No. 24-309

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

## BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 17 OTHER STATES IN SUPPORT OF PETITIONERS


PATRICK MORRISEY
*Attorney General*
OFFICE OF THE WEST VIRGINIA ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
mwilliams@wvago.gov
(304) 558-2021

MICHAEL R. WILLIAMS
*Solicitor General*
*Counsel of Record*

CALEB A. SECKMAN
*Assistant Solicitor General*

*Counsel for* Amicus Curiae *State of West Virginia*

[additional counsel listed after signature page]

## QUESTION PRESENTED

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

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**TABLE OF AUTHORITIES**
(*continued*)

**Page(s)**

**TABLE OF AUTHORITIES**
(*continued*)

**Page(s)**

**TABLE OF AUTHORITIES**
(*continued*)

**Page(s)**



**Other Authorities**

**TABLE OF AUTHORITIES**
(*continued*)

**Page(s)**

**TABLE OF AUTHORITIES**
(*continued*)

**Page(s)**

## INTRODUCTION AND INTERESTS OF AMICI CURIAE*

Some time ago, the Court reminded us of a basic truth: the Second Amendment is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald* v. *City of Chicago*, 561 U.S. 742, 780 (2010) (plurality op.). For too long, the Second Amendment had functioned as an amendment in exile, offering only limited rights in a narrow universe of cases. But the Court has worked to restore the amendment to its rightful place among the others, just as the Framers intended. At least at this level, the right is now getting first-class treatment.

But while *McDonald*'s admonition is now more than a decade old, and although the Court has repeated it from time to time, courts below are still struggling to obey it. Courts upholding local bans on so-called assault weapons and large-capacity magazines have seemed especially prone to "contorting" traditional constitutional principles and subordinating Second Amendment interests. *Harrel* v. *Raoul*, 144 S. Ct. 2491, 2492 (2024) (statement of Thomas, J., concerning denial of certiorari). In those courts, at least, the Second Amendment has become uniquely "subject to the whimsical discretion of federal judges." *Bianchi* v. *Brown*, 111 F.4th 438, 483 (4th Cir. 2024) (Richardson, J., dissenting), petition for cert. filed (Aug. 23, 2024).

That story plays out again here. The Third Circuit, too, has decided that the Second Amendment is sui generis. Although it agrees that a First Amendment violation

---

* Under Supreme Court Rule 37.2, *amici* notified counsel of record of their intent to file this brief.

presumptively causes irreparable harm, that's not so for the Second Amendment—not in Delaware. Thus, at least in part of the country, the Second Amendment right is not thought to be worth protecting in the same way as at least some other constitutional rights. Challengers seeking to preserve their right to bear arms in those places must instead make a special factual showing of a non-"generalized" nature, such that even sworn statements from a person wishing to obtain now-prohibited firearms won't do. Pet.App.20a.

But the Third Circuit's uniquely dismissive attitude toward Second Amendment rights is wrong. Harms that deprive individuals of their constitutional rights are necessarily irreparable. Money cannot make up for a loss, and there's no way to undo the damage. All that can be achieved is the restoration of the right. But for the time that the right is deprived, the individual suffers. And it's especially harmful when the Second Amendment right is impaired. The individual right to keep and bear arms in self-defense is foundational to our system of government. By design, the Second Amendment enshrines a natural right upon which all other rights are predicated. Thus, the right permeates every aspect of the nation's constitutional scheme.

The good news is that the fix here is relatively simple: on a successful showing on the other preliminary injunction factors, a plaintiff who alleges a loss of a constitutional right—the Second Amendment right included—should have irreparable harm presumed. That approach won't throw open the doors to preliminary relief, as factors like the likelihood of success and the balance of harms (not to mention standing) do real work. See Beatrice Catherine Franklin, *Irreparability, I Presume? On Assuming Irreparable Harm for Constitutional*

*Violations in Preliminary Injunctions*, 45 COLUM. HUM. RTS. L. REV. 623, 666 (2014). But it will be a step toward addressing the broader problem of enervated Second Amendment rights.

