NO. 24-309

In the Supreme Court of the United States

GABRIEL GRAY, *et al.*,

Petitioners,

v.

KATHY JENNINGS,
Attorney General of Delaware, *et al.*,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

This Court has held that "[t]he loss of First Amendment freedoms … unquestionably constitutes irreparable injury" due to their intangible and unquantifiable nature, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020), but it has not yet explained the principle at length or decided whether it applies to other intangible constitutional rights, such as those protected under the Second Amendment. This lack of guidance has led to confusion in the lower courts and, now, a split between the Seventh and Ninth Circuits on the one hand, which hold that "[i]nfringements of [the Second Amendment] right cannot be compensated by damages," *Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011), and the panel below on the other, which "respectfully decline[d]" to follow its "sister circuits" and instead held that the violation of Petitioners' Second Amendment rights did not cause irreparable harm, Pet.App.17a. Respondents' claim that "there is no circuit split," BIO.2—in the teeth of the panel majority's *own recognition* that it was creating a split on the question presented—is beyond the pale.

Respondents argue as a backup that "the Third Circuit's decision" to split from the Seventh and Ninth Circuits "was correct," BIO.29, but its merits arguments are all based on the same mistake made by the panel: mischaracterizing Petitioners as seeking "to create a loophole in the preliminary-injunction standard for the Second Amendment" that would "excuse them … from their burden to show irreparable harm," BIO.3, 32. As the Petition made abundantly clear, Petitioners do not argue that they are "not required to

make [a] showing of irreparable harm." BIO.i. We argue that the violation of Second Amendment rights *itself constitutes* irreparable harm.

Finally, Respondents' attempts to contrive some vehicle problem with this case are insubstantial. They suggest that the panel's weighing of the equities and public interest comprises an "independent ground[ ] to deny relief," BIO.23, but the panel itself never claimed that these factors independently justified denial of an injunction—merely that they provided further "support" for the decision it had reached under the irreparable injury factor, Pet.App.23a. The panel plainly did not base its decision on these factors, and Respondents cannot help themselves to the assumption that it would have done so had it correctly understood the irreparable nature of Petitioners' injury. Respondents also attempt to mount a last-ditch standing argument, but there is nothing to this. Petitioners all have standing under long-settled principles.

The Court should grant the writ.

ARGUMENT

I.A. Respondents' insistence that "there is no circuit split" between the panel below and the Seventh and Ninth Circuits, BIO.2, is impossible to square with the decisions of all three courts. Respondents claim, for example, that the Seventh Circuit's decision in "*Ezell* does not answer whether a Second Amendment violation is per se irreparable harm," BIO.17-18, but *Ezell* says this: "The Second Amendment protects … 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." 651 F.3d at 699 (emphasis added).

Respondents attempt to undermine *Ezell* by citing the Seventh Circuit's later decision in *Bevis v. City of Naperville*, which declined "to decide whether an alleged Second Amendment violation gives rise to a presumption of irreparable harm," based on its "decision that the plaintiffs have not shown that they have a strong likelihood of success on the merits." 85 F.4th 1175, 1202-03 (7th Cir. 2023). But given that courts in the Seventh Circuit "will not overturn circuit precedent absent a compelling reason," *United States v. Orona*, 118 F.4th 858, 867 (7th Cir. 2024) (cleaned up), Respondents never explain how *Bevis*'s decision *not to address* the issue can possibly undermine *Ezell*'s explicit resolution of it—particularly where *Bevis* does not purport to cast doubt on *Ezell*'s holding or, for that matter, even cite the decision on this point.

Respondents also claim that "*Ezell* stressed that the plaintiffs' irreparable harm turned on case-specific facts," BIO.17, but the court's holding that "[i]nfringements of" the Second Amendment "right to possess firearms for protection … *cannot* be compensated by damages," 651 F.3d at 699 (emphasis added), could scarcely have been less equivocal. To be sure, *Ezell* noted that *some other* constitutional violations may, in unique circumstances, be remediable by damages. *Id.* at 699 n.10. Nothing Petitioners have said is inconsistent with that point; to the contrary, the Petition expressly acknowledged the possibility of such edge cases. *See* Pet.26. Indeed, for some constitutional violations—such as the taking of property—damages will often be adequate. Petitioners' point is that in the

standard case where the constitutional rights at issue *are* "intangible and unquantifiable"—as they are here—then by definition their infringement "cannot be compensated by damages": precisely what *Ezell* held. 651 F.3d at 699.

