factors are the "most critical." *Nken v. Holder*, 556 U.S. 418, 434, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009). If both are present, a court then balances all four factors. *Id.* Because "a preliminary injunction is an extraordinary and drastic remedy," the movant bears the burden of making "*a clear showing.*" *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S. Ct. 1865, 138 L. Ed. 2d 162 (1997) (per curiam) (quoting and emphasizing 11A Wright & Miller § 2948).

Yet the challengers try to sidestep this framework. They argue that in constitutional cases, a likelihood of success on the merits is enough. It is not.

A. Likely success on the merits is not enough for a preliminary injunction

The challengers and their amici argue that if they win on the first factor, then the District Court abused its

discretion by denying a preliminary injunction. After all, they reason, constitutional rights are priceless, and the government has no interest in enforcing unconstitutional laws. As they readily admit, their argument collapses the four factors into one. The Ninth Circuit has followed that siren. *Baird v. Bonta*, 81 F.4th 1036, 1042 (9th Cir. 2023) (reasoning that when a party shows the first factor, it "almost always" shows irreparable harm and "the merged third and fourth factors [tip] decisively in [its] favor"). For five reasons, though, we plug our ears to that siren song.

First, "[a] preliminary injunction is an extraordinary remedy never awarded as of right." *Winter*, 555 U.S. at 24. Instead, it "is a matter of equitable discretion" that "does not follow from success on the merits as a matter of course." *Id.* at 32. Contrary to the challengers' position, success on the first factor is not enough.

Second, "no test for considering preliminary equitable relief should be so rigid as to diminish, let alone disbar, discretion." *Reilly v. City of Harrisburg*, 858 F.3d 173, 178 (3d Cir. 2017). Yet the challengers' test would do just that, forcing judges to grant preliminary equitable relief based on only a likelihood of success on the merits. That cannot be right: "[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Weinberger v. Romero- Barcelo*, 456 U.S. 305, 313, 102 S. Ct. 1798, 72 L. Ed. 2d 91 (1982). Judges are not robots, especially in equity.

Third, "[c]rafting a preliminary injunction ... often depend[s] as much on the equities of a given case as the

substance of the legal issues it presents." *Int'l Refugee Assistance Project*, 582 U.S. at 579. The challengers ask us to treat a preliminary injunction as rising and falling with the merits. But the merits are just one piece of the puzzle. This equitable remedy calls for courts to weigh the equities, the public interest, and irreparable harm too.

Fourth, if the challengers were right, whenever someone sought a preliminary injunction, courts would always have to prejudge the merits; but they need not. Even assuming irreparable injury, the Supreme Court has overturned an injunction based solely on the balance of equities and the public interest. *Winter*, 555 U.S. at 26, 32. In doing so, it "d[id] not address the underlying merits of plaintiffs' claims." *Id.* at 31. We have taken this approach too. *See Weissbard v. Coty, Inc.*, 66 F.2d 559, 560 (3d Cir. 1933) (not opining on the merits because the District Court would be better placed to rule on them after a "final hearing"). The other factors are independent grounds to deny relief.

Fifth, the challengers' automatic approach presumes clarity early on. They perceive a finished drawing, while we see only the initial sketch. Early in a case, the merits are seldom clear, even when they seem black and white. The litigation process gradually adds hues to this monochrome sketch, sharpening the issues until the trial provides full color. Jumping to conclusions this early is like finding guilt right after hearing each side's key witness, without keeping an open mind long enough to reflect on their weaknesses. A rushed judgment is a dangerous one; judges must be humble enough to stay their hands.

Given the background of the rules of equity, we should not treat the four-factor test as a mechanical algorithm. Law sometimes uses such strict formulae, but equity sees tests as guideposts only. They help the court balance the risks of mootness against the perils of injunctions. Though not all four factors must weigh heavily in every case, any one factor may give a district court reason enough to exercise its sound discretion by denying an injunction. *Reilly*, 858 F.3d at 177-79 (not all factors required). "When one factor is dispositive, a district court need not consider the others." *D.T. v. Sumner Cnty. Schs.*, 942 F.3d 324, 327 (6th Cir. 2019).

Because we must weigh all the factors before *granting* relief, we may take the factors out of order, as *Winter* and *Weissbard* did. We start by considering whether the alleged harm is irreparable. We see no evidence that it is. Plus, failing to grant interim relief would not moot this case.

B. Except in First Amendment cases, we do not presume constitutional harms irreparable

The challengers bear the burden of proving irreparable injury; yet they ask us to lift that burden from their shoulders by presuming all constitutional harms irreparable. We will not. Presuming irreparable harm is the exception, not the rule. Plus, the presumption they propose would trample on traditional principles of equity.

Equity is contextual. It turns on the facts, and it supplements remedies at law only when needed. When

lower courts have tried to harden equitable standards into rules, the Supreme Court has rebuked them. For example, a district court presumed that patent holders who do not practice their patents and are willing to license them cannot suffer irreparable injury. *eBay*, 547 U.S. at 393. In response, the Federal Circuit tilted to the other extreme, adopting a rule that made patent-infringement injunctions all but automatic. *Id.* at 393-94. The Supreme Court, however, rejected both such "broad classifications" as foreign to equity. *Id.* at 393. Rather, it held that district courts must apply their equitable discretion to the facts of each case, guided by "traditional principles of equity." *Id.* at 394.

True, our sister circuits have presumed harm in various settings. *See Baird*, 81 F.4th at 1042 (Second Amendment); *Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992) (Fourth Amendment); *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) (Eighth Amendment).

We respectfully decline to do the same. As we have explained, "[c]onstitutional harm is not necessarily synonymous with the irreparable harm necessary for issuance of a preliminary injunction." *Hohe v. Casey*, 868 F.2d 69, 73 (3d Cir. 1989). We explicitly refused to presume that an alleged equal-protection violation irreparably injured the plaintiff. *Constructors Ass'n of W. Pa. v. Kreps*, 573 F.2d 811, 819-20 (3d Cir. 1978). Even as some courts presumed constitutional harms irreparable, we still favored "traditional prerequisites for injunctive relief" over categorical presumptions. *Anderson v. Davila*, 125 F.3d 148, 164, 37 V.I. 496 (3d Cir. 1997).

The challengers suggest that we applied such a presumption to Fourth Amendment violations in *Lewis v. Kugler*, 446 F.2d 1343 (3d Cir. 1971). We did not. That case did deal with an unreasonable search and seizure. *Id.* at 1344. But the irreparable harm there came because the plaintiffs had "alleged that First Amendment rights have been chilled as a result of government action." *Id.* at 1350 n.12 (capitalization added).

That case highlights the exception to our rule: we presume that First Amendment harms are irreparable. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19, 141 S. Ct. 63, 208 L. Ed. 2d 206 (2020) (per curiam); *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 113 (3d Cir. 2013); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 300, 372 U.S. App. D.C. 94 (D.C. Cir. 2006) (collecting cases).

Unique First Amendment doctrines warrant that exception. Take the "heavy presumption" against prior restraints on speech. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S. Ct. 631, 9 L. Ed. 2d 584 (1963). First Amendment activity, like weekly worship and political speech, can be especially time-sensitive. *See Roman Cath. Diocese*, 592 U.S. at 19; *Elrod v. Burns*, 427 U.S. 347, 374 n.29, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (plurality opinion). We thus presume that prior restraints are unconstitutional because we fear "communication will be suppressed ... before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 390, 93 S. Ct. 2553, 37 L. Ed. 2d 669 (1973). As a rule,

then, the government may not preliminarily enjoin speech. Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L.J. 147, 169-72 (1998).

Or take courts' deference to sincere religious belief. Courts are ill-suited to weigh religious harms, much less assess whether they would be irreparable. If a believer's religious scruples are sincere, courts will not second-guess their centrality. *See Holt v. Hobbs*, 574 U.S. 352, 361-62, 135 S. Ct. 853, 190 L. Ed. 2d 747 (2015); *Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div.*, 450 U.S. 707, 716, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981). This deference comes from the longstanding principle that "the judges of the civil courts" are not as "competent in the ecclesiastical law and religious faith." *Watson v. Jones*, 80 U.S. 679, 729, 20 L. Ed. 666 (1871). This history, though, limits the principle to the First Amendment.

Thus, when weighing preliminary injunctions, courts may presume that suppressing speech or worship inflicts irreparable injury. But this presumption is the exception, not the rule. We will not extend it.

C. At this early stage, the challengers have failed to show irreparable harm

Without a presumption in their favor, the challengers' claim of irreparable harm collapses. They must show that, without a preliminary injunction, they will more likely than not suffer irreparable injury while proceedings are pending. *Reilly*, 858 F.3d at 179. To satisfy that

burden, they submitted only four declarations from Delaware residents who "wish to obtain these firearms and magazines." Oral Arg. Tr. 5:9-10. They do not even allege that Delaware has tried to enforce the disputed laws against them or to seize the guns or magazines that they already own. Nor do they allege a time-sensitive need for such guns or magazines. This status quo shows no signs of changing. Thus, the challengers have not shown that a preliminary "injunction is required to preserve the status quo" while litigation is pending. *Warner Bros.*, 110 F.2d at 293.

Plus, given preliminary injunctions' inherent risks, the challengers' generalized claim of harm is hardly enough to call for this "extraordinary and drastic remedy." *Mazurek*, 520 U.S. at 972. The harm they allege is a far cry from "media companies hav[ing] to alter their editorial policies and posting practices to comply with [a] new speech law" or "businesses hav[ing] to restructure their operations or build new facilities to comply with the new [environmental] regulations" for years while they challenge these regulations. *Labrador v. Poe ex rel. Poe*, 144 S. Ct. 921, 929, 218 L. Ed. 2d 400 (2024) (Kavanaugh, J., concurring). What is more, the challengers offered no evidence that without a preliminary injunction, the District Court will be unable to decide the case or give them meaningful relief. Thus, the court properly found no irreparable harm.

We rule only on the record before us. The challengers have shown no harms beyond ones that can be cured after final judgment. That finding alone suffices to support

the District Court's denial of a preliminary injunction. *Pennsylvania ex rel. Creamer v. U.S. Dep't of Agric.*, 469 F.2d 1387, 1388 (3d Cir. 1972) (per curiam). We do not hold that Second Amendment harms, or constitutional harms generally, cannot be irreparable. Still, the scant evidence before us here hardly shows that the challengers' harm is.

We also limit our analysis of irreparable injury to this preliminary injunction. For permanent injunctions, courts focus not on preserving the case and avoiding interim harms, but on whether the remedy at law is adequate. Emily Sherwin & Samuel L. Bray, *Ames, Chafee, and Re on Remedies* 653 (3d ed. 2020). We do not decide here whether the challengers should get a permanent injunction if they win on the merits.

D. The other factors also support denying the injunction

Even if the challengers had shown an irreparable injury, the third and fourth factors would weigh against a preliminary injunction, as in *Winter*. Those factors, harm to the opposing party and the public interest, "merge when the Government is the opposing party." *Nken*, 556 U.S. at 435. They call for caution because this injunction threatens federalism and the separation of powers—"[t]wo clear restraints on the use of the equity power." *Missouri v. Jenkins*, 515 U.S. 70, 131, 115 S. Ct. 2038, 132 L. Ed. 2d 63 (1995) (Thomas, J., concurring).

The challengers seek to enjoin enforcement of two democratically enacted state laws. Courts rightly hesitate

to interfere with exercises of executive or legislative authority. *Rathke v. MacFarlane*, 648 P.2d 648, 651 (Colo. 1982) (en banc); *cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio Law Abs. 417 (1952) (Jackson, J., concurring). "There is always a public interest in prompt execution" of the laws. *Nken*, 556 U.S. at 436.

That is doubly true when federal courts are asked to block states from enforcing their laws. *See, e.g., Younger v. Harris*, 401 U.S. 37, 53-54, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971). A federal court must weigh how best to deal with state laboratories of democracy. On a complete record, the duty of the federal court sometimes includes correcting a state that goes beyond the U.S. Constitution's bounds. Without the clarity of a full trial on the merits, though, we must err on the side of respecting state sovereignty. Delaware's legislature passed these bills, and Delaware's governor signed them into law. "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303, 133 S. Ct. 1, 183 L. Ed. 2d 667 (2012) (Roberts, C.J., in chambers) (brackets and internal quotation marks omitted).

Plus, Delaware Sportsmen delayed seeking a preliminary injunction. A classic maxim of equity is that it "assists the diligent, not the tardy." Sherwin & Bray 441. The logic behind preliminary injunctions follows the general logic of equity: "[T]here is an urgent need for speedy action to protect the plaintiffs' rights. Delay

in seeking enforcement of those rights, however, tends to indicate at least a reduced need for such drastic, speedy action." *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985). Delaware Sportsmen's four-month delay suggests that it felt little need to move quickly. Its continuing delay as it chooses not to hasten to trial does not help its case. Thus, the final two factors support denying a preliminary injunction as well.

V. The Challengers Had Other Ways to Get Relief Promptly

Our decision today leaves open several ways to vindicate constitutional rights promptly. First, a district court may move up the trial to consolidate it with the preliminary-injunction hearing. Fed. R. Civ. P. 65(a)(2). Second, the court may convert a preliminary-injunction motion into a summary-judgment motion if they first give the parties enough notice. *See Air Line Pilots Assn., Int'l v. Alaska Airlines, Inc.*, 898 F.2d 1393, 1397 n.4 (9th Cir. 1990). Third, rather than move for a preliminary injunction, the parties may agree to an accelerated trial. *See* 11A Wright & Miller § 2948.1 & n.1.

Those approaches have many advantages. Often, "it would be more efficient to consolidate the trial on the merits with the motion for a preliminary injunction under Rule 65(a)(2)." Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 Rev. Litig. 495, 534 (2003). Here, for instance, the trial would have happened in November 2023. Final rulings on the merits would resolve issues definitively and let us

review legal rulings de novo on fully developed records. This preliminary posture, by contrast, just encourages snap judgments in the abstract.

* * * *

A preliminary injunction is not a first bite at the merits. Rather, it is an extraordinary, equitable remedy designed to protect the court's ability to see the case through. It risks cementing hasty first impressions. We trust district courts to reserve this drastic remedy for drastic circumstances. Because the District Court did so here, we affirm its order denying a preliminary injunction. We express no view of the merits.

Appendix A

ROTH, *Circuit Judge*, concurrence

Although I concur with the result reached by the Majority, I write separately to address the plaintiffs' likelihood of success on the merits and, briefly, the balance of the equities and public interest. These additional thoughts may guide future litigants in formulating any steps that they may take following this decision.

As the Majority observes, a court may deny a preliminary injunction under "any one" of the four factors.[1] The District Court did so because plaintiffs failed to establish a likelihood of success on the merits[2] —the first of the two "most critical"[3] factors—and addressed irreparable harm "for thoroughness only."[4] By contrast, the Majority affirms the denial of injunctive relief solely based on a lack of irreparable harm.[5] While I agree that plaintiffs failed to demonstrate irreparable harm, I believe it would be helpful to future litigants to present a full discussion. As the District Court held, I believe that plaintiffs are not likely to succeed on the merits of their constitutional claim.

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1. Maj. Op. 19.

2. *See Delaware State Sportsmen's Ass'n, Inc. v. Delaware Dep't of Safety & Homeland Sec.*, 664 F. Supp. 3d 584, 590-603 (D. Del. 2023).

3. Maj. Op. 16-17 (quoting *Nken v. Holder*, 556 U.S. 418, 434, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009)).

4. *Delaware State Sportsmen's Ass'n*, 664 F. Supp. 3d at 603 n.17.

