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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

Kathleen M. Jennings
Zachary Stirparo
DELAWARE DEPARTMENT OF JUSTICE
Carvel State Office Building
820 N. French Street
6th Floor
Wilmington, DE 19801
(302) 577-8400

David E. Ross
Counsel of Record
Garrett B. Moritz
ROSS ARONSTAM & MORITZ LLP
1313 North Market Street
Suite 1001
Wilmington, DE 19801
(302) 576-1602
dross@ramllp.com

Counsel for Respondents

QUESTIONS PRESENTED

Petitioners challenge two Delaware gun safety laws that regulate certain assault weapons and large-capacity magazines. Petitioners assert they "wish" to obtain these firearms and magazines at some unspecified point in the future, and sought a preliminary injunction on that basis. Pet. 6-7; App. 20a. Petitioners claim they are not required to make any showing of irreparable harm as is ordinarily required to obtain a preliminary injunction because they raised claims under the Second Amendment.

The questions presented are:

1. Whether the court of appeals correctly rejected Petitioners' attempt to sidestep the ordinary preliminary-injunction inquiry with a rule of per se irreparable harm for Second Amendment claims.

2. Whether Petitioners lack Article III standing to challenge either law.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

OPINIONS BELOW

The court of appeals' decision is reported at 108 F.4th 194 and reproduced at App. 1a-52a. The district court's order denying plaintiffs' motion for a preliminary injunction is reported at 664 F. Supp. 3d 584 and reproduced at App. 53a-92a.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2024. No petition for rehearing was filed. The petition for a writ of certiorari was filed on September 16, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

This Petition arises from Petitioners' unsuccessful request for preliminary injunctive relief barring enforcement of a package of gun safety bills enacted by Delaware. Several plaintiffs (including Petitioners) attempted to obtain a preliminary injunction based solely on a handful of declarations stating that some of them "wish to obtain … firearms [or] magazines" that the Delaware laws restrict. App. 20a. The plaintiffs "put on no live witnesses, nor did they offer any evidence that Delaware had tried to enforce these laws or take away their magazines." App. 4a. Indeed, "[t]hey offered no details about how they would be harmed." *Id.*

Petitioners argued that they were not required to make the showing of irreparable harm ordinarily required to obtain the extraordinary equitable remedy

of a preliminary injunction. Rather, they believed the courts should "lift that burden from their shoulders by presuming all constitutional harms irreparable." App. 16a. The courts below refused to do so. This Court's review is unwarranted for several reasons.

First, there is no circuit split. No circuit subscribes to Petitioners' position that "the infringement of Second Amendment rights constitutes *per se* irreparable injury," Pet. 11 (capitalization omitted)—certainly not the Seventh and Ninth Circuits, as Petitioners assert. The Seventh Circuit explicitly "save[d]" this exact question "for another day." *Bevis v. City of Naperville*, 85 F.4th 1175, 1203 (7th Cir. 2023). And the Ninth Circuit held only that a likely constitutional violation will "usually," not always, constitute irreparable harm. *Baird v. Bonta*, 81 F.4th 1036, 1040, 1048 (9th Cir. 2023). Petitioners' effort to depict "conflict and confusion" in *other* constitutional contexts (Pet. 25; *see also* Pet. 24-28) is unpersuasive and, in any event, does not merit this Court's review of the question Petitioners present.

Second, this case is not an appropriate vehicle to address the question Petitioners present. The court of appeals offered an alternative ground for affirming the denial of the preliminary injunction, and Petitioners have not challenged that ground here: The court of appeals held, "[e]ven if the challengers had shown an irreparable injury, the third and fourth" preliminary injunction factors would still "weigh against a preliminary injunction." App. 21a. Thus, even if the Court were to agree with Petitioners' argument about irreparable harm, such a ruling would afford Petitioners no relief. Moreover, Petitioners have failed to

establish the basic jurisdictional requirement of Article III standing. Petitioners can point to no evidence of a concrete, imminent injury traceable to government enforcement of the challenged laws based on a plan to engage in prohibited conduct.

Third, and in any event, the court of appeals was correct to reject Petitioners' attempt to create a loophole in the preliminary-injunction standard for the Second Amendment, or for all constitutional claims. As the Third Circuit's thorough and well-reasoned opinion explained, preliminary injunctions are "[e]xtraordinary [r]emedies" derived in equity, and they require "great[] caution, deliberation, and sound discretion." App. 5a, 8a. Preliminary injunctions are designed "to keep cases alive until trial," App. 10a, not to force courts to prejudge the merits of a case through a "limited 'evidentiary record'" and a "hasty process," as Petitioners asked the lower courts to do here, App. 4a, 9a.

In fact, Petitioners' approach here is the quintessential opposite of what a preliminary injunction is for: After sitting on their hands for months, Petitioners presented their case in an emergency posture, insisting they were entitled to a ruling on the merits on the basis of virtually no evidence at all—precisely the type of "rushed judgment" the Third Circuit warned against. App. 15a. Then, they put the district court proceeding on ice—where it remains now—hoping to persuade the court of appeals to issue a premature ruling on the merits. And when that gambit failed, they now urge this Court to issue a categorical legal rule that virtually requires appellate courts to resolve the merits of any constitutional claim before trial. All

of this is inconsistent with the traditional role of a preliminary injunction and with measured consideration of important constitutional issues.

This Court should deny the Petition.

STATEMENT OF THE CASE

Delaware's legislature enacts two gun safety bills to regulate certain assault weapons and large-capacity magazines

In June 2022, Delaware's legislature enacted a package of gun safety bills to regulate assault weapons and large-capacity magazines. App. 54a-55a. The first of the laws, HB 450, "makes numerous 'assault weapons' illegal, subject to certain exceptions." App. 57a (quoting Del. Code tit. 11, §§ 1464-1467). Among the list of prohibited firearms are various semi-automatic "'assault long gun[s],' including the AR-15, AK-47, and Uzi," several "semi-automatic 'assault pistol[s],'" and certain "copycat" semi-automatic weapons. *Id.* (quoting Del. Code tit. 11, § 1465).

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.* (quoting Del. Code tit. 11, § 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 between any permitted places. They can also transfer them to family members." App. 57a-58a (quoting Del. Code tit. 11, § 1466(c)).