And again, the problem is indeed a broad one. While this case is one clean example, *Amici* States have seen firsthand how courts across the country have stripped individuals of their Second Amendment right. So "[i]f the Second Amendment is ever going to provide any real protection, something needs to change." *Duncan* v. *Bonta*, 19 F.4th 1087, 1160 (9th Cir. 2021) (VanDyke, J., dissenting), vacated and remanded by 142 S. Ct. 2895 (2022). The judicial isolation of the Second Amendment as a right apparently unworthy of defense must end. The Court should grant this Petition to remind the lower courts (again) that the Second Amendment right is a fundamental constitutional right that protects all other rights. To infringe on the Second Amendment right is to infringe on them all.

## SUMMARY OF ARGUMENT

**1.** Harm is irreparable if—as the name suggests—it cannot be undone or adequately compensated for after the fact. Infringements of the Second Amendment right give rise to one such harm. The Second Amendment effectively codifies an indispensable natural right: the right to keep and bear arms in self-defense. This right is critical to a functioning democracy. Without the Second Amendment, all other rights are threatened. No wonder, then, that the Founders made it a cornerstone of the Bill of Rights.

There's no principled basis to create a constitutional pecking order like the one the Third Circuit imagined. But even if there were cause to rank rights, there's every reason to believe that the Second Amendment is as

valuable as the First—which the Third Circuit placed above all other rights. The First and Second Amendments both protect rights that are instrumental to our nation and system of government. The Founding Fathers made this much clear, and this Court has repeated the same.

None of this logic is controversial. Most circuit courts have recognized that constitutional harms are irreparable. The Third Circuit's view is in the minority, and this Court should not allow its warped ruling on irreparability and constitutional rights to stand as an invitation to other circuits to take the same path.

**2.** In fact, reasoning like the Third Circuit's can already be seen in decisions across the country. Relying on an incomplete understanding of the Second Amendment's importance, district courts are unclear as to when such constitutional harms are irreparable. In cases where laws are later overturned, plaintiffs achieve victory but still suffer the indignity of having had their Second Amendment right unjustifiably suspended. In short, these concerns aren't academic. The Court should thus act to address them now.

## REASONS FOR GRANTING THE PETITION

### I. Infringement Of The Second Amendment Right Constitutes *Per Se* Irreparable Injury.

When a court considers whether to grant a preliminary injunction, the risk of irreparable injury absent preliminary relief is one of the two "most critical" factors—likelihood of success on the merits being the other. *Nken* v. *Holder*, 556 U.S. 418, 434 (2009). To show this factor, a plaintiff must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter* v. *NRDC*, 555 U.S. 7, 22 (2008). In some instances, even a

statutory violation can justify at least a presumption of irreparable harm. See, *e.g.*, *Hoop Culture, Inc.* v. *GAP Inc.*, 648 F. App'x 981, 985 (11th Cir. 2016). And "[w]hen an alleged deprivation of a constitutional right is involved … most courts hold that no further showing of irreparable injury is necessary." 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2948.1 (3d ed. 2013).

Yet the Third Circuit found that an infringement on the Second Amendment right, even if adequately demonstrated, was insufficient to show irreparable harm. That decision fails to appreciate the essential nature of the Second Amendment right while inappropriately minimizing its value relative to other constitutional rights. The court should have instead evaluated whether a constitutional violation was likely established here *and then* proceeded accordingly on the harm factor.

### A. The Second Amendment Enshrines A Crucial Individual Right.

The Second Amendment right is an old one—in fact, "[t]he right to arms … is not a right which is granted by the Constitution." David B. Kopel, *The Natural Right of Self-Defense: Heller's Lesson For The World*, 59 SYRACUSE L. REV. 235, 236 (2008). Rather, it "is a pre-existing natural right which is recognized and protected by the Constitution." *Id.* "The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'" *District of Colombia* v. *Heller*, 554 U.S. 570, 592 (2008). Thus, the Second Amendment does not espouse a "novel principl[e]" but instead merely codifies a right "inherited from our English ancestors." *Robertson* v. *Baldwin*, 165

U.S. 275, 281 (1897). Indeed, the right to use arms in self-defense has long been recognized around the world. See, *e.g.*, David B. Kopel, *et al.*, The Human Right of Self-Defense, 22 BYU J. PUB. L. 43, 58 (2007) ("*The* fundamental general principle of international law is the personal right of self-defense." (cleaned up)).

