No. 18-824

In The Supreme Court of the United States

THOMAS R. ROGERS and the ASSOCIATION OF NEW JERSEY RIFLE & PISTOL CLUBS, INC.,

Petitioners,

v.

GURBIR S. GREWAL, *et al*.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The disclosure statement in the petition for writ of certiorari remains accurate.

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ARGUMENT

The panel below upheld a New Jersey law effectively banning ordinary citizens from carrying handguns for self-defense that is materially identical to the District of Columbia law held categorically unconstitutional by the D.C. Circuit in *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017). Respondents' Brief in Opposition does not dispute that the D.C. and New Jersey laws are substantively identical, and it does not deny that *Wrenn* struck down the former or that the decision below, following *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), upheld the latter. Respondents thus tacitly concede, as they must, that there is a clear and direct split on the questions presented—questions that go to the basic scope of the Second Amendment's core guarantee. That tells this Court all it needs to know to grant certiorari.

At stake is nothing less than whether the Second Amendment right to *bear* arms has the same force as the right to *keep* them. Because Respondents cannot dispute the existence of a direct circuit conflict on this fundamental issue, they strain to diminish the contradictions in *Wrenn* and *Drake*'s reasoning. They do not succeed. Respondents maintain that the split may be safely ignored because "*Wrenn* did not consider the reasoning that lay at the heart of *Drake*," BIO.8, but that is simply not so. *Wrenn* considered and *rejected* precisely the line of reasoning Respondents identify—that "good reason"-type restrictions lie outside the Second Amendment's traditional scope—after a detailed analysis that dissects every piece of historical evidence

cited by *Drake* except a single New York law from 1913. This Court would not credit such a flimsy argument against reviewing and resolving a square split over the basic scope of any other constitutional right.

Respondents are thus left with nothing except their argument that this case is a "weak vehicle" because it comes to the Court on a motion to dismiss. The *Heller* and *McDonald* Courts would have been surprised to learn that this feature of the case makes it "a poor vehicle for addressing a constitutional question with far-reaching implications," BIO.12, since *both* cases came to this Court in *precisely the same posture*: review of a district-court decision granting the government's motion to dismiss. In neither case did the absence of a "record" hinder this Court's review. Nor did *Wrenn* (which came to the D.C. Circuit on a preliminary-injunction motion) feel the need to determine "the percent of applications denied" before striking down D.C.'s "good reason" law. BIO.11. No, the constitutional infirmity with D.C.'s law—just like New Jersey's—was apparent on its face, since the law's *very definition* of the special "good reason" or "justifiable need" that makes a citizen eligible for a carry permit *excludes* average citizens with "ordinary self-defense needs" "not as a side effect . . . but by design." *Wrenn*, 864 F.3d at 666. Respondents' efforts to contrive a "vehicle problem" with this case are thus utterly unpersuasive.

Since *Heller* and *McDonald* were handed down, many lower courts have worked tirelessly to empty those opinions of any meaning. Respondents' attempt

to defend the merits of the decision below only serves to illustrate the point, as it is principally based on a historical account of the medieval statute of Northampton that contradicts *Heller* and a flawed public-safety justification no different from the "judicial interest balancing" that both *Heller* and *McDonald* affirmatively rejected. The time has come for this Court to end the relentless resistance to its Second Amendment precedents and resolve whether the Second Amendment really protects, as it says, a right to bear arms as well as keep them.

1. Respondents do not and cannot dispute the central fact warranting this Court's review: the existence of a direct split over the fundamental constitutional questions presented in this case. While the panel below, following *Drake*, upheld New Jersey's "justifiable need" requirement, the D.C. Circuit in *Wrenn* held categorically unconstitutional a District of Columbia law that is *materially identical* to New Jersey's law. Respondents do not dispute that the two laws are substantively identical; indeed, the wording of the standards is virtually the same. *Compare* N.J. STAT. ANN. § 2C:58-4(c), *with* D.C. CODE § 7-2509.11(1)(A). Nor do they contest that the decision below and the holding in *Wrenn* are at loggerheads. The nub of the matter is this: while the same Second Amendment formally applies in both the District of Columbia and New Jersey, ordinary citizens residing in the former jurisdiction may bear arms for the core purpose of self-protection, but those residing in the latter may not. Because this Court's *primary function* is to correct

this "truly deplorable" type of situation, *Martin v. Hunter's Lessee*, 1 Wheat. (14 U.S.) 304, 348 (1816), once it has ascertained that New Jersey does not contest the existence of the split, the Court need not read the papers any further.