The second law, "SS 1 for SB 6," "makes it illegal 'to manufacture, sell, offer for sale, purchase, receive, transfer, or possess a large-capacity magazine.'" App. 58a (quoting Del. Code tit. 11, § 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.* (quoting Del. Code tit. 11, § 1468(2)). This statute similarly exempts military and law-enforcement personnel, "along with individuals who have a valid concealed carry permit." *Id.* (citing Del. Code tit. 11, § 1469(c)). While the statute "does not grandfather any magazines," it requires the State "to implement a buy-back program." *Id.* (citing Del. Code tit. 11, § 1469(d)).

Plaintiffs wait five months or more to seek a preliminary injunction based on their "desire" to acquire restricted assault weapons

Almost five months after the legislature passed the two bills, several plaintiffs sought a preliminary injunction against the laws in two actions. C.A.3 App'x 283, 629.[1] These plaintiffs included Petitioners Gabriel Gray, William Taylor, DJJAMS LLC, Firearms Policy Coalition, Inc., and Second Amendment

[1] "C.A.3 App'x" refers to the plaintiff-appellants' appendix in *Delaware State Sportsmen's Ass'n, Inc. v. Delaware Department of Safety & Homeland Security*, No. 23-1633 (3d Cir. July 3, 2023), ECF Nos. 30-1 – 30-3.

Foundation ("Gray Petitioners"), who moved for a preliminary injunction against the assault weapons law only. *See* C.A.3 App'x 629; Op. Br. ISO Mot. for Preliminary Injunction at 1, *Gray v. Jennings*, No. 22-cv-01500 (D. Del. Nov. 22, 2022), ECF No. 5. Petitioners Christopher Graham and Owen Stevens later filed a third lawsuit, which Firearms Policy Coalition and Second Amendment Foundation also joined as co-plaintiffs (together, "Graham Petitioners"). They joined the Gray Petitioners' motion to enjoin the assault weapons law four months after it was filed. C.A.3 App'x 595-96. Delaware State Sportsmen's Association, Inc. (DSSA) and other plaintiffs who have not sought certiorari moved for a preliminary injunction against both the assault weapons law and the large-capacity magazine law. C.A.3 App'x 283. All three lawsuits were consolidated in the district court. App. 56a.

Plaintiffs' lawsuits made several common contentions. They argued that the Delaware statutes violate their Second Amendment "individual right to keep and bear common arms." C.A.3 App'x 600-01. They asserted that the laws have mislabeled firearms "in common use for lawful purposes" as "'assault weapons.'" C.A.3 App'x 601. They similarly alleged that "large-capacity magazines" "is a misnomer" and that "[m]agazines capable of holding more than 17 rounds of ammunition" are "a common and important means of self-defense." C.A.3 App'x 640 (cleaned up).

Plaintiffs also made similar allegations as to how the laws affected them. For example, Second Amendment Foundation alleged that its members "desire and intend to acquire, possess, and lawfully use

semiautomatic firearms banned by Delaware" and that "[b]ased on the threat of felony prosecution by and through Delaware's Ban," "SAF's Delaware resident members have been prevented from, *inter alia*, possessing, acquiring, importing, transporting, selling, receiving or lawfully using banned 'assault weapons.'" C.A.3 App'x 625. DJJAMS alleged "[m]any customers and prospective customers of [p]laintiff DJJAMS are interested in, have, and continue to seek to purchase constitutionally protected firearms banned by Delaware," and that DJJAMS "would make available for sale and transfer to its customers" the restricted assault weapons but for the law. C.A.3 App'x 622.

Similarly, the individual plaintiffs broadly alleged that they "wish to engage in" conduct that might violate the statutes. C.A.3 App'x 602-03; *see, e.g.*, C.A.3 App'x 622. Plaintiffs' complaints did not claim any imminent threat of enforcement of the laws against them, nor did they assert a time-sensitive need for the restricted weapons.

In support of their motion for a preliminary injunction, plaintiffs submitted a handful of declarations. These declarations included just two from Petitioners here. Petitioner William Taylor, the only individual Petitioner to submit a declaration, declared that "I do not currently own but desire to own firearms that Delaware has banned as 'assault weapons,' specifically an AK design rifle, a commonly-owned type of rifle, for self-defense, hunting, and other lawful purposes. But 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." C.A.3 App'x 296. Petitioner DJJAMS declared that "[a]s a consequence of the Ban, DJJAMS has had to turn away customers," and "[b]ut for the Ban and [DJJAMS's] reasonable fear of serious criminal prosecution," DJJAMS "would sell and assist customers in effecting lawful transfers of such firearms." C.A.3 App'x 293.

The district court denies a preliminary injunction, finding no likelihood of success and no irreparable harm

From the beginning, plaintiffs pushed to use the preliminary-injunction vehicle to force a rushed, emergency decision on the merits of their Second Amendment claims. Delaware in fact offered to forego a preliminary-injunction hearing and proceed directly to an expedited trial on the merits to obtain "a definitive final resolution [on the merits] efficiently and quickly." Dec. 20, 2022 Tr. at 11:3-5, *Del. State Sportsmen's Ass'n, Inc. v. Del. Dep't of Safety & Homeland Sec.*, No. 22-cv-00951 (D. Del. Jan. 19, 2023), ECF No. 30. Plaintiffs declined, preferring a preliminary-injunction proceeding without an "evidentiary hearing" or "expert or other evidence adduced through traditional party discovery methods." Dec. 5, 2022 Letter at 2-3, *Del. State Sportsmen's Ass'n*, No. 22-cv-00951 (D. Del. Dec. 5, 2022), ECF No. 17.

Plaintiffs put on a bare-bones case for a preliminary injunction. They "put on no live witnesses, nor did they offer any evidence that Delaware had tried to enforce these laws or take away their magazines." App. 4a. Aside from the handful of declarations just described, "[t]hey offered no details about how they

would be harmed," *id.*, and scant evidence on the merits of their Second Amendment claim, App. 54a n.2, 79a.

Delaware, by contrast, "present[ed] a robust evidentiary record, including declarations from five expert witnesses," four of whom addressed the history of weapon development and regulation in the United States. App. 54a n.2. Plaintiffs neither offered contrary expert evidence nor sought to examine Delaware's experts. Instead, plaintiffs claimed that "historical regulations [we]re immaterial." Defendants-Appellees' Suppl. App'x at 919, *Del. State Sportsmen's Ass'n*, No. 23-1633 (3d Cir. Aug. 16, 2023), ECF No. 65. According to plaintiffs, the only relevant question was whether assault weapons and LCMs "are 'in common use' for lawful purposes." *Id.* at 909. Plaintiffs left Delaware's evidentiary record unrebutted.