Likewise, the Ninth Circuit in *Baird* could not have more clearly endorsed the same rule as *Ezell*: it held that "[t]he deprivation of constitutional rights 'unquestionably constitutes irreparable injury," that "no further showing of irreparable injury is necessary," and, thus, that "[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." *Baird v. Bonta*, 81 F.4th 1036, 1042 (9th Cir. 2023) (cleaned up). Nor could *Baird* be more clearly in conflict with the Third Circuit's decision below: *Baird* in fact *reversed* the district court for adopting precisely the same course as the majority in this case—"deny[ing] a motion for a preliminary injunction without analyzing the plaintiff's likelihood of success on the merits," based entirely on the non-merits factors. *Id.* at 1041. Respondents emphasize that *Baird* does not hold that the violation of constitutional rights is "always" irreparable, BIO.18, but as just noted, Petitioners have never disputed the existence of unusual cases where a constitutional violation may in fact be reduceable to monetary terms.

Perhaps the fact most fatal to Respondents' claim that "there is no circuit split," BIO.2, however, is that *the panel itself* recognized that it was departing from the other circuits. The panel majority expressly acknowledged that "our sister circuits have presumed

harm in various settings," including under the "Second Amendment"—a point for which it cited *Baird*. Pet.App.17a. Yet it "respectfully decline[d] to do the same," *id.*, thus explicitly splitting from the Ninth and Seventh Circuits on this point.

B. Respondents also attempt to downplay the extent of the conflict and confusion among the circuits over the role of the irreparable harm injunction prong in constitutional litigation more generally. But this argument fails too, and for parallel reasons. Respondents cite cases from several circuits that all acknowledge the existence of unique cases where constitutional harms *are* reducible to monetary damages. *See* BIO.19-22. As discussed, Petitioners have no quarrel with this. But we do insist on this point: in the ordinary case where a constitutional infringement *is not* monetary in nature, the lower courts are clearly in turmoil over *which* constitutional rights are incapable of being redressed at law, *what* types of violations of those rights lead to *per se* harm, and *why* the irreparable harm factor is satisfied in these cases. The voluminous evidence of these conflicts is set forth in the Petition (at 24-28), and Respondents' half-hearted attempts to diminish the degree of disagreement, BIO.20-22, come up woefully short.

II. Unable to conceal the clear circuit split that the panel below itself recognized, Respondents switch gears, arguing instead that the Court should deny certiorari "because the Third Circuit's decision was correct." BIO.29. But all of their argumentation on this score is fatally flawed because it is based on the same misconception of Petitioners' position as adopted by the panel majority: that Petitioners are

somehow attempting "to create a loophole in the preliminary-injunction standard for the Second Amendment." BIO.3. That is false. Petitioners do not claim that Second Amendment plaintiffs are "*not required* to make [a] showing of irreparable harm." BIO.i (emphasis added). Petitioners' argument is that the violation of intangible Second Amendment rights *constitutes* irreparable harm. The Petition was crystal clear on this critical distinction, from the QP to the Conclusion, making Respondents' repeated mis-description of Petitioners' argument mystifying.

Once the actual nature of Petitioners' argument is recalled, all of Respondents' merits arguments tumble like dominoes. They argue at length that "this case demonstrates" that Second Amendment plaintiffs should not be able to " 'sidestep' the required showing" of irreparable harm, since "Petitioners and other plaintiffs below failed to prove they will more likely than not suffer irreparable injury while proceedings are pending." BIO.30, 31, 33 (cleaned up). But that argument begs the question, concluding that Petitioners "failed to prove" irreparable harm based on the unspoken premise that the ongoing violation of Second Amendment rights *does not constitute* irreparable harm. That is in fact the central question over which the lower courts have split: whether undisputed testimony that plaintiffs "wish to obtain [banned] firearms and magazines" but are barred by the challenged law from doing so, BIO.31, *itself constitutes* intangible and irreparable injury—just as religious adherents who "wish to attend Mass on Sunday or services in a synagogue on Shabbat" but are "barred" from attendance by the Government have "unquestionably" suffered "irreparable harm," *Roman Catholic Diocese*, 592 U.S.

at 19 (per curiam). The State responds by regurgitating its argument that in some unusual cases a Second Amendment violation might be reduceable to money damages, BIO.33, but this contention fails for reasons already discussed.