5. Maj. Op. 26-27.

Moreover, because I also believe that *none* of the assault weapons and LCMs at issue are "Arms" protected by the Second Amendment, I would hold that plaintiffs' challenge to Delaware's laws fails at *Bruen*'s first step, not its second.[6]

I. Governing Law

"In a crisp, if not enigmatic, way,"[7] 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 not be infringed."[8] In interpreting its meaning, we are guided by the principle that "the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning."[9] "Normal and ordinary meaning" is that which would "have been known to ordinary citizens in the founding generation."[10] Therefore, our interpretation of the Second Amendment—and our understanding of the "Arms" it protects in the present moment—is necessarily informed

6. The District Court determined that assault long guns and LCMs are "Arms" protected by the Second Amendment, but assault pistols and copycat weapons are not. *See Delaware State Sportsmen's Ass'n*, 664 F. Supp. 3d at 593-97.

7. *Bevis v. City of Naperville*, 85 F.4th 1175, 1188 (7th Cir. 2023).

8. U.S. Const. amend. II.

9. *D.C. v. Heller*, 554 U.S. 570, 576, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) (cleaned up).

10. *Id.* at 577.

and cabined by history and Supreme Court precedent discussing the same.[11]

We thus turn to the "normal and ordinary" meaning of the phrase "keep and bear Arms" as it is used in the Second Amendment.[12] The Supreme Court's decision in *District of Columbia v. Heller* is our north star.[13] In *Heller*, the Court instructed that the founding-era meaning of the word "Arms" "is no different from the meaning today."[14] Contemporaneous dictionaries defined "arms" as "weapons of offence, or armour of defence," or "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another."[15] Most importantly, the term was applied "to weapons that were not specifically designed for military use and were not employed in a military capacity."[16] The Court

11. *See, e.g., id.* at 595 ("There seems to us no doubt, *on the basis of both text and history*, that the Second Amendment conferred an individual right to keep and bear arms.") (emphasis added). As used herein, the term "Arms" refers to weapons that are protected under the Second Amendment while "arms" refers to weapons generally.

12. *Id.* at 576.

13. 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

14. *Id.* at 581.

15. *Id.* (alterations omitted) (citing definitions of "arms" from "[t]he 1773 edition of Samuel Johnson's dictionary" and "Timothy Cunningham's important 1771 legal dictionary").

16. *Id.* ("Cunningham's legal dictionary gave us as an example of usage: 'Servants and labourers shall use bows and arrows on

then went on to explain that the most natural reading of "keep Arms" is simply to have or possess weapons.[17] By contrast, "bear Arms" means something else. By itself, to "bear" meant, then as now, to "carry."[18] But when used with "Arms," "bear" referred "to carrying for a particular purpose—confrontation."[19] Accordingly, to "bear Arms" means to carry weapons "for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person."[20]

At first blush—especially in light of the prefatory clause's reference to "[a] well-regulated Militia"—it might seem nonsensical that the Arms referred to in the Second Amendment do not include those "specifically designed for

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Sundays, &c. and not bear other arms.'") (emphasis in original).

17. *Id.* at 582-83 (confirming this reading by consulting historical sources).

18. *Id.* at 584.

19. *Id.*

20. *Id. Heller* expressly endorsed the definition Justice Ginsburg set forth in her dissent in *Muscarello v. United States*, 524 U.S. 125, 118 S. Ct. 1911, 141 L. Ed. 2d 111 (1998). In analyzing the meaning of the phrase "carries a firearm" as it was used in a federal criminal statute, Justice Ginsburg observed that "[s]urely a most familiar meaning is, as the Constitution's Second Amendment ("keep and *bear* Arms") . . . indicate[s]: 'wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Muscarello*, 524 U.S. at 143 (quoting Black's Law Dictionary 214 (6th ed. 1990)).

military use."[21] The Court's discussions of founding-era history in *United States v. Miller* and *Heller* clear things up.[22] When the Second Amendment was ratified, the term "Militia" referred to "all males physically capable of acting in concert for the common defense."[23] At that time, the "Militia" was "set in contrast with Troops which [States] were forbidden to keep without the consent of Congress."[24] "Troops" were "standing armies" made up of soldiers, while the "Militia" was made up of ordinary citizens who would "appear bearing arms supplied by themselves and of the kind in common use at the time" when called to serve.[25] As a result, the "small-arms weapons" used by the "Militia" and the weapons "used in defense of person and home were one and the same."[26]

Heller held that the Second Amendment confers an individual right to keep and bear "Arms" for self-

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21. *Heller*, 554 U.S. at 581.

22. *U.S. v. Miller*, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373 (1939); *Heller*, 554 U.S. 570.

23. *Miller*, 307 U.S. at 179.

24. *Id.* at 178-79.

25. *Id.; see also id.* at 179 ("In a militia, the character of the labourer, artificer, or tradesman, predominates over that of the soldier: in a standing army, that of the soldier predominates over every other character; and in this distinction seems to consist the essential difference between those two different species of military force.") (quoting Adam Smith, Wealth of Nations, Book V. Ch. 1).

26. *Heller*, 554 U.S. at 625 (quoting *State v. Kessler*, 289 Ore. 359, 614 P.2d 94, 98 (Or. 1980)).

defense—weapons akin to those to those that ordinary citizen-militiamen would keep at home and bring when called to duty—and thus protected respondent's right to keep and bear a handgun. However, *Heller* also made clear that "the right [is] not a right to keep and carry any weapon whatsoever and for whatever purpose."[27] Most importantly for our purposes, *Heller* recognized that right "extends only to certain types of weapons."[28] While "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms," it does not protect "dangerous and unusual weapons." [29] Among the "dangerous and unusual weapons" outside its scope are (1) weapons that are "not typically possessed by law-abiding citizens for lawful purposes," such as short-barreled shotguns;[30] and (2) weapons that are "most useful

27. *Id.* at 626.

28. *Id.* at 623 (discussing *Miller*, 307 U.S. 174).

29. *Id.* at 582, 627.

30. *Id.* at 625. In *Miller*, the Supreme Court held that the Second Amendment does not protect the right to keep and bear short-barreled shotguns "[i]n the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia[.]" *Miller*, 307 U.S. at 178. *See also Heller*, 554 U.S. at 622-23 (explaining that *Miller*'s "basis for saying that the Second Amendment did not apply was *not* that the defendants were 'bear[ing] arms' not 'for . . . military purposes' but for 'nonmilitary use' . . . Rather, it was that the *type of weapon* at issue was not eligible for Second Amendment protection[.]") (emphases and alterations in original) (internal citation omitted).

in military service," such as "M-16 rifles and the like."[31] *Heller*'s discussion of the latter is worth revisiting in full:

> It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.[32]

In other words, the fact that a militia member no longer brings along his or her own weapon to militia duty, does not prevent us from recognizing the significance of the words used in the 18th century to create the Second Amendment.

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31. *Heller*, 554 U.S. at 627.

32. *Id.* at 627-28.

Two years after *Heller*, the Court in *McDonald v. Chicago* expanded *Heller's* scope by confirming that the Second Amendment applies to the states through incorporation under the Fourteenth Amendment.[33] *McDonald* said nothing new about the kinds of Arms protected by the Second Amendment; as in *Heller*, the weapons at issue in *McDonald* were handguns.[34] *McDonald* reiterated that self-defense is the "central component" of the Second Amendment right and the "core lawful purpose" for which the weapons it protects are used.[35]

Twelve years after *McDonald*, the Court made "more explicit" a two-step analytical approach for evaluating Second Amendment claims in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*.[36] At step one, the court determines whether the Second Amendment's "plain text" covers the "conduct" at issue.[37] If it does, the court

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33. *McDonald v. City of Chicago*, 561 U.S. 742, 791, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010).

34. *Id.* at 750.

35. *Id.* at 767-68 (quoting *Heller*, 554 U.S. at 599, 630).

36. 597 U.S. 1, 31, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022).

37. *Id.* at 17. Although *Bruen* does not expressly hold that plaintiffs bear the burden at step one, it necessarily implies that they do. In disposing of the means-ends scrutiny that courts previously applied to Second Amendment claims, the Court explained that its new two-step analysis "accords with how we protect other constitutional rights," such as those guaranteed by the First Amendment. *Bruen*, 597 U.S. at 24. If a plaintiff alleging

proceeds to step two to determine whether the challenged laws are "consistent with the Nation's historical tradition of firearm regulation."[38] At step two, the government must show that that the modern regulation is "relevantly similar" to historical regulation in "how and why the regulations burden a law-abiding citizen's right to armed self-defense."[39]

II. Discussion

A. Plaintiffs failed to establish a likelihood of success on the merits.

The laws challenged here restrict having, making, buying, selling, and receiving "assault weapons" and "large capacity magazines."[40] "Assault weapons" include: (1) forty-four semi-automatic "assault long guns," including the AR-15, AK-47, and Uzi; (2) nineteen semi-automatic

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a violation of their First Amendment rights must "bear[] certain burdens," only after which "the focus then shifts to the defendant to show that its actions were nonetheless justified[,]" then the same must be true here. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 524, 142 S. Ct. 2407, 213 L. Ed. 2d 755 (2022); *see also Bevis v. City of Naperville, Illinois*, 85 F.4th 1175, 1194 (7th Cir. 2023) ("In order to show a likelihood of success on the merits, the plaintiffs in each of the cases before us have the burden of showing that the weapons addressed in the pertinent legislation are Arms").).

38. *Bruen*, 597 U.S. at 24.

39. *Id.* at 29.

40. *See* Del. Code Ann. tit. 11, §§ 1464-69; *id.* § 1465(4) (assault weapons); *id.* § 1468(2) (LCMs).

"assault pistols"; and (3) "copycat weapons."[41] "Large capacity magazines" (LCMs), are magazines "capable of accepting, or that can readily be converted to hold, more than 17 rounds of ammunition."[42]

We must first decide whether these assault weapons and LCMs are "Arms" that individuals are entitled to "keep and bear" under the plain text of the Second Amendment. If they are not properly characterized as "Arms," then Delaware is free to regulate them as it chooses. If they are properly characterized as "Arms," we proceed to *Bruen*'s second step and determine whether the laws are "consistent with the Nation's historical tradition of firearm regulation."[43]

Three principles, the contours of which are disputed by the parties, guide our analysis at *Bruen* step one. First, the Second Amendment extends to "all instruments that constitute bearable arms,"[44] meaning weapons that "are in common use for self-defense today."[45] Second, for purposes of assessing whether a given weapon is in common use for self-defense, what matters is whether the weapon in question is suitable for, owned for, and actually used in self-defense. Third, the Second Amendment does

41. *Id.* § 1465(2) (assault long guns); *Id.* § 1465(3) (assault pistols); *Id.* § 1465(6) (copycat weapons).

42. *Id.* § 1468(2).

43. 597 U.S. at 24.

44. *Heller*, 554 U.S. at 582.

45. *Bruen*, 597 U.S. at 47 (internal quotations omitted).

not protect "dangerous and unusual weapons," meaning those weapons that are "not typically possessed by law-abiding citizens for lawful purposes"[46] or are "most useful" as weapons of war.[47]

i. "Bearable arms" are those that are commonly used for self-defense.

The parties disagree about the kinds of "bearable arms" presumptively protected by the Second Amendment. Plaintiffs contend that weapons used for *any* lawful purpose *including* self-defense are protected, while Delaware argues that *only* weapons that are commonly used for self-defense are protected. Delaware's argument proves stronger.

Limiting the scope of "bearable arms" to those that are used for self-defense comports with the "normal and ordinary" meaning of "bear arms."[48] *Heller* made clear that to "bear arms" means to carry weapons "for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." Thus, the phrase "bearable arms" necessarily refers to weapons that are carried for that same express purpose.[49]

To be sure, weapons can be (and are) used for lawful

46. *Id.* at 625.

47. *Heller*, 554 U.S. at 627.

48. *Heller*, 554 U.S. at 576.

49. *Id.* at 584.

purposes besides self-defense. Recreational target shooting, hunting, and pest-control all come to mind.[50] But *Heller* holds, and its progeny affirms, that self-defense is "*the* core lawful purpose" protected by the Second Amendment.[51] While these other uses may be lawful, the Supreme Court has never recognized them as "core" purposes protected by the Second Amendment.[52] Until it might do so, the "bearable arms" presumptively protected by the Second Amendment are limited to weapons used explicitly for self-defense.[53]

ii. Whether a weapon is "in common use for self-defense" hinges on more than its popularity.

The parties dispute (1) when common use should be assessed (at *Bruen* step one or two), (2) what type of common use matters, and (3) how common use should be measured.

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50. *See Delaware State Sportsmen's Ass'n*, 664 F. Supp. 3d at 594; *Ass'n of New Jersey Rifle and Pistol Clubs, Inc. v. Att'y Gen. New Jersey (ANJRPC)*, 910 F.3d 106, 116 (3d Cir. 2018), *abrogated on other grounds by Bruen*, 597 U.S. 1, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022).; *Bevis*, 85 F.4th at 1192.

51. *Heller*, 554 U.S. at 630 (emphasis added); *see also Bruen*, 597 U.S. at 29 ("As we stated in *Heller* and repeated in *McDonald*, 'individual self-defense is 'the *central component*' of the Second Amendment right.'") (emphasis in original) (quoting *McDonald*, 561 U.S. at 767)).

52. *Heller*, 554 U.S. at 630.

53. *Id.*

"When" is a question easily answered. *Bruen* acknowledged that the handguns at issue were "'in common use' today for self-defense" before conducting its historical analysis, thereby indicating that "common use" comes into play at step one.[54]

"What type" can also be resolved by reference to *Bruen*. As the latest in a line of decisions holding that "individual self-defense is 'the *central component*' of the Second Amendment right," *Bruen* confirms that the only weapons protected by the right are those that are commonly used for self-defense--not for any lawful purpose *like* self-defense.[55]

"How" is more complicated. The Supreme Court has yet to address exactly how we should assess whether a weapon is "in common use today for self-defense."[56] The District Court did so only by considering whether the assault weapons and LCMs were popular.[57] But the plain meaning of "common use," the frameworks of other constitutional rights, and the problems that might flow from the District Court's approach all point toward additional metrics: a weapon's objective suitability for self-defense and whether it is commonly used in self-defense.

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54. *See Bruen*, 597 U.S. at 32.

55. *Id.* at 29 (quoting *McDonald*, 561 U.S. at 767).

56. *Id.* (internal quotations omitted).

57. *See Delaware State Sportsmen's Ass'n*, 664 F. Supp. 3d at 595.

Consider the plain meaning of "common use." "Common" is defined as "occurring, found, or done often; in general use; usual, prevalent."[58] "Use" is defined as "a long-continued possession and employment of a thing for the purpose for which it is adapted[.]"[59] Read together, a weapon is in common use for self-defense if evidence shows it is (1) well adapted for self-defense and (2) widely possessed and employed for self-defense. However, evidence that a weapon is widely possessed or that a widely possessed weapon is occasionally used in self-defense is not, alone, enough to show it is in common use for self-defense—not if we want to heed the phrase's plain meaning.

Beyond plain meaning, *Bruen* says that its two-step standard "accords with how we protect other constitutional rights."[60] We frequently define the boundaries of these rights with objective standards.[61] There is no reason not to

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58. *Common, Adj., Sense II.9.a*, Oxford English Dictionary (Feb. 2024) (online ed.), https://doi.org/10.1093/OED/1740514823.

59. *Use*, Black's Law Dictionary (11th ed. 2019). The complete definition reads: "The application or employment of something; esp., a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional." *Id.; see also Voisine v. United States*, 579 U.S. 686, 692, 136 S. Ct. 2272, 195 L. Ed. 2d 736 (2016) ("Dictionaries consistently define the noun 'use' to mean 'the act of employing' something.").

