No. _____

# In the Supreme Court of the United States

NATIONAL ASSOCIATION FOR GUN RIGHTS; ROBERT C. BEVIS; AND LAW WEAPONS, INC. D/B/A LAW WEAPONS & SUPPLY, AN ILLINOIS CORPORATION,
*Petitioners*,

v.

CITY OF NAPERVILLE, ILLINOIS, JASON ARRES, AND THE STATE OF ILLINOIS

*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Is the State of Illinois' ban of certain handguns constitutional in light of the holding in *D.C. v. Heller*, 554 U.S. 570 (2008), that handgun bans are categorially unconstitutional?

2. Is the "in common use" test announced in *D.C. v. Heller*, 554 U.S. 570 (2008), hopelessly circular and therefore unworkable?

3. Can the government ban the sale, purchase, and possession of certain semi-automatic firearms and firearm magazines that are possessed by millions of law-abiding Americans for lawful purposes when there is no analogous Founding era regulation?

## PARTIES TO THE PROCEEDING

The Petitioners are National Association for Gun Rights, Robert C. Bevis, and Law Weapons, Inc. d/b/a Law Weapons and Supply. Petitioners were plaintiffs in the district court and plaintiffs-appellants in the court of appeals.

The Respondents are City of Naperville, Illinois, Jason Arres, and the State of Illinois. Respondents City of Naperville, Illinois and Jason Arres were defendants in the district court and defendants-appellees in the court of appeals. Respondent State of Illinois was an intervenor in the district court and intervening-appellee in the court of appeals.

## CORPORATE DISCLOSURE STATEMENT

Petitioner National Association for Gun Rights is a nonprofit corporation. It neither issues stock nor has a parent corporation. Petitioner Law Weapons, Inc. does not have a parent corporation and no public company owns any of its stock. Petitioner Robert Bevis is an individual.

## STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Bevis v. City of Naperville, Illinois*, No. 23-1353 (7th Cir.). In an opinion issued November 3, 2023, the court of appeals affirmed the district courts' orders denying preliminary injunctions in Case Nos. 1:22-cv-04775 and 1:23-cv-00532 and vacated the district court's order granting a preliminary injunction in Case No. 3:23-cv-00209 (which had been consolidated with Case Nos. 3:23-cv-00141, 3:23-cv-00192, and 3:23-cv-00215);
- *Bevis v. City of Naperville, Illinois*, No. 1:22-cv-04775 (N.D. Ill.) (order denying motion for preliminary injunction issued February 17, 2023);
- *Herrera v. Raoul*, No. 1:23-cv-00532 (N.D. Ill.) (order denying motion for preliminary injunction issued April 25, 2023); and
- *Barnett v. Raoul*, No. 3:23-cv-00209 (S.D. Ill.) (order granting motion for preliminary injunction issued April 28, 2023). On February 24, 2023, the district court entered an order consolidating *Barnett*, *Harrel v. Raoul*, No. 3:23-cv-141 (S.D. Ill.); *Langley v. Kelly*, 3:23-cv-192 (S.D. Ill.); and *Federal Firearms Licenses of Illinois v. Pritzker*, 3:23-cv-215 (S.D. Ill.), and designating *Barnett* as the lead case. The order for preliminary injunction applied in all of the consolidated cases.

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## PETITION FOR WRIT OF CERTIORARI

*Bruen*[1] called on the Nation's legislatures to engage in a sober reassessment of their power to impose burdens on the right to keep and bear arms. The Illinois legislature ignored that call, and instead of tapping on the regulatory brakes it stomped on the gas and passed a sweeping arms ban[2] that included a ban on the most popular rifle in America.[3] Illinois' reaction to *Bruen* is perhaps not surprising. After all, it is natural for the political branches to chafe at constitutional constraints and to test them.

What is surprising, however, is that after *Bruen*, the lower courts have upheld this and similar firearms bans *without exception*.[4] *See* Mark W. Smith, *What Part of "In Common Use" Don't You Understand?: How Courts Have Defied Heller in Arms-Ban Cases-Again*, 2023 Harv. J.L. & Pub. Pol'y Per Curiam 41 (2023). This is surprising because *Bruen* emphatically called on the lower courts to stop their decade-long practice of giving undue deference to legislative burdens on Second Amendment rights. 597 U.S. at 26. But in the teeth of that guidance, at least as far as

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[1] *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022).

[2] 720 ILCS 5/24-1.9 and 1.10.

[3] App. 79, n. 9 (Brennan, J., dissenting) (AR-15 banned by Illinois is the most popular rifle in Ameria. (*quoting* David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 859 (2015)).

[4] Post-*Bruen*, governments are 13-0 in cases challenging firearm and magazine bans. *See* Section VI, *infra*, collecting cases.

firearm bans are concerned, it has been business as usual.

Judicial resistance to *Bruen* reached its apex just last week when the Supreme Court of Hawaii declared open rebellion against the authority of this Court in *State v. Wilson*, 2024 WL 466105 (Haw. Feb. 7, 2024). In that case, the court upheld a discretionary permitting statute that is flagrantly unconstitutional under *Bruen*. The court's opinion[5] is notable for its open defiance of this Court. Some excerpts:

- *"Bruen* snubs federalism principles." At 1.
- *"Bruen, McDonald, Heller*, and other cases show how the Court handpicks history to make its own rules." At 14.
- "As the world turns, it makes no sense for contemporary society to pledge allegiance to the founding era's culture, realities, laws, and understanding of the Constitution. The thing about the old days, they the old days. At 15 (internal quotation marks and citation omitted).
- "The spirit of Aloha clashes with a federally-mandated lifestyle that lets citizens walk around with deadly weapons during day-to-day activities." At 19.

