NO. 18-824

In the
Supreme Court of the United States

THOMAS R. ROGERS, et al.,

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

On April 27, 2020, this Court issued its decision in *New York State Rifle & Pistol Association v. City of New York*. That case presented the question of whether New York City's "ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment." Pet. for Writ of Certiorari i, No. 18-280 (U.S. Sept. 4, 2018). While the Court vacated the Second Circuit's opinion upholding New York City's ban in light of the City's decision to repeal its law, it did so without reaching the merits, thus leaving lower courts without guidance on the issues at hand and doing little to quell the growing trend among "some federal and state courts" of "not … properly applying" this Court's landmark Second Amendment opinions in *Heller* and *McDonald*. Slip op. 1, *NYSRPA* (Kavanaugh, J., concurring). Indeed, the fact that the City went to great lengths not to defend a law that survived the Second Circuit's version of heightened scrutiny underscores that the scrutiny applied by many lower courts is heightened in name only and inconsistent with this Court's precedents. *See id.* at 27 (Alito, J., dissenting).

This case, which is fully briefed, "is a uniquely good vehicle for reviewing these important issues." Pet. for Writ of Certiorari 18, *Gould v. Lipson*, No. 18-1272 (U.S. Apr. 1, 2019) ("*Gould* Pet."). Not only does it cleanly present the standard-of-review issue highlighted in Justice Kavanaugh's concurrence, but it provides the Court with the option of answering another important question on which the circuits are divided—namely, whether the Second Amendment

protects the right to carry (*i.e.*, "bear") a firearm outside the home for self-defense. In light of the Court's decision not to address the merits in *NYSRPA*, the already-strong case for certiorari here is now all the more compelling.

At issue in this case is a New Jersey law that effectively bars ordinary, law-abiding citizens from carrying handguns outside the home for self-defense. Under N.J. Stat. Ann. §2C:58-4(c), a "private citizen" (*i.e.*, an ordinary New Jersey resident) cannot obtain the permit necessary to carry a handgun in public unless she can show "justifiable need," which state law defines as "a *special* danger to [her] life that cannot be avoided by means other than by issuance of a permit to carry a handgun." (Emphasis added.) The statute means what it says: "Generalized fears for personal safety are inadequate, and a need to protect property alone does not suffice." *In re Preis*, 573 A.2d 148, 151 (N.J. 1990). Instead, a New Jersey citizen must establish a "special" need for a permit that distinguishes her from the ordinary people whose rights are guaranteed by the Second Amendment.

New Jersey's regime deems specific, entirely reasonable fears for one's personal safety insufficient. The facts involving one of the petitioners starkly illustrate this point. Petitioner Thomas Rogers was robbed at gunpoint while working as the manager of a restaurant, and his current work—running a large ATM business within high-crime areas—places him at a high risk of another crime. Pet.App.56a-57a. Yet under New Jersey's regime, that was not enough to make Rogers "special," *see* N.J. Stat. Ann. §2C:58-4(c) (applicant must "specify in detail the urgent necessity

for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life"), or "to establish Justifiable Need" sufficient for a carry permit. Pet.App.64a. Because Rogers' "previous attack[]" was deemed unrelated to his current work, and because his current work, though undoubtedly dangerous, has not given rise to documented "specific threats," N.J. Stat. Ann. §2C:58-4(c) ("Where possible, the applicant shall corroborate the existence of any specific threats or previous attacks by reference to reports of the incidents to the appropriate law enforcement agencies."), the assigned Chief of Police denied Rogers' application, and a judge on the Superior Court affirmed. Pet.App.64a-67a. Petitioner Association of New Jersey Rifle & Pistol Clubs, Inc., joined in this lawsuit after another of its members was similarly denied a permit on the basis of a failure to "'demonstrate a special danger to [his] life,'" even though he too "has been threatened several times in the past" and "frequently travels in remote areas for his work." Pet.App.58a-59a.

New Jersey's law cannot be squared with the text, history, or tradition of the Second Amendment, and this case provides an ideal vehicle for this Court to develop its Second Amendment law and correct the mistaken approach of the Third Circuit and other courts in applying watered-down scrutiny and effectively rendering the Second Amendment a home-bound right. The Second Amendment plainly protects a right to keep *and bear* arms, and the decision below is emblematic of decisions effectively denying the second half of the framers' guarantee.

The Second Amendment protects not just the right of the people to "have weapons" in their homes, *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008), but the right to "wear, bear, or carry" firearms "upon the person or in the clothing or in a pocket, for the purpose … of being armed and ready for offensive or defensive action in a case of conflict with another person," *id.* at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). Consistent with that understanding, the vast majority of states protect the right of their citizens to carry handguns outside the home for self-defense. But a small minority do not. And courts have squarely divided on the constitutionality of those states' regimes.

The Third Circuit is part of the wrong side of that circuit split. Even though New Jersey's regime makes it practically impossible for ordinary, law-abiding citizens to lawfully carry a handgun outside the home for self-defense, the Third Circuit has rejected multiple Second Amendment challenges to it, *see, e.g.*, *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), most recently in this case, Pet.App.1a. Indeed, according to the Third Circuit, New Jersey's draconian anti-carry law "does not burden conduct within the scope of the Second Amendment's guarantee" *at all*—but even if it did, it would still pass muster under a watered-down form of "intermediate scrutiny," which the Third Circuit revealed to be precisely the sort of deferential interest-balancing approach that this Court ruled out in *Heller*. *Drake*, 724 F.3d at 429, 440; *see Heller*, 554 U.S. at 634; *see also Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 130 (3d Cir. 2018) (Bibas, J., dissenting) ("Our

precedent holds that intermediate scrutiny governs limits on weapons outside the home.… But [our] version [of intermediate scrutiny] is watered down—searching in theory but feeble in fact.").