60. *Bruen*, 597 U.S. at 24.

61. *Id.* For example, in the Fourth Amendment context, we assess the constitutionality of an arrest by determining whether

do the same in the Second Amendment context.[62] By taking into account whether a weapon is objectively suitable for self-defense, we ensure that the Second Amendment right to self-defense is not "subject to an entirely different body of rules than the other Bill of Rights guarantees."[63]

Finally, a "common use" analysis that hinges solely on a weapon's popularity produces absurd results. Take, for example, the AR-15 and the Federal Assault Weapons Ban, which made civilian possession of AR-15s unlawful.[64] When the Ban first went into effect in 1994, few civilians

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"the circumstances, viewed objectively, justify [the challenged] action." *Ashcroft v. al-Kidd*, 563 U.S. 731, 736, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011) (alterations in original). In determining whether an individual was subject to an unreasonable search, we consider whether the person being searched had an objectively reasonable expectation of privacy and the objective effect of the officer's actions. *Bond v. United States*, 529 U.S 334, 338, 338 n.2, 120 S. Ct. 1462, 146 L. Ed. 2d 365 (2000). In the Sixth Amendment context, a criminal defendant claiming ineffective assistance of counsel "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 US. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

62. Indeed, even *Bruen* suggests that an objective standard is relevant for judging whether a Second Amendment violation has occurred. The Court specifically held that New York's proper-cause requirement was unconstitutional "in that it prevents law-abiding citizens with *ordinary self-defense needs* from exercising their right to keep and bear arms." *Bruen*, 597 U.S. at 71 (emphasis added).

63. *Id.* at 70 (quoting *McDonald*, 561 U.S. at 780).

64. Pub. L. No. 103-322 § 110102, 108 Stat. 1796.

owned AR-15s.[65] When it expired in 2004, AR-15s "began to occupy a more significant share of the market."[66] Today, plaintiffs describe the AR-15 as "America's most popular semiautomatic rifle" and "the second-most common type of firearm sold[.]"[67] If we looked to evidence of the AR-15's popularity alone, the Ban would have been constitutional before 2004 but unconstitutional thereafter.[68] A law's constitutionality cannot be contingent on the results of a popularity contest.[69]

iii. "Dangerous and unusual weapons" is a category, not a test.

Though the Second Amendment presumptively protects "Arms" that are in common use for self-defense, it does not extend to "dangerous and unusual weapons."[70] The District Court likened this to a "test," and concluded that a weapon must "check both boxes" to qualify as

65. *Bevis*, 85 F.4th at 1199.

66. *Id.*

67. Gray Br. 19-20.

68. *See Bevis*, 85 F. 4th at 1199.

69. *See also Nat'l Ass'n for Gun Rts. v. Lamont*, 685 F. Supp. 3d 63, 102 (D. Conn. 2023) ("[W]hile constitutional protections adapt to the constant evolution of societal norms and technology, no other constitutional right waxes and wanes based solely on what manufacturers choose to sell and how Congress chooses to regulate what is sold, and the Second Amendment should be no exception.").

70. *Heller*, 554 U.S. at 627.

"dangerous and unusual."[71] But *Heller* instructs that "dangerous and unusual" is best understood as a two-part category unto itself.[72] As discussed above, "dangerous and unusual weapons" are either (1) weapons that are "not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns," or (2) weapons that "are most useful in military service," such as "M-16 rifles and the like."[73] For the latter, it is worth noting that "most" is a superlative descriptor.[74] Therefore, even though a weapon might be useful in civilian and military contexts, a weapon that is "most" suited for military use falls outside the scope of "Arms" protected by the Second Amendment.[75]

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71. *Delaware State Sportsmen's Ass'n*, 664 F. Supp. 3d at 595.

72. We are bound by *Heller* and its progeny, not Justice Alito's concurrence in *Caetano v. Massachusetts*, 577 U.S. 411, 417, 136 S. Ct. 1027, 194 L. Ed. 2d 99 (per curiam) (Alito, J., concurring) ("[T]his is a conjunctive test: A weapon may not be banned unless it is *both* dangerous *and* unusual."). Moreover, and as discussed in greater detail below, affording "great weight" to the *Caetano* concurrence is unwarranted. *Delaware State Sportsmen's Ass'n*, 664 F. Supp. 3d at 595.

73. *Heller*, 554 U.S. at 625, 627.

74. *Hanson v. D.C.*, 671 F. Supp. 3d 1, 12 (D.D.C. 2023) (citing *Heller*, 554 U.S. at 627).

75. Even Delaware acknowledges that each of the assault weapons it seeks to regulate may "potential[l]y function as a sports or recreational firearm"; however, that potential is "substantially outweighed by the danger that it can be used to kill and injure human beings." Del. Code Ann. tit. 11, § 1464.

While the District Court concluded that the assault weapons and LCMs at issue *are* typically possessed by lawabiding citizens for lawful purposes, it did not consider whether any of the assault weapons and LCMs at issue "are most useful in military service" and therefore "may be banned" without infringing the Second Amendment right (as *Heller* tells us).[76] That was error.

iv. None of the assault weapons and LCMs are "Arms" protected by the Second Amendment.

The District Court concluded that assault long guns and LCMs are fairly characterized as "Arms," but assault pistols and copycat weapons are not.[77] However, its analysis rested on an incomplete assessment of "common use" and a misunderstanding of what makes a weapon "dangerous and unusual." Analyzed correctly, the record shows that *none* of the assault weapons and LCMs are "Arms" protected by the Second Amendment.

Assault long guns: The assault long guns set forth at § 1465(2) may be commonly owned, but they are nonetheless best categorized as weapons that are most useful in military service and are therefore unprotected by the Second Amendment.[78] Generally speaking, assault long guns derive from weapons of war and retain nearly

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76. *Heller*, 554 U.S. at 627.

77. *See Delaware State Sportsmen's Ass'n*, 664 F. Supp. 3d at 595-96 (addressing assault long guns); *Id.* at 596-97 (addressing LCMs); *Id.* at 593 (addressing assault pistols and copycat weapons).

78. Del. Code Ann. tit. 11, § 1465(2).

all of the features of their military counterparts.[79] These "famed" military features—designed to increase lethality and allow shooters to inflict severe damage over great distances—serve as civilian selling points.[80] But while these features may be useful in military contexts, they make assault long guns ill-suited for self-defense.[81] Unlike

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79. The only meaningful distinction between the assault long guns sold to civilians and the assault long guns reserved for military use appears to be firing capability: civilian versions are only capable of semi-automatic operation while military versions can operate both ways. However, the ease with which semi-automatic rifles can be modified to fire at rates approaching that of their fully automatic counterparts reinforces the concept that the design of an assault long gun is a design for a weapon of war. *Cf. Delaware State Sportsmen's Ass'n*, 664 F. Supp. 3d at 600 (citing evidence of "numerous inexpensive products, available for purchase in most states, that allow AR-style rifles to fire at rates comparable to fully automatic weapons."); *Garland v. Cargill*, 602 U.S. 406, 410-12, 144 S. Ct. 1613, 219 L. Ed. 2d 151 (2024) (describing the ease with which a semi-automatic rifle can be converted to fire at a rate approaching that of a machine gun).

80. *See, e.g.*, SA 680 (advertising AR-15s as follows: "Out of the jungles of Vietnam comes a powerful, battle-proven rifle ready for sale to civilians for hunting and target use. It's the Army's rakish AR-15, famed for its success in guerilla fighting. The sport version is an exact duplicate of the military weapon . . ."); SA 455-56 ¶¶ 57-58 ("Colt sought to capitalize on the military acceptance of the AR-15 / M16 and [] proposed production of these rifles for sale to the civilian market . . . The sole difference between the military and civilian versions was removal of fully automatic capability . . . All of the other features on these rifles that enhanced their capability as combat military firearms remained.").

81. These features also make assault weapons "a counterintuitive choice" for other lawful purposes like hunting and target shooting. SA 474-75 ¶ 88.

wartime offensives, home and self-defense scenarios rarely, if ever, involve lengthy shootouts at long ranges or extensive exchanges of gunfire. Moreover, projectiles traveling at velocities as high as a 5.66 mm or .223 caliber cartridge can easily penetrate most home construction materials, posing a serious risk of harm to bystanders in adjacent rooms or even outside the home entirely.[82]

The lethality of an assault long gun is best illustrated by way of comparison. Take the damage inflicted by a handgun (*Heller's* "quintessential self-defense weapon") and the damage inflicted by an assault rifle. [83] A common caliber handgun cartridge (9 mm or .38) travels at a muzzle velocity of roughly 1,600 feet per second. When it hits tissue, it strikes directly, producing "a small temporary cavity" in tissue that "plays little or no role in the extent of wounding."[84] By contrast, a 5.66 mm or .223 caliber cartridge—the kind typically used in assault weapons—

82. SA 472-73 ¶¶ 83-84 (discussing results of penetration tests wherein nine different types of .223 / 5.56 mm ammunition were fired through simulated wall sections made of gypsum board, sheet rock, and wooden 2x4 studs, and noting that "all nine (including "frangible" rounds designed to disintegrate when hitting a hard surface) easily penetrated the wall section as well as water jugs placed three feet behind."). In addition to materials commonly used in home construction, .223 caliber ammunition can penetrate 3/8" hardened steel from 350 yards away, while 5.56 mm can penetrate up to 3mm of non-hardened steel.

83. *Heller*, 554 U.S. at 629.

84. *Delaware State Sportsmen's Ass'n*, 664 F. Supp. 3d at 600.

travels at double the speed.[85] And unlike a handgun cartridge, it turns sideways when it hits tissue, creating a cavity over ten times larger than the cartridge itself and resulting in "catastrophic" wounding.[86] Doctors who have treated people shot by assault rifles have witnessed "multiple organs shattered, bones exploded, soft tissue absolutely destroyed, and exit wounds a foot wide."[87]

The record is clear: the assault long guns at issue are most useful as weapons of war. As such, they fall outside the scope of "Arms" presumptively protected by the Second Amendment.

LCMs: The District Court explained it was "bound" by our pre-*Bruen* decision in *ANJRPC* in two ways.[88] First, because *ANJRPC* "broadly held that 'magazines are arms,'" the District Court assumed the LCMs at issue here must also be "arms."[89] Second, because plaintiffs in both cases proffered similar "common use" evidence, the District Court determined that these LCMs must also be "in common use for self-defense today."[90] As a result, the District Court held that the LCMs Delaware seeks to regulate are "Arms" presumptively protected by the

85. SA 472 ¶ 83.

86. *Id.*

87. *Id.*

88. *Delaware State Sportsmen's Ass'n*, 664 F. Supp. 3d at 596 (discussing *ANJRPC*, 910 F.3d at 110).

89. *Id.* (quoting *ANJRPC*, 910 F.3d at 116).

90. *Id.* at 596-97.

Second Amendment. While the District Court's reliance on *ANJRPC* was understandable, it read our decision too broadly.

In *ANJRPC*, we held that "magazines are 'arms'" insofar as they "feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended[.]"[91] But *ANJRPC* does not stand for the proposition that *all* magazines are categorically protected Arms under the Second Amendment. Indeed, we expressly assumed without deciding that the LCMs at issue (those with 10 or more rounds of ammunition) were "commonly owned and typically possessed by law-abiding citizens for lawful purposes."[92] Other courts took a similar approach pre-*Bruen*.[93] But we now have the benefit of *Bruen*, which confirms that only "weapons 'in common use' today for self-defense," as opposed to generally "lawful purposes," are protected by the Second Amendment.[94] As a result, the evidence that sufficed for the sake of argument in *ANJRPC*—evidence showing magazines are "typically possessed by law-abiding citizens for hunting, pest-control, and *occasionally* self-defense"—does not suffice here.[95] Not all guns are "Arms" protected under the Second Amendment, nor are all magazines.

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91. *ANJRPC*, 910 F.3d at 116.

92. *Id.* (internal citations omitted).

93. *See, e.g., New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 256-57 (2d Cir. 2015); *Worman v. Healey*, 922 F.3d 26, 30 n.12 (1st Cir. 2019).

94. *Bruen*, 597 U.S. at 48.

95. *ANJRPC*, 910 F.3d at 116 (emphasis added).

Plaintiffs show that LCMs are widely owned but otherwise offer no evidence that the LCMs at issue here—magazines that can hold seventeen or more rounds—are suitable for or actually used in self-defense. By contrast, Delaware offered evidence showing that LCMs are most useful as weapons of war. Like assault long guns, LCMs were designed for military use to allow a soldier to "fire an increased quantity of cartridges without reloading."[96] They are marketed to civilians for the same express purpose ("Twice the violence of action. Half the reloads. Win-win"), but that purpose is plainly most useful in combat.[97] The record shows it is "extremely rare" for a person to fire even ten rounds, let alone more than seventeen, in self-defense.[98] Quite the opposite. A study of "armed citizen" stories collected by the National Rifle Association from 2011 to 2017 found that the average number of shots fired in self-defense was 2.2.[99]

Based on the record presented, the LCMs Delaware seeks to regulate are most useful as military weapons and thus are not "Arms" protected by the Second Amendment.

Assault pistols: Plaintiffs offered no evidence that the nineteen types of assault pistols listed at § 1465(3) are best adapted for self-defense, commonly owned for

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96. SA 454-55 ¶ 55.

97. SA 96 (advertisement for 60-cartridge magazine) (cleaned up).

98. SA 331 ¶ 9.

99. *Id.*

self-defense, or commonly used for self-defense. Plaintiffs' sole argument is that that the Supreme Court has already "clarifi[ed]" that assault pistols listed "are in common use," citing Justice Alito's concurrence in *Caetano v. Massachusetts*.[100] Not so. Although Justice Alito observed that "revolvers and semiautomatic pistols" are "the weapons most commonly used today for self-defense," the Court's *per curiam* opinion pertained only to stun guns and simply affirmed *Heller*'s holding that a weapon need not have existed at the time of the founding to receive Second Amendment protection.[101] Moreover, Justice Alito's broad observation about "revolvers and semiautomatic pistols" tells us nothing about the nineteen specific assault pistols Delaware seeks to regulate.[102]

Dictum from Justice Alito's *Caetano's* concurrence notwithstanding, and based on the record presented, the assault pistols at issue are not "Arms" presumptively protected by the Second Amendment.

Copycat weapons: Plaintiffs claim that the assault long guns and assault pistols listed at §§ 1465(2) and (3) are

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100. Delaware State Br. 12 (citing *Caetano*, 577 U.S. at 416-17 (Alito, J., concurring), *Heller v. D.C. ("Heller II")*, 670 F.3d 1244, 1269, 399 U.S. App. D.C. 314 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), and *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 255 (2d Cir. 2015)); Del. Code Ann. tit. 11, § 1465(3).

101. *Caetano*, 577 U.S. at 416-17 (Alito, J., concurring); *see id.* at 411-12.

102. *Id.* at 416-17 (Alito, J., concurring).

no different from the copycat weapons listed at § 1465(6). According to plaintiffs, because assault long guns and assault pistols are widely owned and therefore protected under the Second Amendment, the same is true for copycat weapons. However, as discussed above, plaintiffs failed to demonstrate that assault long guns and assault pistols are in common use for self-defense. By plaintiffs' own logic, our analysis of copycat weapons ends there. Moreover, the only evidence plaintiffs submitted was a survey regarding the ownership and use of the "AR-15 or similarly styled rifles."[103] These statistics, by themselves, do not establish that copycat weapons are commonly used for self-defense. Accordingly, copycat weapons are not "Arms" protected by the Second Amendment.