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[5] The court purported to interpret the state constitution. But because the state provision is identical to the Second Amendment, it used it opinion as a vehicle to excoriate *Heller* and *Bruen*. It added a couple of summary paragraphs at the end in which it pretended to apply *Bruen* to the Second Amendment claim in the case. *Id*., at 20.

In response to Illinois' arms ban, Plaintiffs filed suit and sought a preliminary injunction against the new law, but the district court denied their motion. Incredibly, the district court engaged in the very interest balancing prohibited by *Bruen* and upheld the arms ban because, in its view, the banned firearms and magazines are "particularly dangerous." App. 151. Plaintiffs appealed and a divided panel of the Seventh Circuit affirmed. The panel majority held that Plaintiffs failed to demonstrate the arms ban is likely unconstitutional. App. 38. Judge Brennan issued a blistering dissent because the banned firearms and magazines are in common use for lawful purposes, and therefore the law is obviously unconstitutional under *Heller*. App. 60-108.

Judge Brennan was surely correct. Illinois' handgun ban is particularly problematic because *Heller* held that such bans are categorically unconstitutional. 554 U.S. at 628. Indeed, the panel majority acknowledged that citizens have a constitutional right to keep and bear handguns. App. 3-4. And it acknowledged that Illinois has banned certain handguns. App. 6. But it nevertheless upheld the ban. App. 35.

In addition, the court of appeals failed to follow this Court's precedents and in one instance created a circuit split as follows:

1. The court held the banned firearms are not even "arms" covered by the plain text of the Second Amendment. App. 31-33, 41.

2. The court created a circuit split with the Ninth Circuit when it held an arm may be banned merely

because it is similar to a weapon used by the military. App. 37.

3. The court wrote that *Heller's* common use test is the product of faulty circular reasoning and cannot be usefully employed. App. 22.

4. The court suggested that *Bruen's* history and tradition test is hypocritical because it uses the interest balancing the Court purported to eschew. App. 42-43.

5. The court failed to apply *Bruen's* history and tradition test in a meaningful way. App. 44-45.

6. The court held that an arm may be banned if a judge thinks it is "especially dangerous." App. 45.

7. The court's decision rests on stealth interest balancing. App. 42.

As a result, Illinois' unconstitutional arms ban remains in full force and Plaintiffs and hundreds of thousands of other law-abiding Illinois citizens are suffering irreparable injury because their fundamental right to keep and bear arms is being infringed. Accordingly, Plaintiffs respectfully urge the Court to grant certiorari and restore to the people of Illinois their Second Amendment freedoms.

## OPINIONS BELOW

The court of appeals opinion is reported at *Bevis v. City of Naperville, Illinois*, 85 F.4th 1175 (7th Cir. 2023). The district court's opinion is reported at *Bevis v. City of Naperville, Illinois*, 657 F. Supp. 3d 1052 (N.D. Ill.), *aff'd*, 85 F.4th 1175 (7th Cir. 2023).

## JURISDICTION

The court of appeals issued its opinion on November 3, 2023. App. 3. It denied Petitioner's motion for rehearing en banc on December 11, 2023. App. 157-58. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

U.S. Const. amend. II states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." This action challenges 720 ILCS 5/24-1.9 and 1.10 and Chapter 19 of Title 3 of the Naperville Municipal Code. These laws are set out in the Appendix.

## STATEMENT OF THE CASE

### I. Factual Background

This action challenges the Illinois arms bans at 720 ILCS 5/24-1.9 and 5/24-1.10 (collectively, the "Act").[6] Those sections generally prohibit the purchase and sale of "assault weapons" and "large capacity ammunition feeding devices" (defined as magazines accepting more than 10 rounds of ammunition for a long gun or more than 15 rounds of ammunition for handguns). The Act also prohibits the mere possession of "assault weapons" and magazines except for those possessed prior to the Act. *Id*. §§ 1.9(c)-(d) & 1.10(c)-(d).

[6] The prohibitions of Chapter 19 of Title 3 of the Naperville Municipal Code (the "Ordinance") largely overlap with those of the Act. Therefore, like the court of appeals, Plaintiffs will focus on the Act.

The Act provides for substantial criminal penalties for violation of its provisions. 720 ILCS 5/24-1(b) and 1.10(g).

Plaintiff Robert C. Bevis is a law-abiding citizen and business owner. App. 192. Plaintiff LWI is engaged in the commercial sale of firearms. App. 193. Plaintiff NAGR is a Second Amendment advocacy organization. App. 194-95. Plaintiffs and/or their members and/or customers desire to exercise their Second Amendment right to acquire, possess, carry, sell, purchase, and transfer the banned arms for lawful purposes including, but not limited to, the defense of their homes. App. 193, 195.

## II. Procedural History

Plaintiffs brought their Second Amendment challenge and filed motions requesting the district court to preliminarily enjoin the Act and the Ordinance. App. 113-14. The district court denied Plaintiffs' motions in an order dated February 17, 2023. App. 155-56. Plaintiffs appealed and the Seventh Circuit affirmed in an opinion dated November 3, 2023. App. 3. The court of appeals denied Plaintiffs' petition for rehearing en banc on December 11, 2023. App. 157-58.

## REASONS FOR GRANTING THE PETITION

### I. Introduction

As summarized above, the Seventh Circuit's decision is fundamentally at odds with a number of this Court's precedents, particularly *Heller* and *Bruen* and has created a circuit split. In the meantime, Plaintiffs and hundreds of thousands of law-abiding Illinois citizens are suffering irreparable injury because their fundamental right to keep and bear arms is being infringed. Accordingly, for the reasons set forth below, Plaintiffs respectfully urge the Court to grant certiorari and restore to the people of Illinois their right to keep and bear arms.