And the right to keep and bear arms' natural law origin portends its importance. Legal theorists such as William Blackstone have described it as an "auxiliary" right that "serve[s] principally" as a "barrier[] to protect and maintain inviolate the three great and primary rights[] of personal security, personal liberty, and private property." 2 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 140 (St. George Tucker ed., 1803); see also *Alden* v. *Maine*, 527 U.S. 706, 715 (1999) (citing Blackstone's works as the "preeminent authority on English law for the founding generation"). In that way, the right to keep and bear arms "serve[s] the purpose of protecting people against governmental oppression or tyrannical usurpation of power." Douglas Walker, Jr., *Necessary To The Security Of Free States: The Second Amendment As The Auxiliary Right Of Federalism*, 56 AM. J. LEGAL HIST. 365, 368 (2016). Indeed, the right has sometimes been seen as a protection for the States themselves from the same threat. See Bertrall L. Ross II, *Inequality, Anti-Republicanism, and Our Unique Second Amendment*, 135 HARV. L. REV. F. 491, 497 (2022).

Because of its importance, since our nation's founding, the Second Amendment has sought to preserve the "ancient right" to keep and bear arms. *Heller*, 554 U.S. at 599. And preservation is the amendment's only goal: it

"has no other effect than to restrict the powers of the national government." *United States* v. *Cruikshank*, 92 U.S. 542, 553 (1875); see also *McDonald*, 561 U.S. at 750 (2010) (holding that "the Second Amendment right is fully applicable to the States"). These restrictions are designed to allow "individual self-defense," which this Court has explained is "the central component of the Second Amendment." *McDonald*, 561 U.S. at 767.

And there is "no doubt, on the basis of both text and history, that the Second Amendment conferred an *individual* right." *Heller*, 554 U.S. at 595 (emphasis added). In fact, based on the right's origins, "it cannot possibly be thought to tie … to militia or military service." *Id.* at 594 (citing and collecting authorities from the Founding Era). This Court has emphasized the individualized nature of the right, too, declaring that there is no more "acute" need than the "defense of self, family, and property." *McDonald*, 561 U.S. at 767. Indeed, the individual right to arms for self-defense is "deeply rooted in this Nation's history and tradition." *Id.* at 767 (quoting *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997)). So even in circuits where constitutional harm amounts to *per se* irreparable harm only in "cases involving individual rights" (rather than general constitutional violations), infringements of the Second Amendment still fit the bill. See, *e.g.*, *Aposhian* v. *Barr*, 958 F.3d 969, 990 (10th Cir. 2020), abrogated on other grounds by *Garland* v. *Cargill*, 602 U.S. 406 (2024).

And the Second Amendment right does not apply only when there is occasion to *use* arms. For one thing, an individual could not exercise their right to armed self-defense if they had no right to obtain and keep arms in the first place—and it's impossible to predict when the need to use the firearm will arise. See *McDougall* v. *Cnty. of*

*Ventura*, 23 F.4th 1095, 1112 (9th Cir. 2022), vacated en banc by 26 F.4th 1016 (9th Cir. 2022) ("It is in these unexpected and sudden moments of attack that the Second Amendments' rights to keep and bear arms becomes most acute."). But more importantly, keeping arms acts as a deterrent against threats to life, liberty, and all other guarantees in the Constitution. In this way, the Second Amendment serves "intangible and unquantifiable interests." *Ezell* v. *City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011). So depriving an individual of their Second Amendment right to armed self-defense causes irreparable harm by preventing them from exercising a natural right that is foundational to our very system of governance.

Though the Third Circuit might think this temporary deprivation is harmless—after all, it is not inevitable that an individual would *need* to actively defend themself or their family during a case's pendency—the inability to protect life and liberty comes at the direct expense of all Constitutional ideals. "The right of the people to keep and bear[] arms is the ultimate guarantor of all their other constitutionally recognized rights." David Harmer, *Securing A Free State: Why The Second Amendment Matters*, 1998 BYU L. REV. 55, 57 (1998). So its loss creates a compounding effect; in other words, the loss of the Second Amendment invites the loss of other rights, too—the First Amendment included. And the loss of those rights can in turn create its own irreparable harm.