Because I would hold that none of the assault weapons or LCMs Delaware seeks to regulate are "Arms" at *Bruen* step one, it is unnecessary to consider whether Delaware met its burden at *Bruen* step two. But even assuming that the assault weapons and LCMs at issue fall within the ambit of Arms protected by the Second Amendment, the District Court's careful analysis leaves no doubt that Delaware's laws are consistent with the nation's historical traditional of firearm regulation.[104] Either way, plaintiffs

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103. William English, 2021 Nat'l Firearms Survey: Updated Analysis Including Types of Firearms Owned 33 (May 13, 2022) (Georgetown McDonough School of Business Research Paper No. 4109494), https://bit.ly/3yPfoHw.

104. *See Delaware State Sportsmen's Ass'n*, 664 F. Supp. 3d at 597-603. Based on a record "almost entirely supplied by" Delaware, the District Court decided that Delaware met its *Bruen* step two burden. *Id.* at 597 n.13. Rightly so.

failed to demonstrate a likelihood of success on the merits of their Second Amendment claim, and the District Court correctly denied injunctive relief.

B. The balance of the equities and the public interest also weigh in favor of denying the preliminary injunction.

Finally, I turn briefly to the balance of the equities and the public interest.[105] I agree with the Majority that neither factor weighs in plaintiffs' favor. However, I believe the Majority construes the state's interest in this case too narrowly. While the Majority rightly identifies Delaware's interest in the execution of its democratically enacted laws,[106] the state has an equally important interest in the safety of its citizens.

In recent years, the United States has experienced an exponential increase in the frequency of mass shootings. Scholars estimate that only twenty-five mass shootings

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105. *See Winter v. NRDC*, 555 U.S. 7, 26, 32, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008); *Reilly*, 858 F.3d at 177-79. There is no tension between our consideration of the public interest and *Bruen*'s disavowal of means-end scrutiny. 597 U.S. at 19. The former is a threshold inquiry that cabins our use of preliminary injunctions, while the latter concerns the merits of the constitutional claim. These inquiries are also substantively different: means-end scrutiny concerns the tailoring of a law to advance a government objective, while the final two preliminary injunction factors consider the consequences for the parties and the public. *Cf. Bevis*, 85 F.4th at 1203-04.

106. Maj. Op. 24-25.

occurred between 1900 and 1965.[107] By contrast, the United States now endures more than 600 mass shootings per year—nearly two per day. Assault weapons and LCMs have been the weapons of choice in many of these mass shootings, and unsurprisingly, mass shootings involving assault weapons and LCMs result in far more fatalities and injuries than those that do not.[108] The Delaware legislature recognized that assault weapons and LCMs pose a grave "threat to the health, safety, and security" of Delawareans and acted accordingly.[109]

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107. *See* Bonnie Berkowitz & Chris Alcantara, *Mass Shooting Statistics in the United States*, Wash. Post (May 9, 2021), https://tinyurl.com/537ww9z4. As used here, a "mass shooting" is a shooting in which four or more people, not including the perpetrator, are injured or killed, where victims are selected indiscriminately, and where the shootings are not attributable to any other underlying criminal activity or circumstance.

108. For example, Delaware submitted a study of 179 mass shootings that have occurred between 1982 and October 2022. Of the mass shootings where the weapon type (153) and magazine capacity (115) were known, 24% involved assault weapons and 63% involved LCMs capable of holding ten or more rounds. Mass shootings involving assault weapons had an average of 36 fatalities or injuries per shooting, while those that did not involve assault weapons had an average number of 10. Similarly, mass shootings involving LCMs had an average of 25 fatalities or injuries per shooting, whereas those that did not involve LCMs had an average of 9. Shooters fired more than 17 rounds in 92% of mass shootings known to have been committed with an assault weapon and an average of 116 shots in mass shootings involving LCMs.

109. Del. Code Ann. tit. 11, § 1464.

Confronted with unprecedented violence, Delaware determined it was in the public interest to address the proliferation of assault weapons and LCMs—instruments that were purpose-built to kill as many people as quickly as possible. It is clear to me that the Second Amendment does not compel Delaware to turn a blind eye to the safety of its citizens. Moreover, Delaware's interest in public safety is relevant to the propriety of denying injunctive relief.

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For the above reasons, I agree that we should affirm the District Court's order denying injunctive relief, but I urge that these other relevant factors be kept in mind by future courts in future cases.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE, FILED MARCH 27, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 22-951-RGA (Consolidated)

DELAWARE STATE SPORTSMEN'S ASSOCIATION, INC; BRIDGEVILLE RIFLE & PISTOL CLUB, LTD.; DELAWARE RIFLE AND PISTOL CLUB; DELAWARE ASSOCIATION OF FEDERAL FIREARMS LICENSEES; MADONNA M. NEDZA; CECIL CURTIS CLEMENTS; JAMES E. HOSFELT, JR; BRUCE C. SMITH; VICKIE LYNN PRICKETT; and FRANK M. NEDZA,

Plaintiffs,

v.

DELAWARE DEPARTMENT OF SAFETY AND HOMELAND SECURITY, *et al.*,

Defendants.

March 27, 2023, Decided
March 27, 2023, Filed

MEMORANDUM OPINION

Appendix B

ANDREWS, UNITED STATES DISTRICT JUDGE:

Before me are Plaintiffs' motions for a preliminary injunction. (D.I. 10; *Gabriel Gray et al. v. Kathy Jennings*, C.A. No. 1:22-cv-01500, D.I. 4).[1] The motions have been fully briefed. (D.I. 11, 37, 44; *Gabriel Gray et al. v. Kathy Jennings*, C.A. No. 1:22-cv-01500, D.I. 5).[2] I heard lengthy and helpful oral argument on February 24, 2023. (D.L 54). For the reasons set forth below, the motions are DENIED.

I. BACKGROUND

A. Nature and Stage of the Proceedings

On June 30, 2022, the State of Delaware enacted a package of gun safety bills, two of which are challenged here. One of them, House Bill 450 ("HB 450"), regulates assault weapons.[3] An Act to Amend the Delaware Code

1. Unless otherwise indicated, docket citations are to the docket in No. 22-951.

2. The evidentiary record is limited. Defendants present a robust evidentiary record, including declarations from five expert witnesses. (D.I. 38-42). Plaintiffs do not challenge Defendants' evidence with any testimonial evidence of their own. I note that nothing I find at this stage will bind my decisions that come later, once the parties have had more time to develop the evidentiary record.

3. Plaintiffs call the designation "assault weapons" a "complete misnomer" that anti-gun publicists developed "in their crusade against lawful firearm ownership." (DSSA Br. at 8; Gray Br. at 5-6). Defendants argue that, to the contrary, the term "assault weapon" derives from the name of the first assault

Relating to Deadly Weapons, H.B. 450, 151st Gen. Assemb. (Del. 2022) (codified at 11 *Del. C.* §§ 1464-1467). The other, Senate Substitute 1 for Senate Bill 6 ("SS 1 for SB 6"), regulates large-capacity magazines ("LCMs"). An Act to Amend Title 11 of the Delaware Code Relating to Deadly Weapons, Senate Substitute 1 for Senate Bill 6, 151st Gen. Assemb. (Del. 2022) (codified at 11 *Del. C.* §§ 1441, 1468-1469A).

On July 20, 2022, Plaintiffs in *Delaware State Sportsmen's Association, Inc. et al. v. Delaware Department of Safety and Homeland Security et al*, C.A. No. l:22-cv-00951 (the "DSSA Action") filed suit challenging HB 450 under the Second, Fifth, and Fourteenth Amendments of the U.S. Constitution, the Commerce Clause, and the Delaware Constitution.[4] (D.I. 1). Plaintiffs also alleged preemption. (*Id.*). On September 9, 2022, Plaintiffs filed an Amended Complaint that added claims challenging SS 1 for SB 6. (D.I. 5). On November 15, 2022, Plaintiffs moved for a preliminary injunction barring the enforcement of the statutes, on the basis

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weapon—the German "Strumgewehr," which translates to "storm rifle"—and that the term has long been used by the gun industry and government agencies. (D.I. 37 at 11).

As to who is right, I express no opinion. I will nevertheless refer to the semi-automatic firearms regulated under HB 450 as "assault weapons," as that is the term employed by the statute.

4. There is no doubt that some of the defendants in this action are properly named. Defendants have not raised the issue of whether this is true of all defendants. Therefore, I do not address it here.

that the statutes violate their right to keep and bear arms under the Second and Fourteenth Amendments and Article I, § 20 of the Delaware Constitution. (D.I. 10 ("DSSA Br.")). On March 14, 2023, Plaintiffs voluntarily dismissed without prejudice the Delaware state law claims brought pursuant to Article I, § 20. (D.I. 56).

On November 16, 2022, Plaintiffs in *Gabriel Gray et al. v. Kathy Jennings*, C.A. No. 1:22-cv-01500 (the "Gray Action") filed suit challenging HB 450 under the Second and Fourteenth Amendments. (Gray Action, D.I. 1). On November 22, 2022, Plaintiffs moved for a preliminary and permanent injunction barring the enforcement of the statute, on the basis that the statutes violate their right to keep and bear arms under the Second and Fourteenth Amendments. (Gray Action, D.I. 4 ("Gray Br.")).

On January 12, 2023, Plaintiffs in *Christopher Graham, et al. v. Kathy Jennings*, C.A. No. 1:23-00033 (the "Graham Action") filed suit challenging SS 1 for SB 6 under the Second and Fourteenth Amendments. (Graham Action, D.I. 1).

On December 20, 2022, the Gray Action was consolidated with the DSSA Action. (D.I. 24; Gray Action, D.I. 12). On March 6, 2023, the Graham Action was consolidated with the DSSA Action as well. (D.I. 52; Graham Action, D.I. 8). Trial has been set for November 13-17, 2023. (D.I. 25).

B. The Challenged Statutes

1. HB 450

HB 450 makes numerous "assault weapons" illegal, subject to certain exceptions. 11 *Del. C.* §§ 1464-1467. The list of prohibited firearms is long. It includes (1) forty-four enumerated semi-automatic "assault long gun[s]," including the AR-15, AK-47, and Uzi, 11 *Del. C.* § 1465(2) , (2) nineteen specifically identified semi-automatic "assault pistol[s]," *id.* § 1465(3), and (3) "copycat weapon[s]," *id.* § 1465(4). "Copycat weapon[s]" include semi-automatic, centerfire rifles that can accept a detachable magazine and which have one of five features,[5] semi-automatic pistols that can accept a detachable magazine and which have certain similar enhanced characteristics, and certain other semi-automatic weapons. *Id.* § 1465(6).

HB 450 prohibits the manufacture, sale, offer to sell, purchase, receipt, transfer, possession or transportation of these weapons, subject to certain exceptions, including for military and law-enforcement personnel (including qualified retired law-enforcement personnel). *Id.* §§ 1466(a), (b). People who possessed or purchased assault weapons before the statute became effective can continue to possess and transport them under certain conditions, including (i) at their residence and place of business, (ii) at a shooting range, (iii) at gun shows, and (iv) while traveling

5. The features include a folding or telescoping stock, a forward pistol grip, a flash suppressor, and a grenade launcher or flare launcher. 11 *Del. C.* § 1465(6)(a). Defendants refer to these features as "military features." (D.I. 37 at 6).

between any permitted places. *Id.* § 1466(c). They can also transfer them to family members. *Id.*

2. SS 1 for SB 6

SS 1 for SB 6 makes it illegal "to manufacture, sell, offer for sale, purchase, receive, transfer, or possess a large-capacity magazine." *Id.* § 1469(a). "Large-capacity magazine[s]" are those "capable of accepting, or that can readily be converted to hold, more than 17 rounds of ammunition." *Id.* § 1468(2). The statute exempts many of the same individuals as HB 450, along with individuals who have a valid concealed carry permit. *Id.* § 1469(c). Unlike HB 450, SS 1 for SB 6 does not grandfather any magazines. It does, however, require the State to implement a buy-back program. *Id.* § 1469(d).

II. LEGAL STANDARD

A preliminary injunction is "an extraordinary remedy," and "should be granted only in limited circumstances." *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). A movant seeking a preliminary injunction must establish (1) "that he is likely to succeed on the merits," (2) "that he is likely to suffer irreparable harm in the absence of preliminary relief," (3) "that the balance of equities tips in his favor, and" (4) "that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). As the Supreme Court has noted, a preliminary injunction is "a drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of

persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S. Ct. 1865, 138 L. Ed. 2d 162 (1997) (emphasis in original) (quoting 11A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2948 at 129-130 (2d ed. 1995)).

The first two factors are the "most critical" factors. *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017). The Third Circuit has explained that the first factor, likelihood of success on the merits, "requires a showing significantly better than negligible, but not necessarily more likely than not." *Id.* The second factor, irreparable harm in the absence of preliminary relief, requires a showing that irreparable harm is "more likely than not." *Id.* If the movant meets these "gateway factors," "a court then considers the remaining two factors and determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief." *Id.*

III. DISCUSSION

For the following reasons, I conclude that Plaintiffs have failed to meet their burden of establishing the first two preliminary injunction factors: (1) likelihood of success on the merits, and (2) irreparable harm in the absence of a preliminary injunction. *Winter*, 555 U.S. at 20. I therefore deny Plaintiffs' motions.[6]

6. Other district courts have reached the same conclusion when faced with *post-Bruen* Second Amendment challenges to similar statutes. *See, e.g., Bevis v. City of Naperville Ill.*, 2023 U.S. Dist. LEXIS 27308, 2023 WL 2077392 (N.D. 111. Feb. 17,

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A. Likelihood of Success on the Merits

The governing case is *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022). I must first determine whether "the Second Amendment's plain text covers an individual's conduct." *Id.* at 2129-30. If the answer is no, then the Second Amendment does not apply, and the regulation is constitutional. But if the answer is yes, then "the Constitution presumptively protects that conduct," and it is the government's burden to "then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2130. Only after performing this second step "may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." *Id.* (cleaned up).

2023) (denying TRO and preliminary injunction where plaintiffs challenged legislation prohibiting sale of assault weapons and LCMs), *appeal docketed*, No. 23-1353 (7th Cir. Feb. 23, 2023); *Ocean State Tactical, LLC v. State of Rhode Island*, 2022 U.S. Dist. LEXIS 227097, 2022 WL 17721175 (D.R.I. Dec. 14, 2022) (denying preliminary injunction where plaintiffs challenged legislation prohibiting possession of LCMs), *appeal docketed*, No. 23-01072 (1st Cir. Jan. 13, 2023); *Or. Firearms Fed'n, Inc. v. Brown*, 2022 U.S. Dist. LEXIS 219391, 2022 WL 17454829 (D. Or. Dec. 6, 2022) (denying TRO where plaintiffs challenged legislation prohibiting sale and restricting use of LCMs), *appeal voluntarily dismissed*, No. 22-36011, 2022 U.S. App. LEXIS 34277 (9th Cir. Dec. 12, 2022).

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1. LCMs and Assault Weapons are Protected by the Second Amendment

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 not be infringed." U.S. CONST. amend. II. "Like most rights, the right secured by the Second Amendment is not unlimited" and is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Bruen*, 142 S. Ct. at 2128 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008)). Only if "the Second Amendment's plain text covers an individual's conduct, [will] the Constitution presumptively protect[] that conduct." *Id.* at 2129-30. To meet this threshold burden, which Plaintiffs concede is theirs (*e.g.*, D.I. 44 at 2), a plaintiff must demonstrate that the "textual elements" of the Second Amendment's operative clause apply to the conduct being restricted. *See* 142 S. Ct. at 2134 (quoting *Heller*, 554 U.S. at 592).