### II. Plaintiffs Will Prevail on the Merits

#### A. The *Heller/Bruen* Framework for Second Amendment Analysis

In *Heller,* the Court held (a) the Second Amendment protects an individual right to keep and bear arms that is not tied to militia membership; and (b) an absolute prohibition of a weapon in common use for lawful purposes is a violation of that right. 554 U.S. at 592, 628. In *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010), the Court held that the right to keep and bear arms is among the fundamental rights necessary to our system of ordered liberty, and therefore the Second Amendment is applicable to the states through the Fourteenth Amendment. *Id.* 561 U.S. at 778 (*reversing NRA v. Chicago*, 567 F.3d 856 (7th Cir. 2009) (Easterbrook, J.)).

In *Bruen*, the Court built on the foundation of *Heller's* text, history, and tradition analysis for Second

Amendment challenges. The Court articulated the following general framework for resolving such challenges: "We reiterate that the standard for applying the Second Amendment is as follows: [1] When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. [2] The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* 597 U.S. at 24. These steps have come to be known as the "plain text" step and the "history and tradition" step.

### B. *Bruen* Step 1: The Plain Text Covers Plaintiffs' Conduct

The "textual analysis focuse[s] on the normal and ordinary meaning of the Second Amendment's language." *Bruen*, 597 U.S. at 20 (*citing Heller*, 554 U.S. at 576–577, 578) (internal quotation marks omitted). Plaintiffs desire to acquire and possess the banned "assault weapons" and magazines. Thus, the first issue is whether the plain text of the Second Amendment covers this conduct. The plain text provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *Heller*, the Court held that a handgun is an "arm" within the meaning of the Second Amendment. 554 U.S. at 581, 628–29. In reaching that conclusion, the Court noted that, as a general matter, the "18th-century meaning" of the term "arms" is "no different from the meaning today." *Id.* at 581. Then, as now, the term generally referred to "weapons of offence, or armour of defence." *Id.* (cleaned up). The

Court noted that "all firearms constitute 'arms'" within the then-understood meaning of that term. *Id.* (cleaned up; internal citation and quotation marks omitted). And, just as the scope of protection afforded by other constitutional rights extends to modern variants of the exercise of those rights, so too the Second Amendment "extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.* at 582. Thus, the banned firearms are obviously "arms" covered by the plain text and therefore *prima facie* protected. Whether they are actually protected is a matter resolved at the second step.

In addition to the obvious case of firearms, the general definition of "arms" in the Second Amendment "covers modern instruments that facilitate armed self-defense." *Bruen*, 597 U.S. at 28. The magazines banned by the State fit neatly within this definition because they are essential to the operation of modern semi-automatic firearms. *See Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Att'y Gen. New Jersey*, 910 F.3d 106, 116 (3d Cir. 2018), *abrogated on other grounds by Bruen* (Because magazines feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended, magazines are "arms" within the meaning of the Second Amendment.).

In summary, the Plaintiffs' conduct in seeking to acquire and possess the banned "assault weapons" and magazines is covered by the plain text of the Second Amendment. Their conduct is, therefore, presumptively protected by the Constitution.

### C. *Bruen* Step 2: Because the Banned Arms are in Common Use, the State Cannot Meet its Burden

The State retained Dr. Louis Klarevas as an expert. Dr. Klarevas estimated that there are approximately 24.4 million "assault weapons" in circulation in American society.[7] *See also, Miller v. Bonta*, 2023 WL 6929336, at *33 (S.D. Cal. Oct. 19, 2023) (stayed) (Citing Dr. Klarevas, the court noted there are 24.4 million "assault weapons" in circulation). Dr. Klarevas also stated that in 2022 in the United States, sixty-three people were killed in seven mass shootings. App. 254. Thus, according to Defendants' own expert, at least 23,999,937 of the 24.4 million "assault weapons" in circulation in 2022 were not used in mass shootings.

The panel used the AR-15 semi-automatic rifle as the "paradigmatic" example of the kind of weapon banned by the Act. App. 10. But as the court noted in *Miller v. Bonta*, *supra*, in 2021 only 447 people were killed by rifles of all types in the entire country. *Id*. at *3. If, conservatively, every rifle-related homicide involved an AR-15, out of 24,400,000 AR-15s, fewer than .0018% were used in homicides. *Id*.

Defendants insist that the 99.9999% of rifles that were not used in homicides may be banned because of the .0001% that were. Defendants are wrong.

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[7] App. 216-17. The State submitted this declaration in *Barnett v. Raoul*, 3:23-cv-209 (S.D. Ill.), which was consolidated with this case in the Seventh Circuit. Dr. Klarevas uses the term "modern sporting rifle" (NSSF's term for AR-15 and AK-47 platform rifles) as a proxy for "assault weapons."

Millions of citizens own tens of millions of AR-15s, and they use them overwhelmingly for lawful purposes. Under this Court's precedents, particularly *Heller*, "*that is all that is needed* for citizens to have a right under the Second Amendment to keep such weapons." *Friedman v. City of Highland Park, Ill.*, 577 U.S. 1039 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) (emphasis added).

The same is true for the so-called "large capacity magazines" banned by the Act. There are over 160 million such magazines in circulation. App. 77 (Brennan, dissenting). And that is all that is needed for the magazines to be protected. *Duncan v. Bonta*, 83 F.4th 803, 816 (9th Cir. 2023) (Bumatay, J., dissenting from order granting stay) (*quoting* Justice Thomas's dissent in *Friedman, supra*).