In applying a watered-down form of means-end scrutiny that leaves most law-abiding citizens unable to exercise a fundamental right and effectively confines the Second Amendment to the home, the decision below contradicts this Court's clear teachings. This case provides the Court with a suitable—indeed, ideal—vehicle to address the growing trend among "some federal and state courts" of "not … properly applying" this Court's landmark Second Amendment opinions in *Heller* and *McDonald*. Slip op. 1, *NYSRPA* (Kavanaugh, J., concurring).

Indeed, this case affords the Court the option, beyond addressing the proper analysis for Second Amendment cases, to resolve an acknowledged circuit split on the constitutionality of laws that effectively stifle all but a select few from exercising a right guaranteed to the people. Every aspect of the lower court rulings in this case conflicts with the D.C. Circuit's decision in *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017), which struck down the District of Columbia's materially indistinguishable requirement that ordinary, law-abiding citizens must show a "good reason" to obtain a permit to carry handguns outside the home, as well as with the Seventh Circuit's decision striking down a complete ban on carrying handguns, *see Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012). The decision below thus falls on the wrong side of a clear circuit split on whether laws that deny typical, law-abiding citizens any

meaningful ability to carry a handgun outside the home for self-defense violate the Second Amendment.

To be sure, the Third Circuit is not alone on that side of the circuit split, or in giving short shrift to claims that the Second Amendment protects the right to bear arms, not just the right to keep them. *See, e.g.*, *Malpasso v. Palozzi*, 767 F. App'x 525 (4th Cir. 2019), *petition for cert. filed*, No. 19-423 (U.S. Sept. 26, 2019); *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018), *petition for cert. filed*, No. 18-1272 (U.S. Apr. 1, 2019); *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012). But that only underscores the need for this Court to resolve the questions presented, as law-abiding individuals in several of the nation's most populous jurisdictions are being denied their Second Amendment rights.

This case is an ideal vehicle to resolve that question and erase all doubt about the Second Amendment's protection of a meaningful protection of the right to keep *and* bear arms. First, "the New Jersey law challenged in *Rogers* is a perfect representative of the types of 'good reason'-style restrictions that have created the split of authority" on the right-to-carry issue. *Gould* Pet. 18. Indeed, New Jersey's requirement that an applicant demonstrate not mere danger, but a "special danger" that distinguishes her from the rest of the people equally protected by the Second Amendment, perfectly captures what makes such regimes antithetical to the guarantee enshrined in the constitutional text.

Furthermore—and *unlike* the state-law regime in *Gould*, which leaves considerable discretion to local permitting authorities, *see Gould*, 907 F.3d at 663-

64—the regime at issue here is principally a statutory, statewide regime. The statutory and statewide nature of the regime makes the New Jersey regime both more important and also more difficult to manipulate to frustrate judicial review. Accordingly, and particularly in light of the presence of an associational plaintiff here, a local permitting authority would be incapable of mooting the case by granting more permits or altering its interpretation of "justifiable need."[1] Instead, the regime could be revised to restore the rights of law-abiding New Jersians only by the state legislature itself—a step that New Jersey has never expressed any intention of taking, despite ample opportunity since *Heller* and *McDonald*.

Finally, this case comes up on a clean record. As in *Heller* and *McDonald*, the decision below affirmed a decision granting the government's motion to dismiss. And "[t]he Second Amendment claim is the sole claim at issue in [this] case, meaning that this Court's resolution … will likely be dispositive not only of th[is] case but also of other … 'good reason'-style restrictions." *Gould* Pet. 18. Moreover, the Third Circuit upheld New Jersey's regime only by employing a version of intermediate scrutiny that is utterly irreconcilable with this Court's precedent and perfectly ripe for correction. This case thus presents

[1] That is no hypothetical concern. When each county can fashion its own version of "good cause," it is easier for a local official to moot the case by altering the standard. "Officials in both California and Massachusetts have changed their policies for issuing licenses to carry handguns in the midst of litigation, with the result that Second Amendment claims became moot." Brief of *Amici Curiae* Coalition of New Jersey Firearms Owners 13 (Feb. 1, 2019).

the Court with an opportunity not only to restore the right to carry arms to law-abiding individuals all throughout the country, but to put an end to efforts to relegate the Second Amendment to second-class status.

While the petitions in *Malpasso* and *Worman v. Healey*, No. 19-404 (U.S. Sept. 23, 2019), could also provide this Court with suitable vehicles to review the important Second Amendment issues left unresolved by the Court's disposition of *NYSRPA*, this case is an ideal vehicle. It squarely presents both the standard-of-review question and the right-to-carry-outside-the-home issue that is splitting the circuits. It gives the Court the option of deciding one or both of those important issues. It also gives the Court an option similar to *Heller* of resolving the case on the straightforward ground that the regime is simply antithetical to the right enshrined in the text of the Constitution. After all, the framers guaranteed the right to keep *and bear* arms to the people, not the subset of the people who can show a "special danger" to the satisfaction of government officials.

This Court granted review of New York's effort to prevent its citizens from crossing the Hudson to exercise their Second Amendment rights, but the City's tactics prevented the Court from clarifying its Second Amendment jurisprudence for the people and the lower courts. This case provides a suitable sequel—indeed, a vital opportunity to ensure that the promise of the Second Amendment extends not only across the Hudson, but across the Nation.

CONCLUSION

For the foregoing reasons and those set forth in the petition and reply, the Court should grant the petition for certiorari.

Respectfully submitted,

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