Driving the analysis at this step are several key limitations to the scope of the Second Amendment's coverage. First, the Second Amendment "extends, prima facie, to all instruments that constitute bearable arms." *Heller*, 554 U.S. at 582. Thus, Plaintiffs must show that the statutes at issue regulate weapons that fall under the Second Amendment's definition of "bearable arms." Second, the Second Amendment extends only to bearable arms that are "in 'common use' for self-defense today." *Bruen*, 142 S. Ct. at 2143. Thus, Plaintiffs must also show

that the statutes at issue regulate such arms. Third, the Second Amendment does not create a right to keep and carry "dangerous and unusual weapons." *Heller*, 554 U.S. at 627. This limitation shares considerable overlap with the "in common use" requirement. Whether a weapon is "in common use" depends on whether it is "dangerous and unusual." *See id.* at 627 (cleaned up) ("[A]s we have explained ... the sorts of weapons protected were those in common use at the time. We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons."); *Bruen*, 142 S. Ct. at 2143 ("[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." (cleaned up)).

As an initial matter, the parties dispute the scope of the "common use" limitation described above. Plaintiffs argue that they "only have to show that the restricted arms are ... in common use today for lawful purposes" (D.I. 44 at 2), "of which self-defense is but one of many" (*id.* at 3). Defendants counter that "the Second Amendment does not protect weapons simply because they are common." (D.I. 37 at 32). Instead, say Defendants, Plaintiffs must show "that assault weapons and LCMs are in 'common use' today for the lawful purpose of self-defense." (*Id.*).

Although the Supreme Court has not spoken on this question directly, it has repeatedly emphasized the centrality of self-defense to the Second Amendment right. *Heller* and *McDonald v. Chicago*, 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) stand for the proposition

"that the Second and Fourteenth Amendments protect an individual right to keep and bear arms for *self-defense*." *Bruen*, 142 S. Ct. at 2125 (emphasis added) (characterizing the holding of both cases). In *Bruen*, the Court held "that the Second and Fourteenth Amendments protect an individual's right to carry a handgun *for self-defense* outside the home." *Id.* at 2122 (emphasis added). The Court explained in *Heller* that self-defense is the "core" of the Second Amendment right, 554 U.S. at 630, the right's "*central component*," *id.* at 599 (emphasis in original), and the motivation for the Second Amendment's codification in a written Constitution. *Id.* Self-defense was no less essential in *Bruen*, which turned on the Court's conclusion that, "handguns ... are indisputably in 'common use' for self-defense today." 142 S. Ct. at 2143 (quoting *Heller*, 554 U.S. at 629). Notably, *Bruen* tethered its "common use" analysis to self-defense. *See* 142 S. Ct. at 2134-35 (concluding that "[t]he Second Amendment's plain text thus presumptively guarantees petitioners Koch and Nash a right to 'bear' arms in public for self-defense," *id.* at 2135); *see also id.* at 2134 ("Nor does any party dispute that handguns are weapons 'in common use' today for self-defense").

Plaintiffs point to various instances in which the Supreme Court addresses the "common use" requirement without mentioning self-defense. For example, Plaintiffs repeatedly highlight the Court's statement that the colonial laws at issue "provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today," *id.* at 2143, arguing that this supports a broad reading of "in common use."

(D.I. 44 at 7, 15). But in context, it seems that the Court was referring to "common use" for self-defense. Indeed, in the sentence immediately preceding the sentence that Plaintiffs cite, the Court concluded that "[handguns] are, in fact, 'the quintessential self-defense weapon.'" *Bruen*, 142 S. Ct. at 2143. Plaintiffs also point to an assertion by the D.C. Circuit that the Supreme Court "said the Second Amendment protects the right to keep and bear arms for other lawful purposes, such as hunting." *Heller v. District of Columbia*, 670 F.3d 1244, 1260, 399 U.S. App. D.C. 314 (D.C. Cir. 2011) (citing *Heller*, 554 U.S. at 630). The D.C. Circuit appeared to rely on the Court's statement in *Heller* that, in the colonial and revolutionary war era, "[t]he traditional militia was formed from a pool of men bringing arms 'in common use at the time' for lawful purposes like self-defense." *Heller*, 554 U.S. at 630. The statement, although certainly favorable to Plaintiffs' view, is far from a clear pronouncement on the scope of the right.

As Defendants note, Plaintiffs' formulation would seem to "upend settled law." (*Id.* at 33). One such law is the National Firearms Act of 1934, 48 Stat. 1236, which restricts civilian acquisition and circulation of fully automatic weapons, such as machine guns. (D.I. 40 at 36). At oral argument, Defendants presented evidence that, as of 2016, there were nearly 176,000 legal civilian-owned machine guns in the United States.[7] (D.I. 50-1, Ex. A at

7. Defendants assert in their opposition brief that "there are over 741,000 registered machine guns in the United States today. (D.I. 37 at 32). As Defendants acknowledged at oral argument (D.I. 54 at 99), the 176,000 figure is more precise, as it excludes, for example, machine guns in law enforcement.

2). That number comes close to the quantity of weapons that Plaintiffs, in their reply brief, identify as sufficient for "common use." (*See* D.I. 44 at 9) (arguing that "the sale of approximately 200,000 stun guns was enough for them to be considered in common use by Justice Alito" in his concurrence in *Caetano v. Massachusetts*, 577 U.S. 411, 420, 136 S. Ct. 1027, 194 L. Ed. 2d 99 (2016) (Alito, J., concurring)).[8] Thus, under Plaintiffs' logic, an unqualified "common use" rule could render the National Firearms Act's machine gun restrictions constitutionally suspect. The Supreme Court, however, has said that it would be "startling" to suggest that those restrictions might be unconstitutional. *Heller*, 554 U.S. at 624. The Supreme Court's confidence in the constitutionality of the National Firearms Act therefore casts doubt on Plaintiffs' argument.

The question is a close one. My sense is that Defendants are correct, and the "in common use" inquiry turns on whether a regulated weapon is "in common use" for self-defense. For the purposes of this opinion, however, the rule I choose does not affect the outcome of the analysis,

8. Plaintiffs' characterization of Justice Alito's concurrence is slightly off the mark. The 200,000-figure was in reference to the number of civilians who owned stun guns, not the number of stun guns that had been sold. *Caetano*, 577 U.S at 420 (Alito, J., concurring). As Plaintiffs note (D.I. 44 at 9), in that concurrence, "the touchstone for 'common use' was ownership." *See Caetano*, 577 U.S. at 420 (Alito, J., concurring) (concluding that stun gun ban violates Second Amendment because "stun guns are widely owned and accepted as a legitimate means of self-defense across the country").

as I conclude that Plaintiffs have shown that at least some of the prohibited assault weapons and LCMs pass muster under both versions of the "in common use" requirement.

a. Assault weapons

The parties do not dispute that assault weapons belong to the broad category of weapons constituting "bearable arms." (*See* D.I. 54 at 111 (Defendants acknowledging that, for example, a bazooka would fall within this category); *id.* at 14 (Plaintiffs acknowledging the same)). The sole question, then, is whether assault weapons satisfy the "in common use" requirement and are therefore presumptively entitled to constitutional protection. I think that Defendants' narrower view of that requirement—that is, the view that a bearable arm must be "in common use" for self-defense—is the correct one. For the following reasons, however, I conclude that Plaintiffs have established that some—but not all—of the regulated assault weapons satisfy both Defendants' and Plaintiffs' formulations of the requirement.

I begin with "assault pistols." Plaintiffs do not devote much argument to these weapons. In fact, between Plaintiffs' opening briefs and joint reply brief, only a single paragraph specifically addresses whether the banned assault pistols are "in common use." In that paragraph, Plaintiffs assert that the "assault pistols" listed in HB 450 constitute "common handguns" that are, per *Bruen*, undisputedly in common use today for self-defense (DSSA Br. at 6 (citing *Bruen's* recognition of handguns as "the quintessential defense weapon," 142

S. Ct at 2119)). Plaintiffs do not, however, accompany this assertion with any support. This is not enough to satisfy Plaintiffs' burden at the preliminary injunction stage. *See Mazurek*, 520 U.S. at 972 (emphasizing that the movant for a preliminary injunction carries a steep burden of persuasion). I therefore decline to find that assault pistols are "in common use" and thus "presumptively protect[ed]" by the Second Amendment. *Bruen*, 142 S. Ct. at 2111.

Next, I turn to "copycat weapons." Plaintiffs' argument on these weapons is scant as well. Although Plaintiffs assert that "[s]o-called 'copycat weapons' and their specific features ... are also in common use" (Gray Br. at 7), Plaintiffs do not go on to explain why this is so. Consequently, I find that Plaintiffs have failed to satisfy their burden of persuasion as to copycat weapons.

Finally, I turn to "assault long guns." Here, Plaintiffs provide ample support for their argument that such weapons are "in common use" for lawful purposes that include self-defense.[9] Plaintiffs show that AR-style rifles—one of the types of "assault long guns" that HB 450 prohibits—are popular. According to one recent survey of gun owners in the United States, 30.2 percent of gun owners (approximately 24.6 million Americans) have owned up to forty-four million AR-15 or similar rifles. (Gray Br. at 5 (citing William English, 2021 Nat'l Firearms

9. Several of the authorities relied upon by Plaintiffs do not appear to be publicly available. (*E.g.*, Gray Br. at iv ("Nat'l Shooting Sports Found., Inc., *Firearms Retailer Survey Report* (2013)")). As Plaintiffs did not attach those authorities to any of their briefs, I decline to consider them here.

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Survey: Updated Analysis Including Types of Firearms Owned 1 (May 13, 2022) (Georgetown McDonough School of Business Research Paper No. 4109494), https://bit.ly/3yPfoHw)).[10] Plaintiffs assert that the number of assault rifles "in circulation" today "approaches twenty million."[11] (DSSA Br. at 7). Gun owners seek such rifles for a variety of lawful uses, including recreational target shooting, self-defense, collecting, hunting, competition shooting, and professional use. (*Id.* at 6 (citing NAT'L SHOOTING SPORTS FOUND., INC., Modern Sporting Rifle Comprehensive Consumer Report 18 (July 14, 2022), https://www3.nssf.org/share/PDF/pubs/NSSF-MSR-Comprehensive-Consumer-Report.pdf)). Taken together, these data suggest that the banned assault long guns are indeed "in common use" for several lawful purposes, including self-defense.

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10. Plaintiffs' source did not differentiate between guns used by civilians and guns used by law enforcement officers, who may have been represented in the survey. *Id.* at 19. The numbers that Plaintiffs report might therefore be imprecise—but not drastically so, as "the number of law enforcement officers in the U.S. is well under a million." *Id.*

11. At oral argument, Plaintiffs said that the total number of weapons in circulation that fall under HB 450's prohibitions is "perhaps 10 million," but, given the unreliability of survey data, "possibly quite a lot more." (D.I. 54 at 24-25). As Defendants note, even twenty million is only "a small fraction of the more than 470 million guns in the United States." (D.I. 37 at 15). The Supreme Court has not clarified the meaning of "common use," as the issue was undisputed in *Bruen*, 142 S. Ct. at 2119. I think that ten million in circulation is enough.

Defendants disagree. They argue that the banned assault weapons, unlike handguns, are not well-suited for any of the lawful purposes that Plaintiffs identify. (D.I. 37 at 17-20 (explaining that assault weapons have limited utility for self-defense, hunting, and recreation)). Plaintiffs argue that, to the contrary, assault weapons are useful for each of those purposes. (*E.g.*, Gray Br. at 6-7 (contending that the AR-15 is "an optimal firearm to rely on in a self-defense encounter"); *id.* at 8 (contending that certain shared features of the prohibited assault weapons, such as flash suppressors and telescoping stocks, are helpful for hunting and sport shooting)). This dispute seems to me to be beside the point.[12] As Plaintiffs argued in their reply brief (D.I. 44 at 4) and at oral argument (D.I. 54 at 142), the relevant question here is "what the people choose" for lawful purposes, rather than a weapon's objective suitability for those purposes. (*Id). See Heller*, 554 U.S. at 629 ("Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.").

Defendants make the related argument that, because "assault weapons are rarely utilized in defense situations," they cannot be "in common use" for self-defense purposes. (*See* D.I. 37 at 19). Defendants cite data showing that assault weapons were used for self-defense in less than 1 percent of "active shooter" incidents over the last two

12. As Defendants offer expert testimony on this point (*e.g.*, D.I. 42 at 49-54), and Plaintiffs have offered no comparable evidence in response, I am inclined to agree with Defendants that assault weapons are not the optimal firearms for self-defense.

decades (D.I. 38 at 15), and that rifles of any type are only used for self-defense in a small minority of incidents. (*Id.* at 18-19). This argument does not convince me either. I agree with Plaintiffs that the plain terms of the Second Amendment— which protects the right to "keep and bear Arms," U.S. CONST. amend. II—"contemplates ways of 'using' firearms other than just shooting them." (D.I. 44 at 8). For example, the Supreme Court stated that "bear arms" means to "wear, bear, or carry... upon the person or in the clothing or in a pocket, for the purpose ... of being armed and ready for offensive or defensive action in a case of conflict with another person." *Heller*, 554 U.S. at 582-84 (alterations in original) (internal quotation marks omitted). *See also Bruen*, 142 S. Ct. at 2134 (noting that "individuals often 'keep' firearms in their home, at the ready for self-defense...."). Consequently, I do not think it matters, for the purposes of this analysis, that assault weapons are seldom fired in self-defense. What matters is that they are commonly owned for the purpose of self-defense, which, as explained, Plaintiff has sufficiently shown.

Next, Defendants argue that the listed assault long guns cannot be deemed to be "in common use" today, as they, along with the other prohibited weapons, are "dangerous and unusual." (D.I. 37 at 30-31). Defendants contend that the "dangerous and unusual" test is an inquiry into whether the regulated item is "unusually dangerous." Defendants' reasoning is as follows. In *Heller*, the Supreme Court cited Blackstone as support for the historical tradition of prohibiting the carrying of "dangerous and unusual" weapons. 554 U.S. at 2817.

Defendants point to the originating text, in which Blackstone employed the phrase "dangerous *or* unusual weapons." (D.I. 37 at 31) (emphasis in original). They argue that this phrase is a figure of speech that means "unusually dangerous," and that, consequently, "unusually dangerous" is the proper interpretation of "dangerous and unusual." (*Id.*).

This argument, although interesting and perhaps meritorious as a historical matter, asks me to ignore the great weight of authority to the contrary. I decline to do so. The test is "dangerous and unusual," and to fall outside the Second Amendment's protection, a weapon must check both boxes. *See Bruen*, 142 S. Ct. at 2128; *see also Caetano*, 577 U.S. at 417 (Alito, J., concurring) ("[T]his is a conjunctive test: A weapon may not be banned unless it is *both* dangerous *and* unusual. Because the Court rejects the lower court's conclusion that stun guns are 'unusual,' it does not need to consider the lower court's conclusion that they are also 'dangerous.'" (emphasis in original)).