Based on this record, the district court denied the preliminary injunction. App. 54a. The court held that plaintiffs had "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." App. 59a.

With respect to likelihood of success on the merits, the court took up plaintiffs' request to issue a decision on the lopsided record the parties had presented. The court found that although some of the regulated arms "are in common use for self-defense, and therefore 'presumptively protected' by the Second Amendment," App. 71a, 74a-75a (quoting *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 17

(2022)), Delaware had met its burden to show that the regulations were "consistent with the Nation's historical tradition of firearm regulation." App. 75a (quoting *Bruen*, 597 U.S. at 24). Based on "the current evidentiary record," App. 80a, the court found "that Defendants ha[d] sufficiently established that assault long guns and [large-capacity magazines] implicate dramatic technological change and unprecedented societal concerns for public safety." App. 82a. The court then reviewed the historical analogues to the Delaware regulations and found that "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." App. 86a (citing *Bruen*, 597 U.S. at 29). Accordingly, the court held "that the … prohibitions of HB 450 and SS 1 for SB 6 are consistent with the Nation's historical tradition of firearm regulation" and plaintiffs had failed to demonstrate a likelihood of success on the merits. App. 88a.

The district court recognized that given "[p]laintiffs['] fail[ure] to meet their burden for likelihood of success on the merits, a finding of irreparable harm cannot help [p]laintiffs here," as "[b]oth factors are required for a preliminary injunction." App. 89a n.17. "[F]or thoroughness," the court nonetheless addressed the irreparable-harm element. *Id.* The court rejected plaintiffs' claim that "an alleged deprivation of a Second Amendment right … automatically constitute[s] irreparable harm." App. 90a.

Applying the standard test for irreparable harm, the court concluded that "[p]laintiffs have not satisfied their burden of proving irreparable harm in the absence of a preliminary injunction." *Id.* The court first addressed plaintiffs' claim that they will suffer irreparable harm because the laws "prevent [p]laintiffs from possessing assault weapons and [large-capacity magazines] 'for self-defense and other lawful purposes.'" *Id.* The court held this claim was insufficient to establish irreparable harm because "[p]laintiffs retain ample effective alternatives, especially with respect to the 'core' purpose of self-defense." *Id.* That was especially so because the laws "regulate[] only a subset of semi-automatic weapons," which are "seldom used for self-defense." *Id.* Large-capacity magazines "are not useful for self-defense either." *Id.* Thus, plaintiffs remain free to avail themselves of "numerous other firearms, including handguns—the 'quintessential self-defense weapon.'" *Id.* (quoting *Bruen*, 597 U.S. at 47). In short, "[p]laintiffs have furnished no evidence that [] they cannot adequately defend themselves without the regulated weapons, or, indeed, that their ability to self-defend has been meaningfully diminished." App. 91a.

The district court also addressed plaintiffs' claim to irreparable harm because "the statutes restrict their ability to sell assault weapons and [large-capacity magazines], resulting in lost business opportunities." App. 91a. The court emphasized that "no court has held 'that the Second Amendment secures a standalone right to *sell* guns or range time.'" *Id.* (quoting *Drummond v. Robinson Twp.*, 9 F.4th 217, 230 (3d Cir. 2021)). Moreover, plaintiffs' bare assertion of

prospective business loss was unconvincing, as plaintiffs "remain free to sell the multitude of firearms that are unaffected by the challenged statutes." *Id.*

Plaintiffs pursue this appeal and put all district court proceedings on hold

After the district court denied the preliminary injunction in March 2023, the court "started preparing for a November 2023 trial." App. 5a. Plaintiffs, however, decided to pursue this appeal, electing to "put the District Court proceedings on hold." *Id.* Plaintiffs stipulated to stay all proceedings "pending the final resolution of the [a]ppeal," including "any certiorari proceedings." Apr. 12, 2023 Joint Stipulation at 3, *Del. State Sportsmen's Ass'n*, No. 22-cv-00951 (D. Del. Apr. 12, 2023), ECF No. 67. As a result, the district court removed the November 2023 trial dates from its calendar.

The court of appeals affirms, declining plaintiffs' request to exempt them from having to show irreparable harm

In the Third Circuit, plaintiffs again argued that they had shown a likelihood of success on the merits of their Second Amendment claims and, accordingly, "they should get an injunction because all constitutional harm is supposedly irreparable and the equities and public interest track the merits." App. 5a. The court of appeals disagreed, because "that is not how equity works." *Id.* "Preliminary injunctions are not automatic. Rather, tradition and precedent have long reserved them for extraordinary situations." *Id.*

And the court of appeals found "nothing extraordinary here" warranting a preliminary injunction. *Id.*

Writing for the three-judge panel, Judge Bibas reviewed the history of the preliminary injunction as an equitable remedy, highlighting that the primary use of equitable powers was "to give relief *in extraordinary cases*, which are *exceptions* to general rules." App. 6a (quoting The Federalist No. 83, at 505 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). The court emphasized that preliminary injunctions "were and still are extraordinary relief," and highlighted some of the "problems" preliminary injunctions raise, including that they are "granted hurriedly and on the basis of very limited evidence." App. 7a-8a. This "hasty process makes the district court jump to conclusions" and "risks prejudging" the merits before the trial process. App. 9a. The court also emphasized that the "primary purpose" of a preliminary injunction is "to keep cases alive until trial," and that the secondary goal of "[p]reventing interim harm" is in fact "at the service of preserving the case." App. 10a-11a. As a result, "the threat of irreparable harm does not automatically trigger a preliminary injunction." App. 12a.

The court rejected plaintiffs' attempt to "sidestep [the preliminary injunction] framework" set forth in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). App. 13a. The court disagreed that "in constitutional cases, a likelihood of success on the merits is enough." *Id.* The court offered five reasons to reject that proposal: (1) a preliminary injunction "is a matter of equitable discretion," but equity would fall out of the equation if likelihood of success were

enough; (2) plaintiffs' proposal would impose a rigid test that would "disbar" a district court from exercising its equitable discretion; (3) treating a preliminary injunction "as rising and falling with the merits" ignores the other "piece[s] of the puzzle," all of which must be weighed in equity; (4) plaintiffs' rule would force courts to "prejudge the merits" in every case involving a constitutional right, which is contrary to this Court's precedents that have "overturned an injunction based solely on the balance of equities and the public interest"; and (5) plaintiffs' rule "presumes clarity early on," which is seldom the case at the outset of litigation. App. 14a-15a. As the court put it, "[a] rushed judgment is a dangerous one; judges must be humble enough to stay their hands." App. 15a.