Respondents' reliance on this Court's decision in *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 392-93 (2006), is ill-founded for the reasons set forth in the Petition—reasons that Respondents completely ignore. As explained there, *eBay* did not, as Respondents intimate, reject the "intangible nature of harms like patent and copyright infringement," BIO.33; rather, it disapproved a "general rule that courts will issue permanent injunctions against patent infringement," 547 U.S. at 391, that was based on the factual assumption that "the passage of time" during the course of infringement generally inflicts "irremediable harm" because of "the finite term of the patent grant," *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1247 (Fed. Cir. 1989), *overruled by eBay*, 547 U.S. 388. Petitioners' argument is not based on any factual assumption that a Second Amendment violation generally causes some downstream irreparable injury; it is based on the understanding that the infringement of intangible Second Amendment rights *is itself* an injury not remediable by money damages.

Respondents notably do not dispute that the logic of the panel majority's decision entails that *permanent* injunctive relief is also unavailable for Second Amendment violations, given that a permanent injunction likewise requires a showing of irreparable harm. Pet.22-23; *see* BIO.35-36. Instead, they argue that "[i]t is Petitioners' rule that will cause mischief" by

enabling Second Amendment plaintiffs to "strategically bypass" a "full trial" by seeking resolution of the merits of their claim through preliminary injunction proceedings. BIO.36. Whatever force this argument appears to have comes entirely from the rhetorical punch of the adverb "strategically." Shorn of that editorialization, the result decried by Respondents is nothing more than this: individuals suffering an ongoing infringement of their fundamental and intangible Second Amendment rights will, under Petitioners' rule, generally be able to expeditiously obtain an injunction temporarily putting a stop to that ongoing Second Amendment violation until any disputed facts are resolved. *Horribile dictu*!

III.A. Respondents' protestations that "[t]his case is an inappropriate vehicle" for resolving the division of authority over the important question presented, BIO.22, are insubstantial. They first say that the panel majority's weighing of the "balance of the equities and public interest" provide "independent grounds" for its decision, which Petitioners "have not sought [to] review." BIO.23. But while the Third Circuit did of course recognize that the final two factors *can* provide an independent basis for denying an injunction, Pet.App.15a, it did not—as Respondents' selective quotation suggests—hold that they *do* provide such an independent basis *in this case*. To the contrary, the panel majority merely found that "the final two factors *support* denying a preliminary injunction." Pet.App.23a (emphasis added). That conclusion was based principally on the panel's determination (ironic, in light of its core holding on the question presented) that the government always "suffers a form of irreparable injury" when it "is enjoined by a court from

effectuating statutes enacted by representatives of its people." Pet.App.22a (cleaned up). While that consideration may "weigh against a preliminary injunction," Pet.App.21a, there is every reason to believe that had the panel correctly understood that the ongoing infringement of Second Amendment rights *also* inflicts "a form of irreparable injury," Pet.App.22a (cleaned up), it would have concluded that the overall balance comes out the other way.

At a minimum, it seems almost certain that in that situation the panel would have found the nonmerits factors in equipoise, requiring assessment of the likelihood of success. A remand by this Court for the Third Circuit to conduct the preliminary injunction balancing anew in light of the correct understanding of the irreparable nature of Petitioners' alleged injury would thus provide real and meaningful relief, and Respondents' insistence that "this Court's resolution of the question presented will not affect the Third Circuit's judgment," BIO.24, is wrong.

B. Finally, while neither court below expressed so much as a syllable of doubt about their Article III jurisdiction to hear this case, Respondents suddenly claim to have discovered, for the first time ever in this proceeding, that "Petitioners lack Article III standing." BIO.22. This last-ditch effort to avoid the Court's review is completely meritless.