Ultimately, any attack on the individual right of self-defense is an attack on all the other promises of the Constitution. Without the Second Amendment, those promises are illusory. Thus, "[i]nfringements of [the Second Amendment right] cannot be compensated by damages" and must be treated like the irreparable harms

they are. *Ezell*, 651 F.3d at 699; see also *Baird* v. *Bonta*, 81 F.4th 1036, 1047 (9th Cir. 2023) (ruling in a Second Amendment context that "even a brief deprivation of a constitutional right causes irreparable injury"); cf. *Wrenn* v. *District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017) (holding that, where the plaintiffs established a "certain" First Amendment violation, that was enough to "stop" and enter injunctive relief). The Court should make that clear with this case.

### B. No Hierarchy Of Constitutional Rights Exists.

In deciding that infringements on the Second Amendment right are not irreparable, the Third Circuit relied on long-since-abandoned principles that treated the Second Amendment as a "constitutional orphan." *Silvester* v. *Becerra*, 583 U.S. 1139, 952 (2018) (Thomas, J., dissenting from denial of certiorari). In fact, the court not only failed to recognize the Second Amendment right's import but even went so far as to explicitly relegate the right to some apparent second tier of constitutional values. According to the Third Circuit, only "First Amendment harms are [presumptively] irreparable." Pet.App.18a. It "w[ould] not extend" this baseline protection to the Second Amendment, no matter how certain the infringement. Pet.App.19a.

**1.** The decision below ignores a critical fact: this Court has long denounced the idea that some rights are more valuable than others. It has explained that there is "no principled basis on which to create a hierarchy of constitutional values." *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982). Instead, they are all vital rights "withdraw[n] … from the vicissitudes of political

controversy." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 638 (1943). Thus, "[o]ne's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights"—such as the Second Amendment right—are beyond the reach of both "majorities and officials." *Id.* Each of these rights is an equal "legal principle[] to be *applied*"—not ranked—"by the courts." *Id.* (emphasis added). The sanctity of each right laid out in the Constitution is the reason that courts apply strict scrutiny to any government action that falls "within a specific prohibition of the Constitution, such as those of the first ten Amendments." *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); see also *Dep't of State* v. *Muñoz*, 144 S. Ct. 1812, 1821 (2024) ("When a fundamental right is at stake, the Government can act only by narrowly tailored means that serve a compelling state interest.").

In the preliminary-injunction context, this Court emphasized the value of constitutional rights by declaring that their "loss … for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (plurality op.); see also, *e.g.*, *Steffel* v. *Thompson*, 415 U.S. 452, 463 n.12 (1974) (suggesting even before *Elrod* that "a showing of irreparable injury might be made in a case where … an individual demonstrates he will be required to forgo constitutionally protected activity to avoid arrest"); *Petrol. Expl.* v. *Pub. Serv. Comm'n of Ky.*, 304 U.S. 209, 218-19 (1938) ("[T]he injury which flows from the threat of enforcement of an allegedly unconstitutional, regulatory state statute with penalties so heavy as to forbid the risk of challenge in proceedings to enforce it, has been generally recognized as irreparable and sufficient to justify an injunction."). And although *Elrod* dealt with the First Amendment, there is—as discussed—

"no … hierarchy among[] constitutional rights." *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 628 (1989). *Elrod*'s reasoning should apply here, too, and the Third Circuit should have followed this Court's lead and given the Second Amendment the same respect due to all constitutional rights.

**2.** Yet even if there were a constitutional ranking system, there would be no good reason to put speech rights in a higher category than the right to bear arms. To the contrary, the two amendments "have often been considered close cousins." Joseph Blocher, *Categoricalism And Balancing In First And Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 379 (2009). The two amendments each "codif[y] a 'right of the people'"—terminology used in the Constitution and Bill of Rights only one other time in the Fourth Amendment. *Heller*, 554 U.S. at 579. This "unambiguous[]" language designates both the First and Second Amendments as "individual rights, not collective rights, or rights that may be exercised only through participation in some corporate body." *Id.* (cleaned up).