The court recognized that there were circumstances under which courts presume irreparable harm, namely in the First Amendment context. App. 16a. But "[p]resuming irreparable harm is the exception, not the rule." *Id.* The court "declined" to extend that exception, because it is based on "[u]nique First Amendment doctrines" not applicable here. App. 17a-18a. The court thus held plaintiffs to the requirement to demonstrate "that, without a preliminary injunction, they will more likely than not suffer irreparable injury while proceedings are pending." App. 19a.

The court agreed with the district court that "[w]ithout a presumption in their favor, the challengers' claim of irreparable harm collapses." App. 19a. Plaintiffs had "submitted only four declarations from Delaware residents who 'wish to obtain these firearms and magazines.'" App. 20a. "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." *Id.* As a result, "the challengers' generalized claim of harm is hardly enough to call for this 'extraordinary and drastic remedy.'" *Id.* The court emphasized that it was "not hold[ing] that Second Amendment harms, or constitutional harms generally, cannot be irreparable." App. 21a. However, "the scant evidence before [it] here hardly show[ed] that [plaintiffs'] harm is." *Id.*

The court went on to hold that even if the plaintiffs had shown an irreparable injury, "the third and fourth factors"—"harm to the opposing party and the public interest"—"would weigh against a preliminary injunction" for two separate reasons. App. 21a. First, the requested relief would "enjoin enforcement of two democratically enacted state laws." *Id.* Particularly in the context of federal court review of state laws, "[c]ourts rightly hesitate to interfere with exercises of executive or legislative authority." App. 21a-22a. Enjoining democratically enacted statutes creates "a form of irreparable injury" for states. App. 22a (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)). The court found itself bound to "err on the side of respecting state sovereignty," at least "[w]ithout the clarity of a full trial on the merits." *Id.*

Second, plaintiffs delayed seeking a preliminary injunction by several months and then compounded the delay by putting the rest of the case on hold pending this appeal. App. 22a-23a. That "continuing delay"

"tends to indicate at least a reduced need for such drastic, speedy action." *Id.*

The court declined plaintiffs' request to evaluate the merits of their Second Amendment claims on the limited preliminary-injunction record. App. 23a-24a.

After the Third Circuit issued its mandate, the district court requested a status update from the parties. While some plaintiffs expressed a desire for discovery, followed by a motion for summary judgment, Petitioners did not, preferring to leave the merits case on ice. Aug. 12, 2024 Letter at 1-2, *Del. State Sportsmen's Ass'n*, No. 22-cv-00951 (D. Del. Aug. 12, 2024), ECF No. 70.

REASONS FOR DENYING THE PETITION

I. There Is No Circuit Split On The Question Presented.

Petitioners argue that the Third Circuit created a circuit split "over whether the infringement of Second Amendment rights constitutes *per se* irreparable injury." Pet. 11 (capitalization omitted). And then they contend that "there is much conflict and confusion" about whether violations of *other* constitutional provisions inflict per se irreparable harm. Pet. 25. Neither argument has merit.

A. The problem with Petitioners' circuit split argument is that neither circuit they invoke—neither the Seventh nor the Ninth—takes the position they attribute to it: that "infringement of Second

Amendment rights necessarily constitutes irreparable injury." Pet. 12 (capitalization omitted).

The Seventh Circuit has expressly "save[d] … for another day" the question "whether an alleged Second Amendment violation gives rise to a presumption of irreparable harm," and if so, "whether any such presumption is rebuttable or ironclad." *Bevis v. City of Naperville*, 85 F.4th 1175, 1202-03 (7th Cir. 2023).

Petitioners ignore *Bevis*. Instead, they argue that the Seventh Circuit answered that question 12 years earlier in *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011), and concluded that there was a per se rule. Pet. 12. *Ezell* established no such categorical rule, however. On the contrary, *Ezell* stressed that the plaintiffs' irreparable harm turned on case-specific facts about the "form of the claim and the substance of the Second Amendment right"—facts vastly different from Petitioners' claims here. 651 F.3d at 700; *see id.* at 699 & n.10; *id.* at 689-91, 697-99 (emphasizing, among other things, the scope of the challenged regulation, which "mandate[d] one hour of range training as a prerequisite to lawful gun ownership, yet at the same time prohibit[ed] all firing ranges in the city" (citation omitted)).

The majority opinion in *Bevis* discussed *Ezell* throughout, *see Bevis*, 85 F.4th at 1187, 1189, 1191, and the dissent even cited *Ezell* in arguing that "a violation of the Second Amendment right presumptively causes irreparable harm," *id.* at 1219 (Brennan, J.). In declining to "decide" that question, the *Bevis* majority necessarily recognized that *Ezell* does not answer whether a Second Amendment violation is per

se irreparable harm. *Id.* at 1202. Even if *Ezell* could be read to support Petitioners' per se rule, however, that would at most suggest an intra-circuit conflict with *Bevis*. That may warrant the Seventh Circuit's en banc consideration. But it would not support this Court's review. *See Joseph v. United States*, 135 S. Ct. 705, 707 (2014) (Kagan, J., respecting denial of certiorari) ("we usually allow the courts of appeals to clean up intra-circuit divisions on their own").

Petitioners likewise miss the mark in asserting (at 13) that the Ninth Circuit adopted a per se irreparable harm standard in *Baird v. Bonta*, 81 F.4th 1036 (9th Cir. 2023). *Baird* held only that where there is a violation of a constitutional right, "that showing *usually* demonstrates that [the plaintiff] is suffering irreparable harm." *Id.* at 1040 (emphasis added).

"Usually" does not mean "always." Indeed, the Ninth Circuit made clear that "it 'is not enough' to grant a preliminary injunction if a movant shows only that he is likely to succeed on the merits." *Id.* at 1045 (quoting *DISH Network Corp. v. FCC*, 653 F.3d 771, 776 (9th Cir. 2011)). And the court emphasized that, unlike here, the *Baird* plaintiffs had "not argue[d] that their likelihood of success on the merits in isolation is *necessarily* enough to warrant an injunction." *Id.* (emphasis added); *compare* App. 13a-14a ("the challengers … argue that … a likelihood of success on the merits is enough"). Accordingly, rather than treat a likely Second Amendment violation as per se irreparable harm, the Ninth Circuit held that the district court must still "analyze[] each" of the equitable preliminary injunction factors, even if the plaintiffs

"showed that they [were] likely to succeed on the merits of their claim." *Baird*, 81 F.4th at 1048.