Defendants' trouble is that, although they thoroughly demonstrate that the prohibited assault long guns are "dangerous" (and probably "unusually dangerous"), *see infra* Section III.A.2, they cannot show that assault long guns are "unusual." As discussed, Plaintiffs have sufficiently demonstrated that assault long guns are numerous and "in common use" for a variety of lawful purposes. I therefore conclude that the prohibited assault long guns are in common use for self-defense, and therefore "presumptively protect[ed]" by the Second Amendment. *Bruen*, 142 S. Ct. at 2111.

b. Large-Capacity Magazines

First, I address the question of whether LCMs are "arms." The Third Circuit answered this question in the affirmative in *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Att'y Gen. New Jersey*, 910 F.3d 106 (3d Cir. 2018) (hereinafter "*ANJRPC*"), a pre-*Bruen* case. There, the statute at issue limited the amount of ammunition that could be held in a single firearm magazine to no more than 10 rounds. *Id.* at 110. The Third Circuit held, "Because magazines feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended, magazines are 'arms' within the meaning of the Second Amendment." *Id.* at 116. Defendants argue that this decision is distinguishable in light of the difference between the restrictions at issue. (D.I. 37 at 29). *In ANJRPC*, 910 F.3d at 110, the upper limit was a capacity of 10 rounds; here, the upper limit is 17 rounds. 11 *Del. C* § 1468(2). Defendants argue that the Third Circuit's decision "rested upon the conclusion that the ban on smaller magazines could 'make it impossible to use firearms for their core purpose.'" (D.I. 37 at 29). Defendants point out that Plaintiffs do not make any such claim here. (*Id.*). Indeed, Plaintiffs admit that they are not aware of any firearms that come with a magazine holding over 17 rounds that cannot also be operated using a smaller magazine. (D.I. 48 at 1).

I am not convinced, however, that this makes a difference. The Third Circuit did not restrict its holding to magazines necessary for the operation of certain firearms; rather, it broadly held that "magazines are

'arms.'" *ANJRPC*, 910 F.3d at 106. I think that I am bound by its decision, notwithstanding Defendants' evidence regarding the historical definition of "arms" (D.I. 39), and the existence of decisions from district courts in other circuits that hold to the contrary. *E.g., Ocean State Tactical, LLC v. State of Rhode Island*, 2022 U.S. Dist. LEXIS 227097, 2022 WL 17721175, at * 13 (D.R.I. Dec. 14, 2022) (finding that plaintiffs failed to demonstrate that LCMs are "arms" within the meaning of the Second Amendment), *appeal docketed*, No. 23-01072 (1st Cir. Jan. 13, 2023). Magazines are arms, and so are LCMs.

Second, I address the question of whether LCMs are "in common use" for self-defense today. The Third Circuit addressed this question as well, although less definitively. Applying the now-defunct two-step approach under intermediate scrutiny, the Third Circuit "assume[d] without deciding that LCMs are typically possessed by law-abiding citizens for lawful purposes." *ANJRPC*, 910 F.3d at 116. It did, however, observe that "millions of magazines are owned, often come factory standard with semi-automatic weapons," and "are typically possessed by law-abiding citizens for hunting, pest-control, and occasionally self-defense." *Id.*

Plaintiffs sufficiently demonstrate that this is so. They argue, "There are currently tens of millions of rifle magazines that are lawfully-possessed in the United States with capacities of more than seventeen rounds," including magazines for the AR-15 rifle (DSSA Br. at 9), which I have already found to be "in common use" for self-defense. The AR-15 platform is capable of accepting

standard magazines of 20 or 30 rounds (*id.* at 9) and is "typically sold with 30-round magazines." *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1145 (S.D. Cal. 2019); (D.I. 54 at 69). Indeed, Plaintiffs point to evidence suggesting that "52% of modern sporting rifle magazines in the country have a capacity of 30 rounds." (D.I. 44 at 16). This is enough to show that LCMs are "in common use" for self-defense.

Defendants respond with the same suitability arguments they raised with respect to assault weapons. For example, Defendants argue that LCMs with more than 17 rounds are "unnecessary for self-defense" because self-defense situations "rarely, if ever, involve lengthy shootouts with extensive gunfire," and data suggest that individuals who use firearms for self-defense rarely fire even 10 rounds. (D.I. 37 at 19). They also contend that LCMs are ill-suited for hunting, which "prioritizes limited, precise shots over a high volume of shots" (*id.*), and recreation, as LCMs aren't necessary for the use of assault rifles in shooting competitions (*id.* at 20). I reject these arguments for the same reasons I rejected them with respect to assault long guns: suitability is immaterial here. Likewise, I reject Defendants' "dangerous and unusual" argument as to LCMs (D.I. 37 at 31-32) for the same reasons I did so with respect to assault long guns: LCMs, although "dangerous," *see* Section III.A.2 *infra*, are not "unusual."

For these reasons, I conclude that the prohibited LCMs, like the prohibited assault long guns, are in common use for self-defense and therefore "presumptively

protect[ed]" by the Second Amendment. *Bruen*, 142 S. Ct. at 2111.

According to Plaintiffs, this is the end of the matter. Plaintiffs argue that, once a weapon is found to be "in common use" within the meaning of the Second Amendment, it cannot be regulated, and no historical analysis is necessary. (D.I. 54 at 29-30). I disagree. As the Supreme Court made clear in *Bruen*, "the standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. *The government must then justify its regulation* by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." 142 S. Ct. at 2129-30 (emphasis added). If the standard were as Plaintiffs propose, then *Bruen* need not have proceeded beyond the first step of the analysis. Instead, however, after concluding that the Second Amendment's plain text "presumptively guarantee[d]" the plaintiffs a right to bear arms in public for self-defense, the Supreme Court turned to the question of historical tradition. *Id.* at 2135. Thus, so do I.

2. Historical Tradition

At this step, the burden shifts to the government to "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2129-30. In conducting this historical inquiry, "[c]ourts are ... entitled to decide a case based

on the historical record compiled by the parties."[13] *Id.* at 2130 n.6.

The parties dispute which historical periods are relevant. Plaintiffs argue that I may consider history from the late nineteenth century and the twentieth century. (D.I. 37 at 33). Plaintiffs disagree. (D.I. 44 at 18). In *Bruen*, the Supreme Court provided the following guidance:

> [W]hen it comes to interpreting the Constitution, not all history is created equal. "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Heller*, 554 U.S. at 634-35. The Second Amendment was adopted in 1791; the Fourteenth in 1868. Historical evidence that long predates or postdates either time may not illuminate the scope of the right.

142 S. Ct. at 2119. Defendants concede that regulations that existed in temporal proximity to 1791 and 1868 are "the most relevant." (D.I. 54 at 132). Defendants are correct, however, that these are not the only relevant historical evidence. As the Court explained in *Bruen*, subsequent history may be relevant to the inquiry as "'a regular course of practice' can 'liquidate & settle the meaning of disputed or indeterminate 'terms & phrases' in the Constitution." 142 S. Ct. at 2136 (quoting *Chiafalo*

13. I reiterate that the evidentiary record at this stage is limited to the extent that it is almost entirely supplied by Defendants. The analysis that follows is made on this limited record.

v. Washington, 140 S. Ct. 2316, 207 L. Ed. 2d 761 (2020)). However, "to the extent later history contradicts what the text says, the text controls." *Id.* at 2137. Thus, I must afford later history little weight "when it contradicts earlier evidence." *Id.* at 2154 (citing *Heller*, 554 U.S. at 614).

Another question is which historical regulations count as analogous. The Court acknowledged, "[T]he regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868." *Id.* at 2132. Thus, "cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach." *Id.* "When confronting such present-day firearm regulations," the historical inquiry should be guided by "reasoning by analogy." *Id.* at 2133. A historical analogue need not be a "historical twin"; "even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Id.* (emphasis omitted). Although the Court declined to "provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment," the Court said that "central considerations" of the inquiry are "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified." *Id.* at 2132-33 (cleaned up).

With these principles in mind, I begin by examining the regulations at issue here. HB 450 and SS 1 for SB 6 were enacted in the immediate aftermath of several mass

shootings. On May 24, 2022, a gunman used an AR-15 style rifle and 30-round magazines to murder nineteen students and two teachers at an elementary school in Uvalde, Texas. (D.I. 37 at 2). This occurred only ten days after another mass shooting, in which a gunman used an AR-15 style rifle and 30-round magazines to murder ten people in a grocery store in Buffalo, New York. (*Id.*). Delaware enacted HB 450 and SS 1 for SB 6 approximately one month later, with the stated purpose of furthering Delaware's "compelling interest to ensure the safety of Delawareans." HB 450. The preamble to HB 450 references both tragedies, as well as "dozens more mass shootings during the last decade," and notes several exceptional dangers of "assault-style weapons," including their "immense killing power," military origins, and disproportionate use in mass shootings. *Id.*

Defendants argue that the instant regulations implicate "unprecedented societal concerns" and "dramatic technological changes." (D.I. 37 at 33). I agree. First, Defendants show that assault long guns and LCMs represent recent advances in technology. Defendants offer evidence that semi-automatic weapons "did not become feasible and available until the beginning of the twentieth century, and the primary market was the military." (D.I. 40 at 24). Although multi-shot or repeating firearms existed in America during the colonial and founding eras, they "were rare and viewed as curiosities." (D.I. 37 at 7 (citing D.I. 40 at 20-24; D.I. 41 at 12; D.I. 39 at 1)). Neither were repeating rifles popular during the Civil War and Reconstruction; during these periods, they were used sparingly as military weapons and were available for civilian acquisition in limited numbers. (D.I. 40 at 26).

It was only after World War I when semi-automatic and fully automatic long guns "began to circulate appreciably in society." (*Id.* at 28). Plaintiffs do not rebut Defendants' evidence with any comparable historical evidence of their own.[14]

Second, Defendants show that assault weapons and LCMs implicate unprecedented societal concerns. Defendants offer evidence that suggests a rise in the yearly rate of public mass shootings over the past four decades. (*See* D.I. 54 at 139 (citing D.I. 38-1, Ex. C)). They also show that, as noted in the preamble to HB 450, mass shootings often involve assault weapons equipped with LCMs. (D.I. 37 at 23-24). One analysis, which examined almost two hundred mass shootings across four databases, concluded that assault weapons were used in nearly a quarter of the incidents for which the type of weapon could be determined (D.I. 38 at 24), and that LCMs were involved in the majority of the incidents for which magazine capacity could be determined. (*Id.* at 24-25). The same analysis found that mass shootings involving assault weapons and LCMs result in more fatalities and injuries than those that do not. (*Id.* at 25-26). This result is consistent with the results of other studies on mass shootings. (*Id.* at 26-28).

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14. Plaintiffs argue that LCMs have been in common use "for centuries." (DSSA Br. at 9). They call attention to the Girandoni air rifle, a multi-shot gun with a 20 or 22-shot magazine capacity, one of which was carried by Meriwether Lewis on the Lewis and Clark expedition. (*Id.*). But as Defendants point out (D.I. 37 at 7-8 n.l), Plaintiffs' own source suggests that this rifle was rare. (*See* D.I. 37-1, Ex. 1 at pp. 3-6).

Appendix B

In light of the current evidentiary record, it is not surprising that mass shootings involving assault weapons and LCMs result in increased casualties. As I have mentioned, *see supra* Section III.A. 1, Defendants demonstrate that assault rifles and LCMs are exceptionally dangerous. Defendants offer evidence that both derive from weapons of war. (D.I. 42 at 18-28 (assault rifles); *id.* at 31-32 (LCMs)). This fact is insufficient, on its own, to show that these arms are particularly destructive; a weapon's origins do not say much about that weapon's destructiveness today. Defendants go further, however. They identify several "military" features that assault rifles share that "increase their lethality," such as "pistol grips and barrel shrouds for maneuverability, use of detachable magazines to fire many rounds rapidly, and the use of intermediate-caliber rounds fired at a high velocity, which inflict severe wounds even over long distances." (D.I. 37 at 11-12).

This last characteristic is one that Defendants discuss at length. (*Id.* at 21-22). Because an assault rifle bullet travels at multiple times the velocity of a handgun bullet, it imparts an "exponentially greater" amount of energy upon impact. (D.I. 37-2, Ex. 12 at 3). Furthermore, as the result of its high speed, an assault rifle bullet typically "yaws" upon contact with tissue, meaning that the bullet turns sideways. (D.I. 42 at 26-27). The resulting wounds are "catastrophic." (D.I. 37 at 21). Upon passing through a target, the bullet's "blast wave" creates a temporary cavity that can be "up to 11-12.5 times" larger than the bullet itself. (D.I. 37-2, Ex. 12 at 4; D.I. 42 at 27). The yaw movement of the bullet can cause it to fragment upon

striking bone, contributing to additional tissue damage extending beyond the cavity. (D.I. 42 at 27). Doctors who treat victims of assault rifles encounter "multiple organs shattered," bones "exploded," soft tissue "absolutely destroyed," and exit wounds "a foot wide." (D.I. 37-2, Ex. 12 at 2, 6). Due to their severity, these injuries often cannot be repaired. (*Id.* at 4). Handgun bullets, by contrast, only injure a structure by striking it directly; although they produce a small temporary cavity, that cavity "plays little or no role in the extent of wounding." (D.I. 42-1, Ex. 1 at p. 183). The power and velocity of assault rifle bullets pose a particularly high risk to law enforcement officers. (D.I. 37 at 22). Although the body armor typically issued to law enforcement officers protects against most handgun bullets, it is not designed to withstand the high-velocity bullets described above; assault rifles therefore "readily penetrate" such body armor. (D.I. 42 at 55).

Other dangerous characteristics abound. One is rate of fire. Although it is true that, unlike a fully automatic weapon, an assault weapon can "only fire as often as a person can pull its trigger" (Gray Br. at 6), Defendants provide evidence of numerous, inexpensive products, available for purchase in most states, that allow AR-style rifles to fire at rates comparable to fully automatic weapons. (D.I. 37 at 14-15; D.I. 54 at 90 (describing one $49 trigger system that allows users to shoot at 900 rounds per minute)). Another is range. Assault rifles are designed for long-range use (D.I. 42 at 49), and therefore "allow criminals to effectively engage law enforcement officers from great distances." (D.I. 37 at 22 (quoting *Kolbe v. Hogan*, 849 F.3d 114, 127 (4th Cir. 2017), *abrogated by*

Bruen, 142 S. Ct. 2111)). This feature, in combination with the exceptional lethality of assault rifle bullets described above, "has led to multiple incidents in which criminals outgun police." (*Id.*).

In sum, I find that Defendants have sufficiently established that assault long guns and LCMs implicate dramatic technological change and unprecedented societal concerns for public safety.

The next step is to review Defendants' evidence of historical regulations, determine whether the regulations at issue impose comparable burdens on the right to armed self-defense, and decide whether the burdens imposed are comparably justified.

Defendants offer multiple historical analogues, including several from the Nation's early history. One notable example concerns the Bowie knife. The Bowie knife—a distinctive long-bladed knife popularized by the adventurer Jim Bowie after he supposedly used it in a brawl—proliferated beginning in the 1830s. (D.I. 40 at 11). The "craze" for these knives led to their widespread use in fights, duels, and other criminal activities, as single-shot pistols tended to be unreliable and inaccurate. (*Id.* at 11-12). Bowie knives became known for these nefarious uses (*id.* at 12-13), and as violent crime increased during the early nineteenth century, states responded with anti-knife legislation. (*Id.* at 13-14). These regulations were "extensive and ubiquitous." (*Id.* at 17). Between 1837 and 1925, twenty-nine states enacted laws to bar Bowie knife concealed carry. (*Id.* at 16). Fifteen states barred their carry altogether. (*Id.*).

Appendix B

Other melee weapons were subject to similar regulations during the nineteenth and early twentieth centuries. Starting in 1862, many states targeted the billy club—a heavy, hand-held club traditionally carried by police. (*Id.* at 8). Fourteen states enacted anti-billy club laws in the 1800s; eleven did so in the early 1900s. (*Id.*). Many states also regulated (and sometimes outlawed) the "slungshot," a weapon developed circa the 1840s that was widely used by criminals and as a fighting implement, and which had a "dubious reputation" on account of its ease of construction and ability to be used silently. (*Id.* at 9). Forty-three states enacted nearly eighty anti-slungshot laws between 1850 and 1900. (*Id.*).