And both amendments "protect[] … intangible and unquantifiable interests." *Ezell*, 651 F.3d at 699. So in the same way that the First Amendment protects speech and its societal value, so too does the Second Amendment safeguard the right to bear arms in self-defense and the boons that such a right brings to a free society. Additionally, the First and Second Amendments are both the "product of an interest balancing by the people." *Heller*, 554 U.S. at 635 (cleaned up); see also *id.* at 582 (noting that the Second Amendment applies with just as much force in modern settings as the First Amendment does). As a result, both amendments already come with the understanding that these rights are important enough

to outweigh the potential disadvantages of free speech or keeping arms. Thus, any "debate" about the right's value is misplaced, and the Second Amendment—like the First—must be treated like the fundamental right it is. See *id.* at 634-35 ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.").

All these similarities have led courts to "consistently rely on the First Amendment for guidance in Second Amendment cases." Joseph E. Sitzmann, *High-Value, Low-Value, And No-Value Guns: Applying Free Speech Law To The Second Amendment*, 86 U. CHI. L. REV. 1981, 1993 (2019). Most recently, in *New York State Rifle & Pistol Association* v. *Bruen*, the Court repeatedly (and correctly), analogized the treatment of the Second Amendment with the treatment of the First Amendment and other constitutional rights. 597 U.S. 1, 24-25, 28, 70 (2022). The Third Circuit erred when it chose a different path.

**3.** And to be clear, it's not a controversial idea that constitutional rights are treated equally in the irreparable-harm context. It is the Third Circuit's rule that "constitutional harm is not necessarily … irreparable harm" that's the exception. Pet.App.17a (cleaned up). The court even conceded that its "sister circuits have presumed harm in various settings" involving constitutional injury. *Id.* That's putting it lightly.

As Petitioners note, at least two circuits, the Seventh and Ninth, have explicitly found that Second Amendment harms constitute irreparable injury. See *Ezell*, 651 F.3d at 700; *Baird*, 81 F.4th at 1042. Another appears to have presumed that the violation of the Second Amendment right would constitute irreparable harm, but ultimately

concluded that the challengers had not shown that their right would, in fact, be affected. *Morehouse Enters., LLC* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, 78 F.4th 1011, 1017-18 (8th Cir. 2023).

But on top of that, most of the other circuits have at least broadly said that constitutional harms are irreparable. For example, the Second Circuit has said that an "alleged violation of a constitutional right … triggers a finding of irreparable harm." *Jolly* v. *Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996). Likewise, the Fourth Circuit declared that district courts have "no discretion to deny relief by preliminary injunction" when a plaintiff "clearly establishes by undisputed evidence that he is being denied a constitutional right." *Henry* v. *Greenville Airport Comm'n*, 284 F.2d 631, 633 (4th Cir. 1960). And the Fifth Circuit made it clear that "the loss of constitutional freedoms for even minimal periods of time … unquestionably constitutes irreparable injury." *BST Holdings, LLC* v. *OSHA*, 17 F.4th 604, 618 (2021). In the the Sixth Circuit, "[w]hen constitutional rights are threatened or impaired, irreparable injury is presumed." *Obama for Am.* v. *Husted*, 697 F.3d 423, 436 (6th Cir. 2012). The Eighth Circuit agrees that "the denial of a constitutional right is a cognizable injury and an irreparable harm." *Ng* v. *Bd. of Regents of Univ. of Minn.*, 64 F.4th 992, 998 (8th Cir. 2023). Much the same from the Tenth Circuit: there, "[a]ny deprivation of any constitutional right" is an "irreparable" injury. *Free the Nipple-Fort Collins* v. *City of Fort Collins*, 916 F.3d 792, 806 (10th Cir. 2019). Finally, the D.C. Circuit has explained that "a prospective violation of a constitutional right constitutes irreparable injury for … purposes" of "seeking equitable relief." *Gordon* v. *Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013). But see, *e.g.*, *Siegel* v. *LePore*, 234 F.3d 1163, 1177 (11th Cir. 2000) (en banc) (rejecting

the argument "that a violation of constitutional rights always constitutes irreparable harm").

So although only two circuits have definitively held Second Amendment harms irreparable, many circuits at one time or another have suggested that *all* constitutional harms meet that standard. Thus, this Court should reverse the Third Circuit's minority position that some rights are more important than others.