In short, neither the Seventh nor the Ninth Circuit has held that a Second Amendment violation "inevitably amount[s] to irreparable injury." *Contra* Pet. 11. And there is no reason to believe either court would find irreparable harm on the specific facts of this case, where Petitioners evinced "little need to move quickly," App. 23a, "furnished no evidence … that their ability to self-defend has been meaningfully diminished," App. 91a, and identified no "harms beyond ones that can be cured after final judgment," App. 20a.[2]

B. Equally unavailing is Petitioners' fallback argument—that there is much "[c]onflict and [c]onfusion" over the extent to which courts treat violations of *other* constitutional provisions as per se irreparable harm. Pet. 24. As an initial matter, even if there were confusion in these other contexts, it would not support granting review on the question presented, which is limited to "[w]hether the infringement of *Second*

[2] The Tenth Circuit's recent decision in *Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96 (10th Cir. 2024), does not support Petitioners' asserted split, either. *Rocky Mountain* observed that "[m]ost courts consider the infringement of a constitutional right enough and require no further showing of irreparable injury." *Id.* at 128 (quoting *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 805 (10th Cir. 2019)). But *Rocky Mountain* did not reach the question whether the asserted *Second Amendment* violation had caused irreparable harm, because the plaintiff "ha[d] not established a likelihood of success on his Second Amendment claim." *Id.*

Amendment rights constitutes *per se* irreparable injury." Pet. i (first emphasis added).

Petitioners overstate any such "conflict and confusion" among the lower courts. At most, some circuits may "presume[] harm in various settings" while others do not. App. 17a. But no court has advanced the per se categorical harm rule Petitioners espouse. Rather, like *Ezell* and *Baird*, they turn on case-specific facts about the nature of each plaintiff's claimed harms and the specific constitutional rights at issue.

For example, Petitioners assert that the Second, Sixth, and Ninth Circuits apply a per se harm standard "universally in any constitutional challenge." Pet. 25. Not so. The Second Circuit has held that "often" it "will be more appropriate to determine irreparable injury by considering what adverse factual consequences the plaintiff apprehends if an injunction is not issued." *Charette v. Town of Oyster Bay*, 159 F.3d 749, 755 (2d Cir. 1998). The Sixth Circuit likewise only presumes harm from "*certain* constitutional" violations, *BE the Bush Recovery Ministries v. Coffee Cnty.*, No. 22-5391, 2023 WL 110775, at *2 (6th Cir. Jan. 5, 2023) (emphasis added), and even then, the presumption may be "rebut[ted]" by case-specific facts, *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 407 (6th Cir. 2017) (emphasizing plaintiff's reputational harm if unconstitutional action were not enjoined). And, as noted above, the Ninth Circuit has no universal per se harm standard, either. *See DISH Network*, 653 F.3d at 776.

Petitioners are also incorrect in arguing (at 25-26) that circuits apply a categorical per se harm standard

to specific constitutional provisions outside the First Amendment context. Not one of the circuits Petitioners invoke embraces a per se rule—for any constitutional provision. For instance, in a Fourth Amendment case Petitioners cite, *Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992), the Second Circuit found irreparable harm in a particular context, involving "random visual body-cavity searches." *Id.* at 75; *see id.* at 77. But that same court has "seriously question[ed]" the irreparable harm showing in other Fourth Amendment contexts. *Standard Drywall, Inc. v. United States*, 668 F.2d 156, 157 n.2 (2d Cir. 1982). The Equal Protection-based irreparable harm in *Brewer v. West Irondequoit Central School District*, 212 F.3d 738 (2d Cir. 2000) (cited at Pet. 25), likewise turned on the "unique and somewhat outrageous facts" of that case. *Id.* at 745. The Eighth Amendment-related harm in *Mitchell v. Cuomo*, 748 F.2d 804 (2d Cir. 1984) (cited at Pet. 26), was similarly based on "evidence of … potentially dangerous consequences" of the claimed violation. *Id.* at 806; *see Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (cited at Pet. 25) ("presum[ing]" Eighth Amendment harm where plaintiff was kept in "medical keeplock" around the clock except for a ten-minute shower once a week).

Nor do Petitioners identify any meaningful "disagree[ment]" among the circuits "over whether only *certain types* of constitutional claims are per se irreparable." *Contra* Pet. 26. Petitioners assert that the Sixth and Eleventh Circuits disagree with the Second Circuit's holding that in the First Amendment context, only "a rule or regulation that directly limits speech" generates per se irreparable harm. *Id.* (quoting *Bronx Household of Faith v. Bd. of Educ. of*

N.Y.C., 331 F.3d 342, 349-50 (2d Cir. 2003)). But both have embraced that same rule. *See Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983) (only "direct penalization, as opposed to incidental inhibition, of First Amendment rights constitutes irreparable injury"); *accord Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989).

Petitioners conclude by arguing that there is "confusion" about the theory underlying the per se "principle" and that the Third Circuit and others improperly "collaps[e] the four [injunction] factors into one." Pet. 27-28. But it was *Petitioners*, not the Third Circuit, who sought to collapse the four factors. *See, e.g.*, C.A.3 Reply Brief at 25, No. 23-1633 (3d Cir. Sept. 20, 2023), ECF No. 84 ("Plaintiffs' Second Amendment rights are being violated, so the remainder of the injunction factors follow naturally."); App. 13a-14a. That Petitioners have now thought better of their own erroneous arguments is, of course, not a valid reason to grant review.

II. This Case Is A Poor Vehicle To Address The Question Presented.

This case is an inappropriate vehicle for addressing the question presented for two reasons. First, the Third Circuit's judgment is supported by an unchallenged, independent ground: "[E]ven if the challengers had shown an irreparable injury, the third and fourth" preliminary injunction factors would still "weigh against a preliminary injunction." App. 21a. Second, Petitioners lack Article III standing, a threshold issue that this Court would have to address before reaching the merits of their claims.

A. Petitioners do not challenge the Third Circuit's other bases for affirmance.

As the Third Circuit recognized, the third and fourth factors of the preliminary injunction inquiry—balance of the equities and public interest—may serve as "independent grounds to deny relief." *See* App. 15a. That is a straightforward consequence of this Court's decision in *Winter*, which held that these factors "require[d] denial of the requested injunctive relief," "even if plaintiffs ha[d] shown irreparable injury." 555 U.S. at 23.