After the Civil War, revolver pistols—which were used only sparingly during the war— entered the civilian market. (*Id.* at 25-26). The increased availability of these guns contributed to escalating interpersonal violence. (*Id.* at 27). States reacted with a "rapid spread" of concealed carry restrictions. (*Id.*). By the end of the 1800s, nearly every state in the country had such laws (*id.*), and, by the early 1900s, at least six states barred possession of these weapons outright. (*Id.* at 28).

Fully automatic firearms entered the scene during World War I. (D.I. 40 at 29). After the war, one such firearm that had been developed for military use—the Thompson submachine gun, widely known as the Tommy gun—became available for civilian purchase. (*Id.*). Initially, it was unregulated. (*Id.*). Once the Tommy gun began to circulate in society, however, its "uniquely destructive capabilities" became clear, especially once it found favor among gangster organizations during Prohibition. (*Id.*

at 31). Although the Tommy gun and like firearms "were actually used relatively infrequently by criminals, when they were used, they exacted a devastating toll and garnered extensive national attention, such as their use in the infamous St. Valentine's Day massacre in Chicago in 1929." (*Id.*). States reacted by passing anti-machine gun laws (*id.* at 35), as well as laws restricting ammunition feeding devices, or guns that could accommodate them, based on set limits on the number of rounds. (*Id.* at 48). Finally, in 1934, Congress enacted the National Firearms Act, which imposed strict regulations on the civilian acquisition and circulation of fully automatic weapons. (*Id.* at 36). The National Firearms Act also imposed strict requirements on the acquisition and circulation of short-barreled shotguns—shotguns with barrels less than 18 inches long—as these weapons widened the spray of fire and caused "devastating" effects when used at close range. (*Id.*).

Plaintiffs urge me to disregard machine gun regulations as irrelevant, as those regulations are temporally remote from the adoption of the Second and Fourteenth Amendments. (D.I. 44 at 18). Plaintiffs rely on the Court's statement in *Bruen* that such evidence isn't helpful "when it contradicts earlier evidence." 142 S. Ct. at 2154. But these later regulations are consistent with the earlier regulations that Defendants provide. As Defendants emphasized at oral argument (D.I. 54 at 129), the historical record that Defendants present, when viewed as a whole, illustrates a pattern: "[F]irearms and accessories, along with other dangerous weapons, were subject to remarkably strict and wide-ranging regulation

when they entered society, proliferated, and resulted in violence, harm, or contributed to criminality." (D.I. 40 at 4). The analogous twentieth-century regulations do not depart from this pattern, and, indeed, reinforce it. Therefore, I decline to disregard them. *See Bruen*, 142 S. Ct. at 2136-37 (recognizing that later history may be relevant where a practice has been "open, widespread, and unchallenged since the early days of the Republic....").

Even if I were to consider evidence from the twentieth century, argue Plaintiffs, none of the purported analogous regulations that Defendants offer are "relevantly similar." (D.I. 44 at 7-8). Plaintiffs' primary argument is that those regulations targeted weapons that are meaningfully different from those addressed by the statutes at issue here. (*See id.*). Specifically, Plaintiffs say that, in contrast to assault weapons and LCMs, the arms addressed by these historical regulations were "perceived at the time to be almost exclusively used by criminals." (*Id.* at 42). Plaintiffs provide no citation for this assertion, and I am not sure that the record supports it. Although the record reflects that criminality was an overriding concern driving historical weapons regulations (*e.g.*, D.I. 40 at 33-34 (Tommy guns); *id.* at 13 (Bowie knives)), the record also shows that some of the regulated weapons circulated appreciably before they were restricted. For instance, as Defendants stressed at oral argument (*see* D.I. 54 at 127), the record demonstrates that Bowie knives proliferated in civil society.[15] (D.I. 40 at 11-12). Furthermore, although

15. This evidence casts some doubt on Plaintiffs' argument—which is also unsupported—that none of the arms targeted by these historical regulations could have been considered in common

Plaintiffs characterize Tommy guns as having been "overwhelmingly put to use by criminals and gangsters" (D.I. 54 at 19-20), this is not what the record reflects. The Tommy gun was rarely used by criminals. (D.I. 40 at 31). Its association with criminal activity was the product of the public's growing awareness of devastating, high-profile shooting incidents, as well as the rise of lurid and sensational news reports covering gun crime. (*Id.* at 33-34). I am therefore unconvinced that the historical regulations under discussion regulated weapons that are relevantly different than those at issue here by virtue of their criminality.

I think that, to the contrary, these historical regulations are "relevantly similar" to the regulations at issue in the two "central" respects identified by the Supreme Court: they impose comparable burdens on the right of armed self-defense, and those burdens are comparably justified. *Bruen*, 142 S. Ct. at 2132-33. First, both sets of regulations impose a "comparable burden." Indeed, the burden that the challenged regulations

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use for lawful purposes. (D.I. 54 at 41). Indeed, it would be hard to imagine that there was a more useful weapon for self-defense in the 1830s than a Bowie knife. Those who carried such weapons claimed to do so for self-defense, although they weren't always believed. For instance, in 1834, a grand jury in Jasper County, Georgia bemoaned "the practice which is common amongst us with the young the middle aged and the aged to arm themselves with Pistols, dirks knives sticks & spears under the specious pretence of *protecting themselves against insult*, when in fact being so armed they frequently insult others with impunity...." (D.I. 40 at 12) (emphasis added).

impose is slight. This is where Defendants' suitability arguments—which I dismissed in *supra* Section III.A.1—become relevant. As discussed, Defendants have shown that LCMs with more than 17 rounds are "unnecessary for self-defense," as individuals in self-defense situations rarely fire even 10 rounds (D.I. 37 at 19), and the record does not reflect that any firearms require LCMs to operate. (D.I. 48 at 1). Defendants have shown the same with respect to assault weapons, which, too, are rarely used defensively. (D.I. 37 at 19). Furthermore, some of the historical regulations are broader than the challenged statutes. For example, multiple nineteenth-century laws regulating melee weapons were blanket restrictions on the carry of entire categories of weapons. (D.I. 40 at 13 (noting laws "barring the category or type of knife embodied by the Bowie knife but without mentioning them by name")). HB 450, by contrast, is not a categorical ban; the "assault long guns" it prohibits are specifically enumerated. 11 *Del. C.* § 1465(2). Accordingly, I find that the LCM and assault long gun restrictions of HB 450 and SS 1 for SB 6 do not impose a greater burden on the right of armed self-defense than did analogous historical regulations.

Second, the burden imposed by both sets of regulations is "comparably justified." The modern regulations at issue, like the historical regulations discussed by Defendants, were enacted in response to pressing public safety concerns regarding weapons determined to be dangerous. HB 450 and SS 1 for SB 6 responded to a recent rise in mass shooting incidents, the connection between those incidents and assault weapons and LCMs, and the destructive nature of those weapons. *See* HB 450.

Plaintiffs argue that these concerns are improper for me to consider, as they "implicate the sort of interest-balancing, means-end analysis" that the Supreme Court instructed lower courts not to undertake. (D.I. 44 at 8). I disagree. Although the *Bruen* Court rejected means-ends scrutiny, it nevertheless advised lower courts to, in determining whether modern and historical regulations are "relevantly similar," consider "how *and why* the regulations burden a law-abiding citizen's right to self-defense." 142 S. Ct. at 2132-33 (emphasis added). *See Oregon Firearms Fed'n, Inc. v. Brown*, 2022 U.S. Dist. LEXIS 219391, 2022 WL 1745829, at *14 (D. Or. Dec. 6, 2022) ("In considering whether Defendants are comparatively justified in imposing Measure 114 as were this Nation's earlier legislatures in imposing historical regulations, this Court finds that it may consider the public safety concerns of today."), *appeal voluntarily dismissed*, No. 22-36011, 2022 U.S. App. LEXIS 34277 (9th Cir. Dec. 12, 2022).[16] Accordingly, I find that Defendants are comparably justified in regulating assault long guns and LCMs "to ensure the safety of Delawareans." HB 450.

For these reasons, I find that the LCM and assault long gun prohibitions of HB 450 and SS 1 for SB 6 are consistent with the Nation's historical tradition of firearm regulation. Plaintiffs have therefore failed to demonstrate a likelihood of success on the merits of their Second Amendment claim.

16. I note that the public safety concerns motivating the challenged regulations are also relevant to determining whether the regulations "implicat[e] unprecedented societal concerns or dramatic technological changes." *Bruen*, 142 S. Ct. at 2132.

B. Irreparable Harm

I proceed to the issue of irreparable harm.[17] In addition to demonstrating a likelihood of success on the merits, plaintiffs seeking a preliminary injunction must also demonstrate that they will suffer irreparable harm in the absence of preliminary relief. *Reilly*, 858 F.3d at 179. This requirement demands a showing that irreparable harm is "more likely than not." *Id.* Deprivations of constitutional rights often—but do not always—amount to "irreparable harm." *See* 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2948.1 (3d ed. 2022) ("When an alleged deprivation of a constitutional right is involved ... most courts hold that no further showing of irreparable harm is necessary."). Although First Amendment deprivations, even for "minimal periods of time," are presumed to be irreparable injuries, *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976), neither the Supreme Court nor the Third Circuit have explicitly extended that holding to the Second Amendment. *See Hohe v. Casey*, 868 F.2d 69, 73 (3d Cir. 1989) ("Constitutional harm is not necessarily synonymous with the irreparable harm necessary for issuance of a preliminary injunction."); *see also Lanin v. Borough of Tenafly*, 515 F. App'x 114, 118 (3d Cir. 2013) (reiterating *Hohe* holding with respect to irreparable harm). Thus, counter to Plaintiffs' assertions (Gray Br.

17. I address this issue for thoroughness only. As Plaintiffs fail to meet their burden for likelihood of success on the merits, a finding of irreparable harm cannot help Plaintiffs here. Both factors are required for a preliminary injunction. *See Reilly*, 858 F.3d at 179.

at 11; DSSA Br. at 18), an alleged deprivation of a Second Amendment right does not automatically constitute irreparable harm. The two Third Circuit cases upon which Plaintiffs rely do not suggest otherwise. *See K.A. ex rel Ayers v. Pocono Mountain Sch. Dist*, 710 F.3d 99, 113 (3d Cir. 2013) (First Amendment); *Lewis v. Kugler*, 446 F.2d 1343, 1350 (3d Cir. 1971) (search and seizure claim).

Plaintiffs have not satisfied their burden of proving irreparable harm in the absence of a preliminary injunction. Plaintiffs claim several injuries. (D.I. 21, 22, 26, 27). First, Plaintiffs say that they will suffer irreparable harm because HB 450 and SS 1 for SB 6 prevent Plaintiffs from possessing and obtaining assault weapons and LCMs "for self-defense and other lawful purposes," in violation of their Second Amendment rights. (D.I. 21 at pp. 2-3; D.I. 22 at pp. 2-3; D.I. 27 at p. 2). But Plaintiffs retain ample effective alternatives, especially with respect to the "core" purpose of self-defense. As Defendants said at oral argument (*e.g.*, D.I. 54 at 81-82), HB 450 regulates only a subset of semi-automatic weapons. These weapons are seldom used for self-defense (D.I. 38 at 15), perhaps because they are ill-suited to the task. (D.I. 42 at 49-54). Unaffected by HB 450 are numerous other firearms, including handguns—the "quintessential self-defense weapon." *Bruen*, 142 S. Ct. at 2143. LCMs are not useful for self-defense either. *See supra* Section III.A.1.b. Notably, Plaintiffs are not aware of any firearms that come with a magazine holding over 17 rounds that cannot also be operated using a smaller magazine.[18] (D.I. 48

18. Plaintiffs mention that "common arms that come equipped with standard-capacity magazines of 17 rounds of ammunition

at 1). Plaintiffs have furnished no evidence that that they cannot adequately defend themselves without the regulated weapons, or, indeed, that their ability to self-defend has been meaningfully diminished. Consequently, I am not convinced that an inability to possess or to obtain assault weapons or LCMs for self-defense and other lawful purposes constitutes irreparable harm.

Second, Plaintiffs say that the challenged statutes are irreparably harming them because the statutes restrict their ability to sell assault weapons and LCMs, resulting in lost business opportunities. (D.I. 22 at pp. 3, 4; D.I. 26 at pp. 2-3). Defendant argues that these injuries are not irreparable. (D.I. 37 at 47). I agree. As the Third Circuit has recognized, no court has held "that the Second Amendment secures a standalone right to *sell* guns or range time." *Drummond v. Robinson Township, 9* F.4th 217, 230 (3d Cir. 2021). Furthermore, Plaintiffs have adduced no evidence that they are likely to incur significant business losses absent a preliminary injunction; Plaintiffs remain free to sell the multitude of firearms that are unaffected by the challenged statutes. Thus, I am not convinced by this argument either. I therefore conclude that Plaintiffs have failed to meet the irreparable harm requirement for a preliminary injunction.

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or below are still banned under SS 1 for SB 6," as "ammunition magazines can often be used for multiple calibers and the number of rounds they can hold depends on the caliber." (D.I. 48 at 1 n.l; *see also* DSSA Br. at 9-10; D.I. 44 at 16 (explaining same)). Plaintiffs do not, however, go on to explain how many weapons are thus affected. As I do not think that Plaintiffs have adequately developed this argument, I do not address it here.

I now turn to the remaining preliminary injunction factors: the balance of the equities and the public interest. I consider these two factors only if the movant "meet[s] the threshold for the first two 'most critical' factors: it must demonstrate that it can win on the merits ... and that it is more likely than not to suffer irreparable harm in the absence of preliminary relief." *Reilly*, 858 F.3d at 179. As Plaintiffs have not met the threshold for either of the first two factors, I need not proceed to the second two.

Accordingly, Plaintiffs' motions for a preliminary injunction are DENIED.

IV. CONCLUSION

An appropriate order will issue.

APPENDIX C — CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Appendix C

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix C

Delaware Code title 11, § 1465. Definitions related to assault weapons

For purposes of this section and § 1466 and § 1467 of this title:

(1) "Ammunition feeding device" means any magazine, belt, drum, feed strip, or similar device that holds ammunition for a firearm.