Firearms are generally divided into two categories, handguns and long guns. *D.C. v. Heller*, 554 U.S. 570, 629 (2008). *Heller* held that handguns may not be categorically banned because they are in common use. *Id.* at 628-29. Turning to long guns, the AR-15 is the most popular rifle in America.[8] If the most popular rifle in country may be banned, it follows that *all* long guns may be banned and *Heller* is cabined to its facts.

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[8] App. 79, n. 9 (Brennan, J., dissenting) (AR-15 banned by Illinois is the most popular rifle in Ameria. (*quoting* David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 859 (2015)).

Nothing in *Heller* suggested the Court intended it to be limited to its specific facts.[9]

Just the opposite is true. In *Heller*, the Court performed an exhaustive search of the historical record and concluded that no Founding-era regulation "remotely burden[ed] the right of self-defense as much as an absolute ban" on a weapon in common use. *Id.* 554 U.S. at 632. Thus, laws that ban weapons in common use for lawful purposes – whether handguns or long guns – are categorically unconstitutional. *Id.* at 628. There is no need to revisit this issue in each arms ban case. As Solicitor General Elizabeth Prelogar noted in her oral argument to this Court in *United States v. Rahimi,* No. 22-915, once a Second Amendment principle is "locked in," it is not "necessary to effectively repeat that same historical analogical analysis for purposes of determining whether a modern-day legislature's disarmament provision fits within the category." Trans., 55:18 – 56:1 (available at https://bit.ly/3QwPm3c).

This necessarily means that the State cannot carry its burden under *Bruen's* step two (the history and tradition step). After an exhaustive search, *Heller* concluded that it is impossible to demonstrate that a ban of a weapon in common use is consistent with the Nation's history and tradition of firearms regulation. It follows that the State's ban on weapons in common use for lawful purposes, like the ban at issue in *Heller*, is categorially unconstitutional. *See also* Smith, *supra*,

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[9] Ironically, in *Heller* the government argued that handguns should be banned and long guns permitted. 554 U.S. at 629. Here the government argues the opposite.

at 2 ("*Heller's* 'in common use' constitutional test controls, and there is nothing for the lower courts to do except apply that test to the facts at issue.").

### D. Summary: The Act is Unconstitutional

In summary, the Second Amendment's plain text covers Plaintiff's proposed conduct of acquiring, keeping, and bearing bearable arms. The Constitution thus presumptively protects that conduct. The State has not (indeed cannot) rebut that presumption, because under *Heller*, its ban of arms in common use is not consistent with the Nation's history and tradition of firearms regulation.

## III. The Panel Majority Opinion Manifestly Conflicts with *Heller* and *Bruen* in Several Respects and Creates a Circuit Split

### A. The State's Handgun Ban is Clearly Unconstitutional

The D.C. ordinance challenged in *Heller* banned the possession of handguns in the city even for self-defense in the home. The Court invalidated the ordinance, writing "banning from the home the most preferred firearm in the nation to keep and use for protection of one's home and family [fails] constitutional muster." 554 U.S. at 628-29 (cleaned up). Applying this rule to the present case, there cannot be the slightest doubt that laws absolutely banning handguns are unconstitutional. Indeed, the panel majority acknowledged that "everyone can agree" that handgun bans are unconstitutional. App. 3-4. The panel majority also acknowledged that the "Illinois Act bans certain ... pistols." App. 6. Having acknowledged that the Act bans certain handguns, one would expect the

majority to address the issue further and demonstrate how the State's handgun ban is somehow distinguishable from the handgun ban invalidated in *Heller*. But it did not. Thus, the panel majority's opinion manifestly conflicts with *Heller*.

### B. The Court of Appeals' Holding that a Fire*arm* is not an *Arm* Conflicts with *Heller*

As noted, *Heller* stated that the textual analysis focuses on the normal and ordinary meaning of the words in the constitutional text. *Heller*, 554 U.S. at 576. The plain and ordinary meaning of "*arm*" obviously includes all fire*arms*. This is what *Heller* said. *Id.* at 581 (citing with approval a source that said that all firearms constituted arms.). Thus, it follows that the firearms banned by the State are arms within the meaning of the text.

Not so fast, says the Seventh Circuit. The word "arms" in the text includes some firearms but not others. And how does one discern the difference? The ordinary meaning of the text is no help according to the panel majority because the word "arms" in the Second Amendment has an idiomatic meaning that in the context of firearms includes only "firearms that are not too 'militaristic.'" App. 42.

This approach to the text cannot be reconciled with *Heller*. "Normal meaning may of course include an idiomatic meaning ..." *Id.* at 576-77. While adopting an idiomatic meaning may be appropriate, *Heller* demands that the idiom must be demonstrated. In other words, a court cannot impose on the text an idiomatic definition that "[n]o dictionary has ever adopted." *Id.*

at 586. Plaintiffs are unaware of any dictionary from the Founding era that defines the normal and ordinary meaning of the word "arms" to include only non-"militaristic" arms. Certainly, the court of appeals did not point to one. Thus, the panel majority's idiomatic reading of the text must be rejected.

Of course, the panel seems to have drawn this line between firearms covered by the text and those that are not in an effort to cabin *Heller* as much as possible to its specific facts. But as then-Judge Kavanaugh wrote in *Heller v. D.C.* ("*Heller II*"), 670 F.3d 1244 (D.C. Cir. 2011), a line based on a desire to restrict *Heller* is "not a sensible or principled constitutional line for a lower court to draw." *Id.* at 1286 (Kavanaugh, J., dissenting). Justice Kavanaugh was correct, and the panel majority's approach to the text cannot be reconciled with *Heller's* "plain and ordinary meaning" mandate.