Unable to deny the direct conflict between the holdings of the *Wrenn* court and the panel below, Respondents try to minimize the "disagreements" in their reasoning. BIO.8. They insist that "*Wrenn* did not consider" *Drake*'s contention that "good reason"-type restrictions qualify as "longstanding . . . 'exceptions' to the right to keep and bear arms" because two supposedly analogous laws were adopted in New Jersey and New York early "in the 20th century." BIO.8-9. And this reasoning, Respondents say, "lay at the heart of *Drake*." *Id.* at 9. But *Wrenn did* consider—and affirmatively *reject*—this contention that good-reason requirements are "longstanding" measures that "reflect limits to the preexisting right protected by the Amendment." 864 F.3d at 659. And in doing so, *Wrenn* discussed at great length the piece of evidence that *actually* formed the "heart" of *Drake*'s cursory analysis: the 19th-century "historical laws regulating or prohibiting the carrying of weapons in public." *Drake*, 724 F.3d at 432; *cf. Wrenn*, 864 F.3d at 662-63. Indeed, because the early-20th-century New Jersey restrictions that the *Drake* majority cited in fact only limited *concealed* carriage and not carriage altogether, *see Drake*, 724 F.3d at 448-49 (Hardiman, J., dissenting), they are merely an example of the concealed-carry restrictions addressed and dismissed as irrelevant by *Wrenn*.

Accordingly, all that is left of Respondents' argument is that *Drake* cited one 20th-century restriction—New York's 1913 law—that *Wrenn* did not discuss. This Court has never suggested that a direct conflict between the circuits may safely be ignored so long as the courts on one side of the split cite at least one minor, subsidiary piece of evidence that the courts on the other side do not expressly address.

Respondents argue that the existence of this 1913 New York law also shows that *Wrenn* was inconsistent "with the D.C. Circuit's own prior analysis" in *Heller II*. BIO.9. There is nothing to this. *Heller II* stated that some restrictions adopted on a widespread basis early in the 20th century are "deeply enough rooted in our history to support the presumption [of constitutionality]," not that *every* gun-control measure adopted in a single, outlier jurisdiction before 1925 is henceforth immune from constitutional scrutiny. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1253 (D.C. Cir. 2011). Neither the *Wrenn* majority nor Judge Henderson writing in dissent perceived any "tension" between *Heller II* and *Wrenn* on this score. *See Wrenn*, 864 F.3d at 668-71 (Henderson, J., dissenting). Nor, apparently, did the full D.C. Circuit—not a single judge of which requested *en banc* rehearing. Order, *Wrenn*, Nos. 16-7025 & 16-7067 (D.C. Cir. Sept. 28, 2017).

Respondents' efforts to explain away the conflict between *Drake* and the opinions in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), and *Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018), *reh'g granted*, 915 F.3d 681 (9th Cir. 2019), are equally unavailing. Respondents

insist that *Drake* "was entirely consonant with the Seventh Circuit's ruling in *Moore*" because the Illinois law struck down in that case was "a flat ban," BIO.7, and the Hawaii law in *Young* similarly "disguise[d] an effective ban on the public carry of firearms," BIO.8. This attempt to harmonize the opinions ignores the obvious fact that New Jersey's "justifiable need" restriction *also* functions as "a total ban on most . . . residents' right to carry a gun in the face of ordinary self-defense needs." *Wrenn*, 864 F.3d at 666. And even if Respondents could reconcile *Moore* and *Young* with *Drake*'s *holding* in this way, the Third Circuit's *reasoning* contradicts *Moore* and *Young* at every turn. *See* Pet.18-19; Brief for *Amicus Curiae* National Rifle Ass'n 14-18 (Feb. 1, 2019). Indeed, the panel dissent in *Young* recognized that the majority's decision was inconsistent with the Second, Third, and Fourth Circuits' "contrary conclusions" and that it deepened an "already existing circuit split" that calls for this Court's resolution. 896 F.3d at 1075 (Clifton, J., dissenting).