## II. Individuals Across The Country Have Been Deprived Of Their Constitutional Rights.

The Third Circuit's mistake reflects a real problem, too. The States and their citizens have suffered under the mistaken presumption that Second Amendment violations are somehow fixable after the fact. Constitutional violations have been allowed to continue in pending cases simply because lower courts believe there's no harm in doing so. But rights are important, and no compensation can make up for their loss. This Court should correct the mistaken presumption otherwise.

**A.** Take *Second Amendment Foundation, Inc.* v. *ATF*, 702 F.Supp.3d 513 (N.D. Tex. 2023), as an example. In that case, the district court denied plaintiffs a preliminary injunction in part because it was "unclear whether allegations of Second Amendment violations alone are sufficient to establish irreparable harm." *Id.* at 543. It wasn't until a year later when—in a now-consolidated case—another district judge granted summary judgment that plaintiffs were able to exercise their rights again. See *Mock* v. *Garland*, No. 4:23-CV-00095-O, 2024 WL 2982056 (N.D. Tex. June 13, 2024), appeal filed in *Mock* v. *Garland*, No. 24-10743 (5th Cir. Aug. 15, 2024). And although the district court in *Mock* did not rule on the constitutionality of the ATF's rule, it

still found the rule was arbitrary and capricious under the APA. *Id.* at *6. Thus, the initial reviewing court in *Second Amendment Foundation* allowed the plaintiffs there to be deprived of their constitutional rights by a rule that was improper in the first place. That deprivation had serious, real-world effects—the rule in question banned pistol braces, an assistive device that many disabled and elderly individuals require to make any use of their firearms. And the district judge acknowledged this loss of rights by a vulnerable population would not have happened if the rights infringed upon were First Amendment rights. See *Second Amendment Foundation*, 702 F.Supp.3d at 543 ("It is widely accepted that allegations of First Amendment violations can sufficiently show likely irreparable harm."). Such a disparity between constitutional rights has no proper basis and should not be allowed to continue.

**B.** And in *Jones* v. *Becerra*, 498 F.Supp.3d 1317 (S.D. Cal. 2020), the court there similarly undervalued the Second Amendment right when refusing to enjoin an age restriction on the purchase of guns. In its order denying a preliminary injunction, the court in *Jones* said that the plaintiffs' alleged "deprivation of [Second Amendment] rights" was not "sufficient to demonstrate irreparable harm." *Id.* at 1331. The court reasoned that it didn't matter whether plaintiffs' rights were being violated because there was a "delay" before the preliminary injunction was sought. *Id.* But a delay by a plaintiff does not change the fact that rights are being deprived. And though the court found there was no likelihood of success on the merits, it was clear that "[e]ven if Plaintiffs [had] show[n] a likelihood of success on the merits, they have not demonstrated irreparable harm" by the "deprivation of their rights." *Id.* at 1330-31. Here again, the net effect

was that another vulnerable group—younger citizens—were deprived of their Second Amendment rights.

The Ninth Circuit rebuked the *Jones* court's irreparable harm conclusions as "error." *Jones* v. *Bonta*, 34 F.4th 704, 732 (9th Cir. 2022), vacated by *Jones* v. *Bonta*, 47 F.4th 1124, 1125 (9th Cir. 2022) (vacating both the Ninth Circuit's opinion and the district court's order denying a preliminary injunction and remanding "for further proceedings consistent with [*Bruen*]"). The appellate court reminded the district court that "exceptions" to a law that otherwise represents a Second Amendment violation "do not alleviate" the law's "burden on Second Amendment rights." *Jones*, 34 F.4th at 732. Indeed, any law that does not allow a plaintiff "to exercise their core Second Amendment right" is irreparable. *Id.* This is true regardless of the harm's duration, as "a harm need not last indefinitely to be irreparable." *Id.* And although that opinion has been vacated after *Bruen*—whose heightened protections seem likely to result in a similar outcome to the first appeal—it demonstrates the problem that district courts do not understand the irreparable nature of Second Amendment harms.