### C. The Panel's "Useful for Military Service" Holding is Wrong and Creates a Circuit Split

The panel majority held that to prevail on the merits, Plaintiffs have the burden of showing that the banned arms are not "predominantly useful in military service." App. 30. The panel used the AR-15 as the paradigmatic example of the kind of weapon the statute covers. App. 7. The panel then held that AR-15s are similar to M-16s used in the military and are therefore not protected by the Second Amendment. App. 37 (*citing Heller*, 554 U.S. at 627 (weapons "most useful in military service" may be banned)).

There are two problems with this, one factual and one legal. First, as Judge Brennan accurately noted, the semi-automatic AR-15 is a civilian, not military, weapon, and no army in the world uses a service rifle that is only semiautomatic. App. 94. More importantly, even assuming for the sake of argument that the AR-15 might be used by the military, the panel majority still misconstrued *Heller*, as the very passage they cited demonstrates. In that passage, the Court held that weapons in common use brought to militia service by members of the militia are protected by the Second Amendment. *Id*. What do militia members do with those weapons when they bring them to militia service? They fight wars.[10] It would be extremely anomalous, therefore, if *Heller* were interpreted to mean simultaneously that (1) weapons brought by militia members for military service are protected by the Second Amendment, and (2) all weapons used for military service are not protected by the Second Amendment. This is obviously not the law. Rather, "*Heller* [merely] recognized that militia members traditionally reported for duty carrying 'the sorts of lawful weapons that they possessed at home,' and that the Second Amendment therefore protects such weapons as a class, regardless of any particular weapon's suitability for military use." *Caetano v. Massachusetts*, 577 U.S. 411, 419 (2016) (Alito, J., concurring). *See also Kolbe v. Hogan*, 849 F.3d 114, 156 (4th Cir. 2017) (Traxler, J., dissenting) (calling an arm a "weapon of war" is irrelevant, because under *Heller* "weapons that are most useful for military service" does not include

[10] *See* U.S. Const. amend. V (referring to "the Militia, when in actual service in time of War").

"weapons typically possessed by law-abiding citizens.").

In addition to being wrong on the merits, the court of appeals' holding creates a circuit split with the Ninth Circuit. In *Teter v. Lopez*, 76 F.4th 938 (9th Cir. 2023), the Ninth Circuit reviewed Hawaii's ban on so-called "butterfly knives." While not a firearms ban case, the Ninth Circuit's reasoning bears on the "useful in military service" issue. The court noted that in determining whether a weapon is an "arm" protected by the Second Amendment, the only thing that matters is whether it fits within the general definition of "arms." *Id.* at 949 (citing *Heller*, 554 U.S. at 581). Thus, whether the weapon has "military value" is irrelevant to the analysis. *Id.* This conflicts with the Seventh Circuit's holding that weapons that are useful in military service are not covered by the plain text.

### D. The Common Use Test is Not Circular

As discussed above, *Heller* held that a firearm in common use for lawful purposes may not be absolutely banned. 554 U.S. at 628-29. This has become known as the "common use" test. Justice Breyer thought the Court was wrong to adopt the common use test. *Heller*, 554 U.S. 720–21 (Bryer, J., dissenting). He was particularly concerned that under the test, machine guns might have been protected if they had not been restricted early on. *Id.* He argued the Court had employed faulty logic, and "[t]here is no basis for believing that the Framers intended such *circular reasoning*." *Id.* (emphasis added).

The Seventh Circuit is also not a fan of the common use test. Indeed, it expressed its disapproval of

this Court's approach using the same machine gun example used by Justice Breyer in his *Heller* dissent. App. 22. Like Justice Breyer, the Seventh Circuit believes the test is the product of faulty circular reasoning. *Id.* Accordingly, the court rejected the common use test and implicitly, if not expressly, adopted Justice Bryer's dissent in its stead. *Id.*

In his dissent in the court below, Judge Brennan took his colleagues to task on this point. First, he explained how the common use test, properly understood, is not circular at all. App. 71. And then he observed that no matter how he and his colleagues feel about this Court's reasoning, "[w]e are not free to ignore the Court's instruction as to the role of 'in common use' in the Second Amendment analysis." *Id.* 61-62.

The panel majority ignored the common use test and it is obvious why they did so. As Justice Thomas observed in *Friedman, supra*, millions of law-abiding citizens possess AR-15s for lawful purposes and that is all that is needed for citizens to have a Second Amendment right to keep them. To avoid reaching that result, it was necessary to jettison the test. As Judge Brennan pointed out, this was plain error.

### E. *Bruen* was not Hypocritical

*Bruen's* step two history and tradition test involves reasoning by analogy to determine whether the challenged regulation is "relevantly similar" to a Founding-era law. 597 U.S. at 28-29. In determining whether a historical regulation is relevantly similar to a modern regulation, "at least two metrics: how and why the regulations burden a law-abiding citizen's

right to armed self-defense" are particularly important. 597 U.S. at 29.

The Seventh Circuit panel majority thinks the Court's adoption of these metrics is hypocritical. It wrote:

> With respect to the 'how' question, judges are instructed to consider 'whether modern and historical regulations impose a comparable burden' on that right. *Id.* For all its disclaiming of balancing approaches, *Bruen* appears to call for just that . . . The 'why' question is another one that at first blush seems hard to distinguish from the discredited means/end analysis. *But we will do our best.*

App. 42-43 (emphasis added).