To be sure, the Ninth Circuit subsequently agreed to rehear *Young*. But it does not follow that this Court should allow "this issue to further percolate." BIO.9. The benefit of percolation is that it allows "different aspects of an issue [to be] further illumined by the lower courts." *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (opinion of Frankfurter, J., respecting the denial of the petition for writ of certiorari). Here, the lower courts have grappled extensively with the question presented for the better part of a decade; every federal circuit with jurisdiction over a state law

presenting the issue has weighed in; deep judicial disagreement over how to resolve it has produced dozens of dueling opinions; and the lower courts have finally coalesced around two well-developed and directly contrary approaches, manifested in the square split between *Drake* and *Wrenn*. In these circumstances, further percolation will not facilitate this Court's review; it will merely undermine faith in the federal courts' ability to perform their core function of providing a uniform interpretation of basic constitutional protections.

2. This Court's review of the circuit split presented here is especially urgent because it goes to the scope of a fundamental constitutional guarantee's core protection. The courts have divided not over the details of how some doctrinal sub-rule should be implemented, but over the basic question whether the government may enact a "total ban" that "destroys the ordinarily situated citizen's right to bear arms . . . by design." *Wrenn*, 864 F.3d at 666. The conflict of authority over this fundamental issue is intolerable.

The necessity of this Court's review is further underscored by the general trend of Second Amendment jurisprudence after *Heller* and *McDonald*. Since those decisions were handed down, the lower courts have flagrantly defied their instructions in case after case, rejecting *Heller*'s textual and historical analysis in favor of "a loose form of 'interest-balancing' in which the state always wins." Brief for *Amicus Curiae* National Rifle Ass'n, *supra*, at 17. And they have applied that weak-tea scrutiny to uphold every variety of gun

restriction imaginable. Brief for the American Civil Rights Union as *Amicus Curiae* 9 (Feb. 1, 2019) (collecting cases). Again, Respondents notably *do not dispute* that the lower courts have engaged in a relentless campaign to sap *Heller* and *McDonald* of meaning, or that this massive resistance independently justifies this Court's review.

Instead, Respondents tentatively suggest that the Court "could also hold the petition pending [its] decision in *New York State Rifle & Pistol Association v. City of New York*, No. 18-280." BIO.23 n.8. But the Court hears many cases each Term resolving disputes about the application of more favored rights. *See Silvester v. Becerra*, 138 S. Ct. 945, 951 (2018) (Thomas, J., dissenting from the denial of certiorari) ("[I]n this Term alone, we have granted review in at least five cases involving the First Amendment and four cases involving the Fourth Amendment—even though our jurisprudence is much more developed for those rights."). Delaying review in this case would thus *itself* send the unfortunate signal that the Second Amendment continues to be disfavored in this Court, implicitly blessing the lower courts' efforts to hollow out the decisions in *Heller* and *McDonald*. And again, such a delay would come at the cost of perpetuating the damage caused by the existence of a direct conflict between the circuits over the constitutionality of "good reason"-style laws.

3. This petition presents the Court with an ideal vehicle for resolving the intractable disagreement between the circuit courts. New Jersey's law is a perfect representative of the "good reason"-style laws that

have given rise to the conflict. Pet.21. The "justifiable need" restriction is well-established in New Jersey law. Brief of *Amici Curiae* Coalition of New Jersey Firearms Owners, *et al.* 9-12 (Feb. 1, 2019). Moreover, the Second Amendment challenge was the sole, dispositive claim alleged below, it has been squarely presented at every stage, and Petitioners' standing is not in doubt.

Respondents do not contest any of this. Instead, they argue that "this case is an especially weak vehicle" because "there is nothing in the record" on "the percent of applications denied" by New Jersey. BIO.11-12. This argument fundamentally misunderstands the constitutional defect with New Jersey's law. "Good reason"-style laws infringe the rights of most law-abiding citizens not as a matter of contingent fact but *by definition*—because the very *function* of the law is to ban citizens from bearing arms unless they can "show a special need for self-defense distinguishable from that of the population at large." *Drake*, 724 F.3d at 442. This type of law accordingly "destroys the ordinarily situated citizen's right to bear arms not as a side effect . . . but by design: it looks precisely for needs 'distinguishable' from those of the community." *Wrenn*, 864 F.3d at 666. Record evidence showing "the percent of applications denied," BIO.11, would thus be utterly irrelevant; the law on its face bans *ordinary* citizens from carrying arms for self-defense, and it is that feature—not the

denial rate for those citizens hardy enough to apply—that renders it unconstitutional.[1]