**C.** Yet another example can be seen in *Walters* v. *Kemp*, No. 1:20-CV-1624, 2020 WL 9073550 (N.D. Ga. May 5, 2020). There, the plaintiffs challenged a state probate judge's order issued during the start of the COVID pandemic that entirely suspended the ability of individuals to obtain a weapon license necessary to carry a handgun on their person. *Id.* at *1. The district court denied plaintiffs a preliminary injunction in part because "[e]ven if [they] were likely to succeed on their Second Amendment claim, neither the Eleventh Circuit nor the Supreme Court has held that the Second Amendment's

protections are of the sort that, when violated, trigger a presumption of irreparable harm." *Id.* at *11.

Thus, the court in *Walters* saw no issues with taking away Second Amendment rights as long as there were other "lawful options" to carry *some* types of weapons—though not handguns on one's person. *Walters*, 2020 WL 9073550, at *11. The court further suggested that the Second Amendment's protections can surely be taken away unless a plaintiff makes a showing that the government will *never* give them their rights back. *Id.* ("There is nothing in the record to suggest that the probate judges will not resume processing [weapon license] applications" sometime later.). And the government did return plaintiffs' Second Amendment rights eventually, leading to the case being voluntarily dismissed and thereby incapable of correction. See Not. of Dismiss. of All Defs., *Walters* v. *Kemp*, No. 1:20-CV-1624 (N.D. Ga. June 1, 2020), ECF No. 62. This Court should take notice though and ensure that district courts do not wantonly disregard Second Amendment rights merely because the infringements are not absolute or are of unclear duration.

**D.** In a similar case, the plaintiffs in *Plastino* v. *Koster*, No. 4:12-cv-01316, 2013 WL 1769088 (E.D. Mo. Apr. 24, 2013), were likewise denied a preliminary injunction against a Second Amendment restriction pertaining to concealed carry. The court there "[f]irst and foremost" based its decision on the fact that the case did not "implicate a First Amendment right." *Id.* at *3. Without such an implication, the court believed there was no irreparable harm, as only First Amendment freedoms are apparently worthy of such a finding. It refused "to extend" those protections to the Second Amendment. *Id.* And once again, the law changed during this lawsuit,

allowing plaintiffs to exercise their Second Amendment rights and mooting the case—but only after the plaintiffs were left without constitutionally granted protections for months on end. See Mot. for Voluntary Dismiss., *Plastino* v. *Koster*, No. 4:12-cv-01316 (E.D. Mo. Oct. 10, 2013), ECF No. 51. This concerning pattern should not be allowed to continue.

* * *

When an individual's Second Amendment rights are infringed upon, there is constitutional harm that cannot be compensated for or undone. That is irreparable harm. And it's happening far too often to tolerate.

## CONCLUSION

The Court should grant the Petition.

Respectfully submitted.

PATRICK MORRISEY
*Attorney General*

OFFICE OF THE
WEST VIRGINIA
ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
mwilliams@wvago.gov
(304) 558-2021

MICHAEL R. WILLIAMS
*Solicitor General*
*Counsel of Record*

CALEB A. SECKMAN
*Assistant Solicitor General*

*Counsel for* Amicus Curiae *State of West Virginia*

## ADDITIONAL COUNSEL

TREG TAYLOR
Attorney General
State of Alaska

ANDREW BAILEY
Attorney General
State of Missouri

TIM GRIFFIN
Attorney General
State of Arkansas

AUSTIN KNUDSEN
Attorney General
State of Montana

CHRIS CARR
Attorney General
State of Georgia

MICHAEL T. HILGERS
Attorney General
State of Nebraska

RAÚL LABRADOR
Attorney General
State of Idaho

GENTNER DRUMMOND
Attorney General
State of Oklahoma

BRENNA BIRD
Attorney General
State of Iowa

ALAN WILSON
Attorney General
State of South Carolina

KRIS KOBACH
Attorney General
State of Kansas

MARTY JACKLEY
Attorney General
State of South Dakota

LIZ MURRILL
Attorney General
State of Louisiana

KEN PAXTON
Attorney General
State of Texas

LYNN FITCH
Attorney General
State of Mississippi

SEAN REYES
Attorney General
State of Utah

BRIDGET HILL
Attorney General
State of Wyoming