The panel is wrong. Balancing the merits of a firearms policy against a citizen's interest in exercising their right (i.e. interest balancing) is not hard to distinguish from evaluating whether a historical regulation is relevantly similar to a modern regulation. The Seventh Circuit's charge that prohibiting the former conflicts with requiring the latter is meritless. Indeed, just the opposite is true. Far from allowing interest balancing in the history and tradition analysis, *Bruen* expressly prohibited it. 597 U.S. at 29, n. 7 ("[C]ourts may [not] engage in independent means-end scrutiny under the guise of an analogical inquiry").

### F. The Seventh Circuit's History and Tradition Analysis was a Complete Failure

The court of appeals relied mainly on its "plain text" analysis to uphold the Act. Hence, the court gave short shrift to *Bruen* step 2 and failed to engage in a robust examination of the historical record to determine if there were any Founding-era regulations analogous to the State's arms ban. Instead, the court held that the burden of the State's arms ban (i.e., the "how" of the regulation) is comparable to historical regulations merely because it has a grandfather clause and law enforcement and military personnel are exempt. App. 43. The problem with this is that the lower court did not bother to identify any state laws from the Founding era (or even from the 19th century) that were absolute bans of commonly held weapons but had grandfather provisions and exempted law enforcement and military personnel.[11]

Indeed, the lower court did not seem to understand the point of the "how" analysis. We know this because the dissent performed an analysis of the "how" question, about which the panel majority scoffed: "[The dissent's analysis] "relies only on the fact that the particulars of those regulations varied from place to place, and that some were more absolute than others." App. 43. But surely the point of the "how" question is to examine particulars of the historical regulations to discern whether they imposed a

[11] The court pointed to some municipal laws, but *Bruen* held that such laws covered too few people and are therefore not useful in the analysis. 597 U.S. at 67.

comparable burden. The lower court's "how" analysis fails on its face.

The lower court's analysis of the "why" question was even worse. The court held that the "why" of the State's arms ban can be conclusively determined from the title of the Act, writing "we find the best indication of its purpose in its name: 'Protect Illinois Communities Act.'" *Id*. But this Court held that in asking "why," the issue to be determined is whether the historical regulation was "comparably justified" to the modern one. 597 U.S., at 29. The Court cautioned lower courts that in making this determination they must review the justification at an appropriate level of generality, because in one sense "everything is similar in infinite ways to everything else." *Id*. (internal quotation marks and citation omitted). The Seventh Circuit failed to heed this warning. For the lower court, any justification, no matter how general, is good enough. Indeed, the court went so far as to flippantly hold that a recital that the purpose of the regulation is to exercise the police power demonstrates a sufficiently comparable justification. App. 44-45. (purpose of Ordinance was to protect health, safety and welfare). Under the Seventh Circuit's analysis, the "why" question becomes meaningless, because at the level of generality employed by the panel majority, *all* historical regulations are comparably justified to *all* modern regulations. After all, by definition, the exercise of the police power is the purpose of all firearms regulations. *Bruen* did not mean to establish a meaningless metric, so the lower court surely erred.

### G. Arms May Not be Banned Because a Court Thinks they are "Especially Dangerous"

The district court misapprehended this Court's "dangerous and unusual" test and erroneously held that an arm may be banned if, in a reviewing court's judgment, it is "particularly dangerous." App. 151. Far from correcting the district court's error, the Seventh Circuit adopted it. App. 45. The panel majority held that the State's arms ban satisfies *Bruen*'s step 2 because there is a long-standing tradition of regulating "especially dangerous" weapons. *Id*. Thus, the circuit court also misapprehended *Heller's* "dangerous and unusual" test.

*Heller* stated: "We also recognize another important limitation on the right to keep and carry arms. [*United States v. Miller*, 307 U.S. 174 (1939)] said … that the sorts of weapons protected were those 'in common use at the time.' [] We think that limitation is fairly supported by the historical tradition of prohibiting the *carrying of 'dangerous and unusual weapons*.'" *Heller*, 554 U.S. at 627 (emphasis added). The Court then cited several authorities' discussion of the common law offense of "affray," i.e., the carrying of weapons in public in such a way as to incite public terror. *See e.g.*, *State v. Langford*, 10 N.C. 381, 383-84 (1824) (man commits "affray" when he "arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people."). The offense of affray did not prohibit any class of arms as such (including dangerous and unusual arms). Instead, it prohibited the misuse of dangerous and unusual arms to terrorize the public. It follows that a person would be

"in no danger of offending … by wearing *common weapons*" in such a way as not to give rise to a suspicion of "an intention to commit any act of violence." *Id.* (emphasis added). *See also* 1 Timothy Cunningham, *A New and Complete Law Dictionary* (1783) (same). Thus, *Heller's* point in citing these authorities was to contrast weapons in common use with the unusual weapons used to terrorize the public by those who committed affray.

In *Bruen,* the court reiterated this same concept:

> [In *Heller*], we found it 'fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons' 'that the Second Amendment protects the possession and use of weapons that are 'in common use at the time.' *Id.* at 627, 128 S.Ct. 2783 (first citing 4 W. Blackstone, Commentaries on the Laws of England 148–149 (1769).

*Id.* 597 U.S. at 21.