Applying *Winter*'s teaching, the Third Circuit concluded that the "irreparable injury" Delaware would suffer from enjoining "two democratically enacted state laws" "support[ed] denying a preliminary injunction," particularly given Petitioners' unexcused "delay" in seeking a redress for the alleged violation. App. 21a-23a.

Petitioners have not sought review of that holding. Nor have they argued to this Court—as they argued below, App. 13a-14a—that a showing of likelihood of success automatically tips the third and fourth factors in favor of a preliminary injunction. On the contrary, Petitioners now concede that "irreparable injury will justify a preliminary injunction" *only* "so long as the other traditional factors are met." Pet. 1; *accord* Pet. 27-28 (acknowledging that "automatic" injunctive relief upon a showing of likelihood of success on the merits is "inconsistent with the 'equitable discretion' historically possessed by the courts"). Accordingly, the Third Circuit's

unchallenged holding regarding the third and fourth factors independently supports the Third Circuit's judgment.

This Court "reviews judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam). Because this Court's resolution of the question presented will not affect the Third Circuit's judgment, review of that issue "can await a day when" its resolution would be "meaningful." *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959).

B. Petitioners cannot establish standing.

The Court has an independent duty to assure itself of jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998). At least one petitioner must have Article III standing to seek this court's review. *Va. House of Delegates v. Bethune-Hill*, 587 U.S. 658, 663 (2019). Thus, at least one Petitioner must show (1) an "injury in fact" that is both "concrete and particularized" and "actual or imminent"; (2) a "causal connection between the injury and the … challenged action of the defendant"; and (3) redressability of the injury by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). In this preliminary injunction posture, Petitioners must be able to "point to factual evidence" that could make a "'clear showing'" that they are "'likely'" to establish each element of standing. *Murthy v. Missouri*, 603 U.S. 43, 58 (2024).

Petitioners' theory of injury is quite narrow: The individual Petitioners do not assert harm from the

restricted weapons being practically unavailable for purchase—presumably, because they can purchase guns across the border. Instead, they claim injury because they "wish" to acquire available weapons—and Petitioner DJJAMS "wish[es]" to sell them—but they all fear prosecution if they do. App. 20a; C.A.3 App'x 293, 296, 621, 649-51. Thus, in this pre-enforcement challenge, Petitioners must demonstrate "an injury that is the result of [each] statute's … threatened *enforcement*, whether today or in the future." *California v. Texas*, 593 U.S. 659, 670 (2021). With respect to the "injury in fact" requirement in particular, they need to show a concrete injury that is "imminent" because the plaintiff demonstrates "'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014).

Neither Petitioners' declarations nor their complaints' allegations show standing to challenge either the assault weapons law or the large-capacity magazine law. Thus, this Court is without jurisdiction to hear this case.

1. Petitioner DJJAMS does not have standing. Matthew Jenkins submitted a declaration "solely in his capacity as principal of DJJAMS." C.A.3 App'x 292 (all caps omitted). He stated that, "[a]s a consequence of the Ban, DJJAMS has had to turn away customers who wished to purchase" firearms from DJJAMS, a licensed firearms dealer, "resulting in lost business opportunities." C.A.3 App'x 293. "But for the Ban and [Jenkins'] reasonable fear of serious criminal

prosecution for a violation of it, [Jenkins] would sell and assist customers in" acquiring firearms. *Id.* The facts alleged in DJJAMS' complaint are similar. C.A.3 App'x 622-23.

These allegations are insufficient to establish standing. For starters, DJJAMS attempts to allege injury from only the assault weapons law, not the large-capacity magazine law, so it necessarily cannot challenge denial of a preliminary injunction as to the latter. *See Murthy*, 603 U.S. at 61. As to the assault weapons law, neither DJJAMS nor any other plaintiff has "even allege[d] that Delaware has tried to enforce the disputed law[] against them" or other types of facts demonstrating a credible threat of enforcement. App. 20a. DJJAMS does not allege, for example, that it sold the restricted weapons prior to the law, that others have been prosecuted under the law, or that DJJAMS has been threatened with prosecution. *See, e.g.*, *Susan B. Anthony*, 573 U.S. at 159-61. Yet the law had been in effect for almost six months at the time of Jenkins' December 2022 declaration.

More fundamentally, DJJAMS has no standing because "no court has held 'that the Second Amendment secures a standalone right to *sell* guns.'" App. 91a (quoting *Drummond*, 9 F.4th at 230). "The Supreme Court in *Heller* was careful … to caution" that "the right of gun users to acquire firearms legally" for self-defense "is not coextensive with the right of a particular proprietor to sell them," stating, "'[n]othing in our opinion should be taken to cast doubt on ... laws imposing conditions and qualifications on the commercial sale of arms.'" *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017) (en banc) (quoting

District of Columbia v. Heller, 554 U.S. 570, 626-27 (2008)). Whatever "real-world damages (or more accurately, … *possibility* of real-world damages)" DJJAMS asserts from "the possibility of facing criminal sanctions," *June Medical Services L.L.C. v. Russo*, 591 U.S. 299, 370 (2020) (Thomas, J., dissenting), *abrogated on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022), it has not shown it intends to "engage in a course of conduct arguably affected with a constitutional interest" that would confer standing here, *Susan B. Anthony*, 573 U.S. at 158-59.

2. The individual Petitioners (Gray, Taylor, Graham, and Stevens) cannot establish standing on this record. Only one of the three, Taylor, submitted a declaration. Like DJJAMS, Taylor asserted injury from only the assault weapons law. C.A.3 App'x 296; *see also* C.A.3 App'x 622 (complaint). Taylor states he is "in the process of obtaining [his] concealed carry permit"; that he "do[es] not currently own but desire[s] to own" restricted assault weapons; and "[b]ut for the Ban and [his] reasonable fear of serious criminal prosecution for a violation of it, [he] would purchase and lawfully use such a firearm." C.A.3 App'x 296.

Like DJJAMS, Taylor fails to show a credible threat of enforcement. *Supra* at 26.[3] Taylor has also

[3] The other individual Petitioners' failure to submit evidence is fatal for standing to seek a preliminary injunction. *See Murthy*, 603 U.S. at 58. In any event, their complaints are similarly defective. *See* C.A.3 App'x 621, 649-51. And the Graham Petitioners' allegations as to the large-capacity magazine law could not give them standing to challenge the assault weapons

failed to show a concrete, imminent injury traceable to this theoretical enforcement for two additional reasons. First, "'some day' intentions" to own an assault weapon—"without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury." *Lujan*, 504 U.S. at 564. The indefiniteness of Taylor's "desire" is underscored by his waiting almost five months after the law's approval to sue and seek injunctive relief.