This is confirmed by *Wrenn*. That case reached the D.C. Circuit on a motion for a preliminary injunction. The D.C. Circuit nonetheless not only ordered *preliminary* injunctive relief, it also ordered the trial courts to make those injunctions *permanent*, noting that its "holding at this stage makes [the] outcome 'inevitable'" since "the merits of the plaintiffs' challenge are certain and don't turn on disputed facts." 864 F.3d at 667; *see also Moore*, 702 F.3d at 942 (reversing dismissal and ordering the lower courts to enter permanent injunctions without any further proceedings, since "[t]he constitutionality of the challenged statutory provisions does not present factual questions for determination in a trial").

Indeed, *Heller* and *McDonald* teach much the same lesson. Both of those cases, like this one, came to this Court after each district court granted an early motion to dismiss, with no record or factual development below. The "particularly weak record" in those

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[1] The number of denials is irrelevant for an independent reason: whether a citizen *applies* for a carry permit is obviously influenced by whether he thinks he is likely to *obtain* one. And after decades of insistence by New Jersey that ordinarily-situated citizens need not apply, most citizens who do not face specific, documented threats have likely gotten the message and will not waste their time and money submitting the requisite $50 application fee, three character references, evidence of familiarity with safe handling and use of handguns, two sets of fingerprints, four photographs, and a consent for a mental health records search, all to file a futile application. *See* N.J. ADMIN. CODE § 13:54-2.4.

cases, BIO.10, plainly did not hinder this Court's review.

Respondents argue, at last, that if the Court is inclined to take up the questions presented, it should instead grant the petition in *Gould v. Morgan*, No. 18-1272, which raises the same issues. But the *Gould* petitioners *themselves* note that this case is the superior vehicle, for all of the reasons discussed above. *See* Petition for Writ of Certiorari 18, *Gould*, No. 18-1272 (Apr. 1, 2019); *see also supra*, pp. 8-9.

4. Finally, Respondents assert that this Court should deny review because "the Third Circuit correctly held that New Jersey's careful law to govern the public carrying of firearms is constitutional." BIO.13. Not so.

New Jersey first repeats *Drake*'s argument that "public carry laws cohere with the history and tradition of the Second Amendment." BIO.18. But in fact, the historical evidence shows precisely the opposite. *See* Brief for *Amicus Curiae* National Rifle Association, *supra*, at 6-11. New Jersey points to the medieval Statute of Northampton for support, but as *Heller* recognized, that law (and its American analogues) did no more than bar "the carrying of 'dangerous and unusual weapons,'" 554 U.S. at 627—weapons not protected by the Second Amendment, *id.* at 623-24, 627. Similarly, the "surety"-style laws enacted beginning in the 1830s merely imposed modest, presumptive burdens on those persons "reasonably accused of posing a threat." *Wrenn*, 864 F.3d at 661. They are not remotely analogous to

New Jersey's law. In reality, the law's closest historical analogues are the slave codes and black codes making it unlawful for African-Americans "to carry weapons without a license to do so." Brief for *Amicus Curiae* National African American Gun Ass'n, Inc. 17 (Jan. 30, 2019). Unsurprisingly, Respondents do not seek support in *this* part of the historical record—which was affirmatively excised from our constitutional tradition by the enactment of the Fourteenth Amendment.

Nor are Respondents correct that the challenged law is "substantially related to the state's interest in public safety." BIO.18. Even if New Jersey's public-safety concerns were capable of overriding this enumerated constitutional right—which they plainly are not—this contention would fail as a matter of fact as well as a matter of law. For far from supporting Respondents' public-safety argument, the empirical evidence shows that "good reason"-style restrictions do *nothing* to advance public safety—but may well harm it. *See* Brief of the Attorneys General of Arizona, *et al.* 4-15 (Jan. 18, 2019); Brief of *Amici Curiae* Law Enforcement Groups, *et al.* 11-21 (Feb. 1, 2019).

CONCLUSION

The Court should grant the writ.

May 3, 2019

Respectfully submitted,

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