Nothing in *Heller* nor *Bruen* even hints that the Second Amendment does not protect a weapon merely because in a reviewing court's view it is "especially dangerous." Judge Manion's dissent in *Friedman v. City of Highland Park, Illinois*, 784 F.3d 406 (7th Cir. 2015), is instructive on this point. He noted that whether a weapon is dangerous is of no significance for application of the common use test (*Id.* at 415, n. 2) because "[a]ll weapons are presumably dangerous." *Id.* Thus, the issue for purposes of the test is whether a weapon is also unusual, i.e. "not commonly used for

lawful purposes." *Id*. In *Caetano v. Massachusetts*, 577 U.S. 411 (2016), Justice Alito made a similar observation when he wrote that the "dangerous and unusual" test is "a conjunctive test: A weapon may not be banned unless it is *both* dangerous *and* unusual." *Id*, 577 U.S. at 418 (Alito, J. concurring) (emphasis in the original).

In summary, an arm cannot be subjected to a categorical ban unless it is both dangerous and unusual. *Heller*, 554 U.S. at 627; *Bruen*, 597 U.S. at 21. An arm that is commonly possessed by law-abiding citizens for lawful purposes is, by definition, not unusual. It follows, that "the relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes." *Caetano*, 577 U.S. at 418 (Alito, J., concurring). Therefore, the Seventh Circuit's holding that the State's ban of commonly possessed firearms and magazines is constitutional merely because, in its view, the arms are "especially dangerous" is clearly erroneous.

### H. The Seventh Circuit Engaged in Stealth Interest Balancing

The Seventh Circuit's decision rests on a foundation of stealth interest balancing. The court held that the government may restrict citizens' access to certain weapons that are "especially dangerous" or "militaristic" in character. App. 42, 45. What is the defining feature of an "especially dangerous" or "militaristic" weapon? The court answers that it is a "weapon such as the AR-15, which is capable of inflicting the grisly damage described in some of the briefs." App. 42. The problem with this is that all firearms are

capable of inflicting grisly damage. One might even say that is a firearm's purpose.

The court of appeals held that in drawing the line between protected and unprotected arms, a court must examine the record to determine whether there is an "important difference" between the banned weapon and other (unidentified) weapons in terms of lethality. App. 45-46, n. 12. In other words, the lower court made an empirical judgment about the relative dangerousness of the banned weapons and based on that judgment determined that the State's interest in banning these "especially dangerous" weapons outweighs citizens' rights to use them for self-defense in their home. This is precisely the sort of interest balancing precluded by *Bruen*. 597 U.S. at 22.

## I. The Panel's Holding Conflicts with *Staples*

As discussed above, the panel held that AR-15s are similar to M-16s and may therefore be banned. App. 37. As Judge Brennan correctly wrote, this holding directly conflicts with *Staples v. United States*, 511 U.S. 600 (1994). App. 77. *Staples* held that the difference between semi-automatic weapons like the AR-15 and automatic weapons like the M-16 is legally significant. Indeed, the contrast between semiautomatic weapons and automatic weapons was key to the Court's analysis. *Id.* at 603. The Court contrasted semi-automatic firearms such as the AR-15 with machineguns and other dangerous and unusual weapons and concluded that the former "traditionally have been *widely accepted as lawful possessions*." *Id.* at 612 (emphasis added). Thus, the court of appeals' holding

that AR-15s are legally indistinguishable from machine guns like the M-16 conflicts with *Staples*.

Moreover, the panel's belief that semi-automatic firearms may be banned because they are similar to automatic firearms is wrong, because many of the handguns that *Heller* held are protected by the Second Amendment are semi-automatic. In *Heller II,* then-Judge Kavanaugh put the matter this way: "D.C. asks this Court to find that the Second Amendment protects semi-automatic handguns but not semi-automatic rifles. There is no basis in *Heller* for drawing a constitutional distinction between semi-automatic handguns and semi-automatic rifles." *Id.* at 1286 (Kavanaugh, J., dissenting). In summary, as then-Judge Kavanaugh wrote, there is no meaningful constitutional distinction between the semi-automatic handguns protected under *Heller* and the semi-automatic rifles banned by the State. It follows that the panel's holding that the rifles are unprotected because their ability to fire semi-automatically makes them similar to machineguns conflicts with *Heller*.

### J. The Seventh Circuit Failed to Apply *Bruen* to the Magazine Ban

The court of appeals hardly bothered to analyze Illinois' magazine ban. Almost the entire extent of its analysis consisted of the following paragraph:

> Turning now to large-capacity magazines, we conclude that they also can lawfully be reserved for military use. Recall that these are defined by the Act as feeding devices that have in excess of 10 rounds for a rifle and 15 rounds for a

> handgun. Anyone who wants greater firepower is free under these laws to purchase several magazines of the permitted size. Thus, the person who might have preferred buying a magazine that loads 30 rounds can buy three 10-round magazines instead.

App. 37.

This is not judicial analysis. This is judicial fiat. Moreover, the panel's fiat conflicts with *Heller*. As discussed above, the fact that a weapon may be used by the military does not mean that the State can ban it if the weapon is in common use for lawful purposes. Moreover, the panel seems to be under the impression that the State can ban some magazines (even though they are in common use) so long as it deigns to allow its citizens to acquire other magazines. But there is no limiting principle to the panel's reasoning. Can the State also ban magazines with a capacity in excess of two rounds because anyone who wants greater firepower is free to purchase several two-round magazines? It would seem so under the panel's analysis, i.e., a person who might have preferred buying a magazine that loads 30 rounds can buy 15 two-round magazines instead. This conclusion obviously conflicts with *Heller*. Indeed, *Heller* rejected the precise argument advanced by the panel when it held that it is "no answer" to say that banning a commonly possessed arm is permitted so long as other arms are allowed. 554 U.S. at 629.