Second, Taylor does not demonstrate his inability to own an assault weapon sometime in the future is traceable to the law and redressable by an injunction, because Taylor does not assert he would otherwise meet the eligibility requirements to own a restricted weapon. His declaration does not establish he is without a felony conviction, can pass a background check, or meets the age qualifications. C.A.3 App'x 296; *see* Del. Code tit. 11, §§ 1448, 1448A. Nor has he established he is not a member of law enforcement, which means his conduct may not be "proscribed by [the] statute" at all. *Susan B. Anthony*, 573 U.S. at 159. The Court cannot "infer[]" these facts; they "'must affirmatively appear in the record.'" *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). Whether characterized as a traceability, redressability, or injury-in-fact problem, these omissions further undermine the Court's jurisdiction to hear Taylor's case. *Cf. Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (concluding

---

law—the only law they sought to enjoin by joining in the Gray Petitioners' motion. *Supra* at 6.

plaintiff must be "able and ready" to engage in the desired activity).

3. For similar reasons, the organizational Petitioners (Firearms Policy Coalition and Second Amendment Foundation) also cannot establish standing. These Petitioners sued on behalf of their members. C.A.3 App'x 637, 651-53. This type of third-party associational standing requires each Petitioner to demonstrate that "'(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 199 (2023).

The organizational Petitioners fail to satisfy the first requirement—they do not "identify members who have suffered the requisite harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). The only members identified in this case are other Petitioners, whose asserted harms have the standing deficiencies described above. *See* C.A.3 App'x 293, 296, 650-51; *supra* at 27-29. For those same reasons, the organizational Petitioners also do not have standing.

III. The Third Circuit's Decision Is Correct.

The Court should also deny certiorari because the Third Circuit's decision was correct. In a thorough opinion, Judge Bibas rightly rejected Petitioners' stark position that "the infringement of Second

Amendment rights *per se* constitutes irreparable harm" justifying preliminary injunctive relief. Pet. 15.

A. "[A] preliminary injunction is an extraordinary remedy never awarded as of right." App. 14a (quoting *Winter*, 555 U.S. at 24). Its purpose is "merely to preserve the relative positions of the parties until a trial on the merits can be held." App. 10a (quoting *Starbucks Corp. v. McKinney*, 602 U.S. 339, 349 (2024)). Early American law recognized that courts must use "extreme caution" and grant this equitable relief "only in very clear cases." App. 8a (quoting 2 Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* § 959a, at 227 (2d ed. 1839)). Thus, "a plaintiff seeking a preliminary injunction must make a *clear showing* that 'he is likely to succeed on the merits, *that he is likely to suffer irreparable harm in the absence of preliminary relief*, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *Starbucks*, 602 U.S. at 346 (emphases added) (quoting *Winter*, 555 U.S. at 20); *accord* App. 13a.

Petitioners are incorrect that they can "sidestep" the required showing with a rule of per se irreparable harm whenever a constitutional violation is at play. App. 13a. *Contra* Pet. 15-19. A constitutional "violation" is "not necessarily synonymous with the irreparable harm necessary for issuance of a preliminary injunction." App. 17a. Petitioners' per se rule would violate "longstanding principles of equity," App. 7a (quoting *Trump v. Hawaii*, 585 U.S. 667, 716 (2018) (Thomas, J., concurring)), by "lift[ing] th[e] burden from [Petitioners'] shoulders" to prove irreparable harm, App. 16a.

Indeed, this case is a prime example of why a categorical rule for Second Amendment violations would be unwise and over-inclusive, weighing in favor of injunctive relief even where there is no evidence a plaintiff has suffered any harm. Here, *even assuming* the challenged laws violate the Second Amendment, Petitioners and other plaintiffs below failed to prove "they will more likely than not suffer irreparable injury while proceedings are pending." App. 19a.

The declarations here asserted certain plaintiffs "wish to obtain these firearms and magazines" somewhere at some vague point in the future but fear prosecution if they were found to possess them in Delaware. App. 20a. However, "[t]hey d[id] 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 d[id] they allege a time-sensitive need for such guns or magazines," App. 20a, or attempt to explain why these restrictions "meaningfully diminish[]" Petitioners' ability to self-defend, App. 91a; *see also* App. 4a.[4] Petitioners "offered no details" at all "about how they would be harmed." App. 4a. The limited record Petitioners supplied did not "show[] that a preliminary 'injunction [wa]s required to preserve the status quo' while litigation [wa]s pending." App. 20a.

Moreover, all plaintiffs "delayed seeking a preliminary injunction," App. 22a, which is "inconsistent

[4] As DJJAMS's "lost business opportunities" do not implicate a Second Amendment right to self-defense in the first place, C.A.3 App'x 293, it legally cannot prove the type of constitutional harm underlying Petitioners' per se rule. *Supra* at 26-27.

with a claim of irreparable injury." *Shaffer v. Globe Prot., Inc.*, 721 F.2d 1121, 1123 (7th Cir. 1983); *see* C.A.3 App'x 283-84, 595-96, 629 (DSSA and the Gray Petitioners waited almost five months, and the Graham Petitioners almost nine months). Such significant delays "in seeking enforcement of [the plaintiffs'] rights … tends to indicate at least a reduced need for such drastic, speedy action" as a preliminary injunction. App. 23a (quoting *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985)); *see also Citibank*, 756 F.2d at 274 (10-week delay); *Open Top Sightseeing USA v. Mr. Sightseeing, LLC*, 48 F. Supp. 3d 87, 90 (D.D.C. 2014) (36-day delay). And Petitioners' "continuing delay as [they] choose[] not to hasten to trial does not help [their] case." App. 23a.

In other words, given that Petitioners were in no hurry to seek a preliminary injunction or ultimate resolution of the merits, and made only "generalized claim[s] of harm," App. 20a, they failed to show why "the District Court w[ould] be unable to decide the case or give them meaningful relief" without a preliminary injunction, App. 20a; *see also Starbucks Corp.*, 602 U.S. at 346. Because there are cases (like this one) where there is no irreparable harm pending a trial, the Court should not create a per se rule that there always is.