Petitioner Taylor submitted declaration testimony that he "desire[s] to own firearms that Delaware has banned as 'assault weapons,' specifically an AK design rifle," and that "[b]ut for the Ban and my reasonable fear of serious criminal prosecution for a violation of it, I would purchase and lawfully use such a

firearm." 3d Cir. Doc. 30-2 at 296. Petitioners Gray, Graham, and Stevens similarly alleged in their complaint that they "wish[ ] and intend[ ] to acquire, possess, and lawfully use arms Delaware bans as 'assault weapons,' " *id.* at 621, as well as the banned magazines, *id.* at 636-37, and that they "would do so but for [their] reasonable fear of prosecution as a result of Defendant's active enforcement of the State's Ban," *id.* at 621; *see Elrod v. Burns*, 427 U.S. 347, 350 n.1, 373 (1976) (plurality) (noting, in case arising from both a motion to dismiss and motion for preliminary injunction, that the Court could consider "all of the well-pleaded allegations of respondents' complaint and uncontroverted affidavits filed in support of the motion for a preliminary injunction"). Petitioner DJJAMS avers that it wishes to sell the banned firearms to qualified purchasers and would do so "[b]ut for the Ban and [its] reasonable fear of serious criminal prosecution for a violation of it." 3d Cir. Doc. 30-2 at 293. And Petitioners Second Amendment Foundation and Firearms Policy Coalition likewise alleged that they have members in Delaware—including all of the named plaintiffs—who wish to purchase and possess the banned semiautomatic firearms and ammunition magazines and would do so but for the challenged provisions. *Id.* at 623-25, 636-37. Respondents have never disputed these facts, and they do not do so now.

Respondents instead argue that Petitioners' allegations that they wish to acquire the banned arms and magazines are " 'some day' intentions" that are incapable of supporting standing. BIO.28. Not so. Petitioners do not state that they hope to acquire the banned items "[i]n the future" but "without any description of concrete plans, or indeed even any specification of

when the some day will be." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). They specify which types of firearms and magazines they wish to acquire and how they would use them, and they unequivocally state that they *would acquire them now* were it not for the ban. 3d. Cir. Doc. 30-2 at 296, 650-51. These allegations of injury plainly suffice under this Court's settled jurisprudence governing preenforcement challenges. *See, e.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 155 (2014).

Turning to Petitioner DJJAMS, Respondents claim that it cannot show standing because the Second Amendment does not protect a "standalone right to sell guns." BIO.26 (emphasis omitted). But DJJAMS has standing whether or not that is so, because the doctrine of third-party standing allows it to vindicate the rights of its customers to *acquire* the firearms it wishes to *sell them*. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 196-97 (1976); *Griswold v. Connecticut*, 381 U.S. 479, 480-81 (1965).

Respondents also assert that Petitioners failed to adequately show that "Delaware has tried to enforce the disputed law[ ] against them." BIO. 26, 27 (cleaned up). But Respondents have "not argued to this Court that plaintiffs will not be prosecuted if they do what they say they wish to do," *Holder v. Humanitarian Law Project*, 561 U.S. 1, 16 (2010), and in these circumstances the Court has long assumed that plaintiffs face a "well-founded fear that the law will be enforced against them" absent some "reason to assume otherwise," *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988).

Finally, Petitioners' injuries are traceable to the challenged law and redressable by the preliminary injunction they seek. Respondents resist this conclusion too, on the basis that Petitioner Taylor's declaration "does not establish he is without a felony conviction, can pass a background check, or meets the age qualifications," or that "he is not a member of law enforcement." BIO.28. But the declaration does aver that Taylor would purchase and use the banned firearms "*[b]ut for the Ban*," 3d Cir. Doc. 30-2 at 296 (emphasis added), which necessarily implies that it is the challenged law, and not one of these other qualifications, that is preventing him from exercising his Second Amendment rights. And the complaint removes any doubt that he meets all of these qualifications. *Id.* at 622.

CONCLUSION

The Court should grant the writ of certiorari.

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Respectfully submitted,

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