### K. The Panel Majority's Continued Reliance on *Friedman* Cannot be Reconciled with *Bruen* or *Caetano*

In *Friedman v. City of Highland Park, Illinois*, 784 F.3d 406 (7th Cir. 2015), the court announced a unique three-part test to determine Second Amendment questions. Under this test, a court asks: "whether a regulation [1] bans weapons that were common at the time of ratification or [2] those that have 'some reasonable relationship to the preservation or efficiency of a well regulated militia' . . . and [3] whether law-abiding citizens retain adequate means of self-defense." *Id.* 784 F.3d at 410. All three legs of this test are foreclosed by Supreme Court precedent:

> [1] The Second Amendment's "reference to 'arms' does not apply only to those arms in existence in the 18th century." *Bruen*, 597 U.S. at 28 (cleaned up).
>
> [2] The Second Amendment's operative clause "does not depend on service in the militia." *Bruen*, 597 U.S. at 20.
>
> [3] "[T]he right to bear other weapons is 'no answer' to a ban on the possession of protected arms." *Caetano v. Massachusetts*, 577 U.S. 411, 421 (2016) (*per curiam*), *quoting Heller*, 554 U.S. at 629.

It is a mystery why the panel majority believes *Friedman* has any continuing relevance at all when all three legs of the stool upon which it is propped have been knocked out by this Court. It is even more mystifying that the panel would base its holding in part on the obviously abrogated *Friedman* test, and doing so obviously conflicts with this Court's precedents.

## IV. Plaintiffs Are Suffering Irreparable Harm

Plaintiffs have established that they are likely to prevail on the merits of their claim that the Act violates the Second Amendment. Violation of constitutional rights per se constitutes irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (loss of constitutional freedom "for even minimal periods of time" unquestionably constitutes irreparable injury); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020).

Recently, the Ninth Circuit applied the *Elrod* principle in the Second Amendment context. *Baird v. Bonta*, 81 F.4th 1036, 1040 (9th Cir. 2023). *See also Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) (also applying principle in Second Amendment context). Moreover, Plaintiffs are suffering much more than intangible harm to constitutional rights. Respondents are literally destroying Mr. Bevis's livelihood, because the challenged laws are forcing LWI out of business. App. 199.

## V. An Injunction Would Not Harm the Public Interest

However strong the State's asserted public safety policy may be, the public has no interest in furthering that policy by unconstitutional means. As this Court stated in *Heller* in response to an identical argument, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of [arms commonly] held and used for self-defense in the home." *Id.* 554 U.S. at 636. And as this Court stated in *Bruen*, the interest-balancing inherent in the district court's

public interest analysis has no place in resolving questions under the Second Amendment. *Id.* 597 U.S. at 17. It is always in the public interest to enjoin an unconstitutional law. *See N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013).

Moreover, as noted above, the State has *not* demonstrated that the banned weapons pose a disproportionate threat to public safety. Indeed, the State's own expert witness inadvertently concedes that 99.999% of the banned AR-15s are not used in mass shootings. Surely, the public interest is not served by banning a weapon that is overwhelmingly used by law-abiding citizens for lawful purposes.

## VI. Cases Upholding Arms Bans

In the wake of *Bruen*, the inferior courts have *unanimously* upheld challenged arms bans in contested cases. *See*

- *Duncan v. Bonta*, 83 F.4th 803 (9th Cir. 2023) (staying injunction of California's magazine ban)
- *Miller v. Bonta*, Case No. 23-2979 (ECF 13) (9th Cir. 2023) (staying injunction of California's assault weapon ban)
- *Bevis v. City of Naperville, Illinois*, 2023 WL 7273709 (7th Cir. Nov. 3, 2023)
- *Capen v. Campbell*, 2023 WL 8851005 (D. Mass. Dec. 21, 2023) (upholding Massachusetts' assault weapon and magazine bans)
- *Or. Firearms Fed'n v. Kotek*, 2023 WL 4541027 (D. Or. July 14, 2023) (upholding Oregon's law restricting magazines)

- *Brumback v. Ferguson*, 2023 WL 6221425 (E.D. Wash. Sept. 25, 2023) (denying plaintiffs' motion for a preliminary injunction in challenge to Washington's law restricting magazines)
- *Hartford v. Ferguson*, 2023 WL 3836230 (W.D. Wash. Jun. 6, 2023) (same, as to Washington's assault weapon law)
- *Nat'l Ass'n for Gun Rights v. Lamont*, 2023 WL 4975979 (D. Conn. Aug. 3, 2023) (same, as to Connecticut's assault weapon and magazine laws)
- *Or. Firearms Fed'n v. Brown,* 644 F. Supp. 3d 782 (D. Or. 2022) (denying plaintiffs' motion for TRO)
- *Hanson v. District of Columbia*, 2023 WL 3019777 (D.D.C. Apr. 20, 2023) (same, as to D.C.'s magazine law)
- *Del. State Sportsmen's Ass'n, Inc. v. Del. Dep't of Safety & Homeland Sec.*, 2023 WL 2655150 (D. Del. Mar. 27, 2023) (same, as to Delaware's assault weapon and magazine laws)
- *Ocean State Tactical, LLC v. Rhode Island*, 646 F. Supp. 3d 368 (D.R.I. 2022) (same, as to Rhode Island's magazine law)
- *Goldman v. City of Highland Park, Illinois*, 2024 WL 98429 (N.D. Ill. Jan. 9, 2024) (upholding assault weapon and magazine ordinance)

Appeals in some of these cases remain pending, but Plaintiffs are unaware of a single contested post-

*Bruen* court decision upholding a challenge to a ban of a firearm or magazines.[12]

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted this 12th day of February 2024.

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[12] The three district court decisions upholding challenges (*Duncan, Miller* and *Barnett*) have been reversed or stayed by circuit courts.