(2) "Assault long gun" means any of the following or a copy, regardless of the producer or manufacturer:

a. American Arms Spectre da Semiautomatic carbine.

b. Avtomat Kalashnikov semiautomatic rifle in any format, including the AK-47 in all forms.

c. Algimec AGM-1 type semi-auto.

d. AR 100 type semi-auto.

e. AR 180 type semi-auto.

f. Argentine L.S.R. semi-auto.

g. Australian Automatic Arms SAR type semi-auto.

h. Auto-Ordnance Thompson M1 and 1927 semi-automatics.

i. Barrett light .50 cal. semi-auto.

j. Beretta AR70 type semi-auto.

k. Bushmaster semi-auto rifle.

l. Calico models M-100 and M-900.

m. CIS SR 88 type semi-auto.

n. Claridge HI TEC C-9 carbines.

o. Colt AR-15, CAR-15, and all imitations except Colt AR-15 Sporter H-BAR rifle.

p. Daewoo MAX 1 and MAX 2, aka AR 100, 110C, K-1, and K-2.

q. Dragunov Chinese made semi-auto.

r. Famas semi-auto (.223 caliber).

s. Feather AT-9 semi-auto.

t. FN LAR and FN FAL assault rifle.

u. FNC semi-auto type carbine.

v. F.I.E./Franchi LAW 12 and SPAS 12 assault shotgun.

w. Steyr-AUG-SA semi-auto.

x. Galil models AR and ARM semi-auto.

y. Heckler and Koch HK-91 A3, HK-93 A2, HK-94 A2 and A3.

z. Holmes model 88 shotgun.

aa. Manchester Arms "Commando" MK-45, MK-9.

bb. Mandell TAC-1 semi-auto carbine.

cc. Mossberg model 500 Bullpup assault shotgun.

dd. Sterling Mark 6.

ee. P.A.W.S. carbine.

ff. Ruger mini-14 folding stock model (.223 caliber).

gg. SIG 550/551 assault rifle (.223 caliber).

hh. SKS with detachable magazine.

ii. AP-74 Commando type semi-auto.

jj. Springfield Armory BM-59, SAR-48, G3, SAR-3, M-21 sniper rifle, and M1A, excluding the M1 Garand.

kk. Street sweeper assault type shotgun.

ll. Striker 12 assault shotgun in all formats.

mm. Unique F11 semi-auto type.

nn. Daewoo USAS 12 semi-auto shotgun.

oo. UZI 9mm carbine or rifle.

pp. Valmet M-76 and M-78 semi-auto.

qq. Weaver Arms "Nighthawk" semi-auto carbine.

rr. Wilkinson Arms 9mm semi-auto "Terry".

(3) "Assault pistol" means any of the following or a copy, regardless of the producer or manufacturer:

a. AA Arms AP-9 pistol.

b. Beretta 93R pistol.

c. Bushmaster pistol.

d. Claridge HI-TEC pistol.

e. D Max Industries pistol.

f. EKO Cobra pistol.

g. Encom MK-IV, MP-9, or MP-45 pistol.

h. Heckler and Koch MP5K, MP7, SP-89, or VP70 pistol.

i. Holmes MP-83 pistol.

j. Ingram MAC 10/11 pistol and variations, including the Partisan Avenger and the SWD Cobray.

k. Intratec TEC-9/DC-9 pistol in any centerfire variation.

l. P.A.W.S. type pistol.

m. Skorpion pistol.

n. Spectre double action pistol (Sile, F.I.E., Mitchell).

o. Stechkin automatic pistol.

p. Steyer tactical pistol.

q. UZI pistol.

r. Weaver Arms Nighthawk pistol.

s. Wilkinson "Linda" pistol.

(4) "Assault weapon" means any of the following:

a. An assault long gun.

b. An assault pistol.

c. A copycat weapon.

(5) "Completed a purchase" means that the purchaser completed an application, passed a background check, and

has a receipt or purchase order for the assault weapon, without regard to whether the purchaser has actual physical possession of the assault weapon. If receipt of the assault weapon will not occur until July 1, 2023, it is not a completed purchase.

(6) "Copycat weapon" means any of the following:

a. A semiautomatic, centerfire rifle that can accept a detachable magazine and has at least 1 of the following:

1. A folding or telescoping stock.

2. Any grip of the weapon, including a pistol grip, a thumbhole stock, or any other stock, the use of which would allow an individual to grip the weapon, resulting in any finger on the trigger hand in addition to the trigger finger being directly below any portion of the action of the weapon when firing.

3. A forward pistol grip.

4. A flash suppressor.

5. A grenade launcher or flare launcher.

b. A semiautomatic, centerfire rifle that has an overall length of less than 30 inches.

c. A semiautomatic pistol that can accept a detachable magazine and has at least 1 of the following:

1. Except as otherwise provided under paragraph (6)c.1.A. of this section, an ability to accept a detachable ammunition magazine that attaches at some location outside of the pistol grip.

A. Subject to paragraph (6)c.1.B. of this section, the characteristic detailed under paragraph (6)c.1. of this section does not apply when the characteristic is utilized in conjunction with a rimfire pistol that is used solely for the purposes of competitive shooting events or practice shooting in preparation for competitive shooting events.

B. Paragraph (6)c.1.A of this section applies only to competitive shooting events operated by state or nationally recognized competitive shooting organizations.

2. A threaded barrel capable of accepting a flash suppressor, forward pistol grip or silencer.

3. A shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to fire the firearm without being burned, except a slide that encloses the barrel.

4. A second hand grip.

d. A semiautomatic shotgun that has both of the following:

1. A folding or telescoping stock.

2. Any grip of the weapon, including a pistol grip, a thumbhole stock, or any other stock, the use of which would allow an individual to grip the weapon, resulting in any finger on the trigger hand in addition to the trigger finger being directly below any portion of the action of the weapon when firing.

e. A semiautomatic shotgun that has the ability to accept a detachable magazine.

f. A shotgun with a revolving cylinder.

g. A semiautomatic pistol with a fixed magazine that can accept more than 17 rounds.

h. A semiautomatic, centerfire rifle that has a fixed magazine that can accept more than 17 rounds.

(7) "Detachable magazine" means an ammunition feeding device that can be removed readily from a firearm without requiring disassembly of the firearm action or without the use of a tool, including a bullet or cartridge.

(8) "Family" means as defined in § 901 of Title 10.

(9) "Flash suppressor" means a device that functions, or is intended to function, to perceptibly reduce or redirect muzzle flash from the shooter's field of vision.

(10) "Grenade launcher" means a device designed to fire, launch, or propel a grenade.

(11) "Qualified retired law-enforcement officer" means as defined in § 1441B(c) of this title.

(12) "Secure storage" means a firearm that is stored in a locked container or equipped with a tamper-resistant mechanical lock or other safety device that is properly engaged so as to render the firearm inoperable by a person other than the owner or other lawfully authorized user.

(13) "Shooting range" means any land or structure used and operated in accordance with all applicable laws and ordinances for the shooting of targets for training, education, practice, recreation, or competition.

Appendix C

Delaware Code title 11, § 1466.
Manufacture, sale, transport, transfer, purchase, receipt, and possession of assault weapons; class E or F felony

(a) Prohibitions.—Except as provided in subsection (b) or (c) of this section, it is unlawful for a person to do any of the following:

(1) Transport an assault weapon into this State.

(2) Manufacture, sell, offer to sell, transfer, purchase, receive, or possess an assault weapon.

(b) Applicability--This section does not apply to any of the following:

(1) The following individuals, if acting within the scope of official business:

a. Personnel of the United States government or a unit of that government.

b. Members of the armed forces of the United States or of the National Guard.

c. A law-enforcement officer.

(2) An assault weapon modified to render it permanently inoperative.

(3) Possession, importation, manufacture, receipt for manufacture, shipment for manufacture, storage, purchases, sales, and transport to or by a licensed firearms dealer or manufacturer who does any of the following:

a. Provides or services an assault weapon for a law-enforcement agency of this State or for personnel exempted under paragraph (b)(1) of this section.

b. Acts to sell or transfer an assault weapon to a licensed firearm dealer in another state or to an individual purchaser in another state through a licensed firearms dealer.

c. Acts to return to a customer in another state an assault weapon transferred to the licensed firearms dealer or manufacturer under the terms of a warranty or for repair.

(4) Organizations that are required or authorized by federal law governing their specific business or activity to maintain assault weapons.

(5) The receipt of an assault weapon by inheritance, and possession of the inherited assault weapon, if the decedent lawfully possessed the assault weapon and the person inheriting the assault weapon is not otherwise a person prohibited under § 1448 of this title.

(6) The receipt of an assault weapon by a personal representative of an estate for purposes of exercising

the powers and duties of a personal representative of an estate, including transferring the assault weapon according to will or probate proceedings.

(7) Possession by a qualified retired law-enforcement officer who is not otherwise prohibited from receiving an assault weapon if either of the following applies:

a. The assault weapon is sold or transferred to the qualified retired law-enforcement officer by the law-enforcement agency on retirement.

b. The assault weapon was purchased or obtained by the qualified retired law-enforcement officer for official use with the law-enforcement agency before retirement.

(8) Possession or transport by an armored car guard, as defined in § 1302 of Title 24, if the armored car agency is acting within the scope of employment with an armored car agency, as defined under § 1302 of Title 24, and is licensed under Chapter 13 of Title 24.

(9) Possession, receipt, and testing by, or shipping to or from any of the following:

a. An ISO 17025 accredited, National Institute of Justice-approved ballistics testing laboratory.

b. A facility or entity that manufactures or provides research and development testing, analysis, or engineering for personal protective equipment or vehicle protection systems.

(c) Exceptions.--

(1) A licensed firearms dealer may continue to do all of the following with an assault weapon that the licensed firearms dealer lawfully possessed on or before June 30, 2022:

a. Possess the assault weapon.

b. Sell the assault weapon or offer the assault weapon for sale. But, the licensed firearms dealer may only sell the assault weapon or offer the assault weapon for sale as permitted under paragraph (b)(3)b. of this section.

c. Transfer the assault weapon. But, the licensed firearms dealer may only transfer the assault weapon as permitted by paragraph (b)(3)b. or (b)(3)c. of this section.

(2) a. A licensed firearms dealer may take possession of an assault weapon from a person who lawfully possessed the assault weapon before June 30, 2022, for the purposes of servicing or repairing the assault weapon.

b. A licensed firearms dealer may transfer possession of an assault weapon received under paragraph (c)(2)a. of this section for purposes of accomplishing service or repair of the assault weapon.

(3) A person who lawfully possessed, or completed a purchase of an assault weapon prior to June 30, 2022, may possess and transport the assault weapon on or after June 30, 2022, only under the following circumstances:

a. At that person's residence, place of business, or other property owned by that person, or on property owned by another person with the owner's express permission.

b. While on the premises of a shooting range.

c. While attending any exhibition, display, or educational project that is about firearms and that is sponsored by, conducted under the auspices of, or approved by a law-enforcement agency or a nationally or state-recognized entity that fosters proficiency in, or promotes education about, firearms.

d. While transporting the assault weapon between any of the places set forth in this this paragraph (c)(3) of this section, or to any licensed firearms dealer for servicing or repair under paragraph (c)(2) of this section, if the person places the assault weapon in secure storage.

(4) A person may transport an assault weapon to or from any of the following if the person places the assault weapon in secure storage:

a. An ISO 17025 accredited, National Institute of Justice-approved ballistics testing laboratory.

b. A facility or entity that manufactures or provides research and development testing, analysis, or engineering for personal protective equipment or vehicle protection systems.

(5) Ownership of an assault weapon may be transferred from the person owning the assault weapon to a member of that person's family, and it is lawful for the family member to possess the transferred assault weapon under paragraph (c)(3) of this section, if the transferor lawfully possessed the assault weapon and the family member to whom the assault weapon is transferred is otherwise lawfully permitted to possess it.

(d) Penalty.--A violation of this section is a class D felony.

(e) Disposal.--A law-enforcement agency in possession of a person's assault weapon as a result of an arrest under this section shall dispose of the assault weapon under the process established for deadly weapons and ammunition under § 2311 of this title following the person's adjudication of delinquency or conviction under this section or by the person's agreement to forfeit the assault weapon under an agreement to plead delinquent or guilty to another offense.

Appendix C

Delaware Code title 11, § 1467.
Voluntary certificate of possession

(a) A person who is exempt from § 1466(a) of this title under § 1466(c)(3) of this title may, no later than June 30, 2023, apply to the Secretary of the Department of Safety and Homeland Security for a certificate of possession.

(b) In a prosecution under § 1466 of this title, it is an affirmative defense that the defendant was lawfully in possession or had completed a purchase of the assault weapon prior to June 30, 2022. A certificate of possession is conclusive evidence that a person lawfully possessed or had completed a purchase of an assault weapon before June 30, 2022, and is entitled to continue to possess and transport the assault weapon on or after June 30, 2022, under § 1466(c)(3) of this title.

(c) The Secretary of the Department of Safety and Homeland Security shall establish procedures with respect to the application for and issuance of certificates of possession for assault weapons that are lawfully owned and possessed before June 30, 2022. Rules and procedures under this subsection must include all of the following:

(1) That the application contain proof that the person lawfully possessed or had completed a purchase of an assault weapon before June 30, 2022.

(2) That the certificate of possession must contain a description of the assault weapon, including the make, model, and serial number. For an assault weapon

manufactured before 1968, identifying marks may be substituted for the serial number.

(3) That the certificate of possession must contain the full name, address, date of birth, and thumbprint of the person who owns the assault weapon, and any other information the Secretary deems appropriate.

(4) That the Department will not retain copies of the certificate or other identifying information relating to any individual who applies for a voluntary certificate of possession.

(d) A person who inherits or receives a weapon from a family member that is lawfully possessed under § 1466(c)(3) of this title and lawfully transferred may apply for a certificate of possession within 60 days of taking possession of the weapon. To receive a certificate, the person must show that the transferor was lawfully in possession and that he or she is the lawful recipient of the transfer.

Appendix C

Delaware Code title 11, § 1468.
Definitions related to large-capacity magazines

For purposes of this section and §§ 1469 and 1469A of this title:

(1) "Ammunition feeding device" means any magazine, belt, drum, feed strip, or similar device that holds ammunition for a firearm.

(2) a. "Large-capacity magazine" means any ammunition feeding device capable of accepting, or that can readily be converted to hold, more than 17 rounds of ammunition.

b. "Large-capacity magazine" does not include an attached tubular device designed to accept, and only capable of operating with, .22 caliber rimfire ammunition.

c. For purposes of this subsection, the presence of a removable floor plate in an ammunition feeding device that is not capable of accepting more than 17 rounds of ammunition shall not, without more, be sufficient evidence that the ammunition feeding device can readily be converted to hold more than 17 rounds of ammunition.

(3) "Licensed firearms dealer" means a person licensed under Chapter 9 of Title 24 or 18 U.S.C. § 921 et seq.

(4) "Qualified retired law-enforcement officer" means as defined under § 1441B(c) of this title.

Appendix C

Delaware Code title 11, § 1468.
Large-capacity magazines prohibited; class E felony; class B misdemeanor; or civil violation

(a) Except as otherwise provided in subsections (c) through (e) of this section, it is unlawful for a person to manufacture, sell, offer for sale, purchase, receive, transfer, or possess a large-capacity magazine.

(b)(1) A violation of this section which is a first offense which only involves possession of a large capacity magazine is a civil penalty of $100.

(2) A second violation of this section which only involves possession of a large capacity magazine is a class B misdemeanor.

(3) All other violations of this section, including a subsequent offense involving only possession of a large capacity magazine are a class E felony.

(4) A large-capacity magazine is subject to forfeiture for a violation of this section.

(5) The Superior Court has exclusive jurisdiction over violations under subsections (b)(2) and (b)(3) of this section.

(c) This section does not apply to any of the following:

(1) Personnel of the United States government or a unit of that government who are acting within the scope of official business.

(2) Members of the armed forces of the United States or of the National Guard who are acting within the scope of official business.

(3) A law-enforcement officer.

(4) A qualified retired law-enforcement officer.

(5) An individual who holds a valid concealed carry permit issued by the Superior Court under § 1441 of this title.

(6) A licensed firearms dealer that sells a large-capacity magazine to another licensed firearms dealer or to an individual exempt under paragraphs (c)(1) through (5) of this section.

(7) A large-capacity magazine that a person has rendered permanently inoperable or has permanently modified to accept 17 rounds of ammunition or less.

(d) Repealed pursuant to 83 Laws 2022, ch. 331, § 6.

(e) This section does not apply to any of the following:

(1) A person who manufactures a large-capacity magazine, if the person manufactures the large-capacity magazine with the intent to sell the large-capacity magazine, or offer the large-capacity magazine for sale, to a person outside of this State.

(2) A person who ships or transports a large-capacity magazine for a person under paragraph (e)(1) of this section.