B. Petitioners offer no persuasive reason to excuse them, and all future plaintiffs asserting Second Amendment rights, from their burden to show irreparable harm under traditional equity principles.

Petitioners' main argument is that there is "per se" irreparable harm before trial simply because

"harm that has been suffered" from the violation of a fundamental constitutional right is "intangible," so "money damages" are "wholly inadequate" relief. Pet. 1; *see also* Pet. 17 ("[t]he universal test" of equity jurisdiction "is the inadequacy of [money] damages"); Pet. 19 ("legal remedies are inadequate for *continuing* wrongs"). But this case demonstrates that the facts of a particular controversy do not always warrant the assumption that a party's particular Second Amendment injury, intangible or not, is irreparable. For example, where a plaintiff moves for a preliminary injunction against requirements to serialize firearms assembled from "ghost gun" kits, permitting the plaintiff to deserialize the firearms post-trial could provide adequate relief. So too if the alleged Second Amendment violation arises from private liability insurance requirements; a refund would fully compensate the plaintiff.

Moreover, this Court has "consistently rejected" similar calls for "categorical[]" rules purportedly justified by the intangible nature of harms like patent and copyright infringement. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392-93 (2006); *see* Pet. 17 (analogizing to copyright infringement). It has explained that "the creation of a right is distinct from the provision of remedies for violations of that right." *eBay*, 547 U.S. at 392. As to the latter, the Court has insisted district courts adhere to "'traditional principles of equity'" and resist "such 'broad classifications.'" App. 17a (quoting *eBay*, 547 U.S. at 393-94). *Uzuegbunam v. Preczewski*, 592 U.S. 279 (2021), cited at Pet. 19, is not to the contrary. The only issue there was whether the plaintiff could recover nominal damages alone to redress a past constitutional injury.

Uzuegbunam, 592 U.S. at 282-83. Petitioners do not explain how they are aided by a decision that reaffirmed the "'well established'" rule "'that a party whose rights are invaded *can* always recover nominal damages,'" a form of money damages, even for "non-pecuniary rights." *Id.* at 289 (emphasis added).

Petitioners also argue that failing to adopt a per se rule would impermissibly subject the Second Amendment "to an entirely different body of rules than the other Bill of Rights guarantees." Pet. 15-16 (quoting *Bruen*, 597 U.S. at 70). Their sole basis for this assertion is that a similar principle was established for *one* Bill of Rights provision—the First Amendment—in *Elrod v. Burns*, 427 U.S. 347 (1976), where the plurality opinion stated that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* at 373; *see* Pet. 15-16. The Third Circuit's acknowledgement of this longstanding First Amendment principle is not some "attempt to demote the Second Amendment to second-class status." *Contra* Pet. 16. Instead, it honors this Court's own recognition of "[u]nique First Amendment" considerations, including the "time-sensitive" nature of "First Amendment activity, like weekly worship and political speech." App. 18a (citing *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (per curiam) and *Elrod*, 427 U.S. at 374 n.29 (plurality opinion)). However, "[p]resuming irreparable harm is the exception, not the rule." App. 16a.

Lastly, Petitioners argue that without a rule of per se irreparable harm, preliminary injunction hearings about Second Amendment violations will

impermissibly become exercises in the "subjective balancing approach" that *Bruen* rejects. Pet. 22. As an initial matter, the "interest-balancing" to which Petitioners object relates only to the Third Circuit's unchallenged balancing of the equities and public interest and not to the standard for irreparable harm. As noted above (*supra* at 23), Petitioners readily concede that courts must still consider "the[se] other traditional factors," even if irreparable injury is presumed. Pet. 1-2, 27-28.

In any event, "[t]here is no tension between [a court's] consideration of the public interest and *Bruen*'s disavowal of means-end scrutiny." App. 50a n.105 (Roth, J., concurring). "The former is a threshold inquiry that cabins [courts'] use of preliminary injunctions, while the latter concerns the merits of the constitutional claim." *Id.*; *see also eBay*, 547 U.S. at 392 (contrasting the "right" with "the provision of remedies for violations of that right"). Petitioners' own cases underscore that no matter the nature of the substantive claim, "[i]n each case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987); *see* Pet. 23 (citing *Amoco*, 480 U.S. at 546 n.12). As Petitioners "readily admit[ted]" below, their contrary view would "collapse[] the four [injunction] factors into one." App. 14a; *see* Pet. 27-28.

Petitioners offer the tentative suggestion that "the panel's reasoning appears to" permit a similar "balancing exercise" for a permanent injunction as well. Pet. 22 (citing App. 21a). But the Third Circuit's

decision focused on the proper role of a *preliminary* injunction; speculation about collateral effects on a permanent injunction is no basis on which to grant review.

It is Petitioners' rule that will cause mischief—and across all constitutional litigation. If every constitutional violation creates per se irreparable harm, this factor would always rise or fall with the likelihood of success on the merits. *See* Pet. 1-2. That would mean that in evaluating irreparable harm, district "courts would always have to prejudge the merits," App. 15a, "hurriedly and on the basis of very limited evidence," App. 8a (quoting *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 1015 (10th Cir. 2004) (en banc) (McConnell, J., concurring)), even though "[a]ffidavits drafted by lawyers are poor substitutes for discovery, live testimony, and cross-examination," App. 9a. Appellate courts, too, would be required to resolve the merits in any constitutional appeal, on the same limited record, regardless of plaintiffs' actual need for a quick resolution, and contrary to the typical discretion to resolve preliminary injunctions on other grounds. *See Winter*, 555 U.S. at 31 (resolving preliminary injunction based on other factors without reaching merits).

This, in turn, will lead plaintiffs to do exactly what Petitioners did here: strategically bypass "the clarity of a full trial on the merits" in the interest of securing what is sure to be treated as the definitive resolution of the law on appeal. App. 22a-24a. While there may be times when it is necessary for courts to make these sorts of "snap judgments in the abstract," App. 24a, that should not be the norm for

constitutional law. And it is most certainly not what a preliminary injunction is for.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Kathleen M. Jennings
Zachary Stirparo
DELAWARE DEPARTMENT OF JUSTICE
Carvel State Office Building
820 N. French Street
6th Floor
Wilmington, DE 19801
(302) 577-8400

David E. Ross
Counsel of Record
Garrett B. Moritz
ROSS ARONSTAM & MORITZ LLP
1313 North Market Street
Suite 1001
Wilmington, DE 19801
(302) 576-1602
dross@ramllp.com

December 12, 2024