No. 20-A___

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,

Plaintiffs-Applicants,

v.

CITY OF NAPERVILLE, ILLINOIS and JASON ARRES,

Defendants-Respondents,

and

THE STATE OF ILLINOIS,

Intervening Party-Respondent

To the Honorable Amy Coney Barrett, Associate Justice of the United States Supreme Court and Circuit Justice for the Seventh Circuit

Emergency Application for Injunction Pending Appellate Review

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QUESTION PRESENTED

Can the government ban the sale, purchase, and possession of certain semi-automatic firearms and firearm magazines tens of millions of which are possessed by law-abiding Americans for lawful purposes when there is no analogous historical ban as required by *D.C. v. Heller*, 554 U.S. 570 (2008), and *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022)?

PARTIES AND RULE 29.6 STATEMENT

The Applicants are National Association for Gun Rights, Robert C. Bevis, and Law Weapons, Inc. d/b/a Law Weapons and Supply. Applicants are the Plaintiffs in the district court and the appellants in the Court of Appeals for the Seventh Circuit.

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

The Respondents are City of Naperville, Illinois (the "City"), Jason Arres, and the State of Illinois (the "State"). The City and Mr. Arres (the City's Police Chief) are the Defendants in the district court and the appellees in the Seventh Circuit. The State is an intervening party in both the district court and the Seventh Circuit.

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**TO THE HONORABLE AMY CONEY BARRETT,
ASSOCIATE JUSTICE OF THE SUPREME COURT AND
CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT**

This is an exceedingly simple case. The Second Amendment protects arms that are commonly possessed by law-abiding citizens for lawful purposes, especially self-defense in the home. *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2128 (2022) (*citing D.C. v. Heller*, 554 U.S. 570, 629 (2008)). The arms banned by Respondents are possessed by millions of law-abiding citizens for lawful purposes, including self-defense in the home. Under this Court's precedents, "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). There cannot be the slightest question, therefore, that the challenged laws are unconstitutional.

The challenged laws are unconstitutional because "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Bruen*, 142 S. Ct. at 2129-30. Plaintiffs desire to keep and bear for lawful purposes (including defense of their homes) the semi-automatic firearms and firearm magazines banned by the challenged laws. App.82 ¶ 3; App.79-80 ¶ 4. "[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms." *Bruen*, 142 S. Ct. at 2132. Thus, Plaintiffs' conduct is presumptively protected by the Second Amendment. *Id.*, 142 S. Ct. at 2129-30.

Given that the Second Amendment presumptively protects Plaintiffs' conduct, the burden shifts to the government to attempt to rebut the presumption of unconstitutionality by demonstrating that their absolute ban is "consistent with the Nation's historical tradition of firearm regulation." *Id*. But it is impossible for Respondents to carry this burden because we have known since *Heller* that no founding era precedent remotely burdens Second Amendment rights as much as an absolute ban on a category of arms commonly held by law-abiding citizens for lawful purposes. *See Bruen*, 142 S. Ct. at 2128 (*citing Heller*, 554 U.S. at 631-32).

In *Bruen*, the Court observed that if the last 10 years of Second Amendment litigation have taught it anything, it is that the inferior federal courts too often defer to legislative burdens on Second Amendment rights. *Id*., 142 S. Ct. at 2131. This Court intended *Bruen* to be a course correction and a reminder to the lower courts that the Second Amendment is not a second-class right. *Id*., 142 S. Ct. at 2156.

Unfortunately, if the 10 months of Second Amendment litigation since *Bruen* have taught us anything, it is that many of the lower courts did not get the message. This action is a case in point. In the teeth of this Court's precedents, the district court refused to address the evidence that the arms banned by the challenged laws are held by millions of law-abiding citizens for lawful purposes.[1] The district court did not dispute the evidence; it simply ignored it.

[1] The Seventh Circuit did not engage in any analysis at all (see App.36-37), and therefore this motion will focus on the district court's opinion.

The district court also refused to address the *Heller/Bruen* rule that a categorical ban of commonly held arms is unconstitutional. As with the evidence, the court did not dispute the existence of the rule; it ignored it. Thus, the district court erred when it failed to apply the *Heller/Bruen* framework to Plaintiffs' Second Amendment challenge.

Instead of following *Heller* and *Bruen*, the district court went off the rails and invented out of whole cloth the "particularly dangerous weapon" doctrine. Under the district court's new doctrine, weapons that a court judges to be "particularly dangerous" are unprotected by the Second Amendment (App.20). And since the semi-automatic rifles and magazines banned by Respondents are, in the district court's judgment, particularly dangerous, Plaintiffs have no right to possess them. App.32. But the banned semi-automatic rifles are the second-most popular firearm in the United States, behind only semi-automatic handguns,[2] which *Heller* held are protected by the Second Amendment. *Id.*, 554 U.S. at 628. If the district court is correct and the second most popular firearm is not protected by the Second Amendment, this means that *Heller* is a one-off decision cabined to its facts.

The district court is clearly wrong. In *Heller*, the Court explained that the nation's historical tradition prohibiting the "carrying of 'dangerous and unusual weapons'" supports the common use test. *Id.*, 554 U.S. at 627. But as Justice Alito observed in *Caetano v. Massachusetts*, 577 U.S. 411 (2016), the

[2] NSSF, 2021 Firearms Retailer Survey Report 9 (available at bit.ly/42Dw3KB).

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). The second most popular firearm in the United States is not unusual. It follows, that its "relative dangerousness" is irrelevant to the constitutional inquiry, *id*., and, as Justice Thomas observed in *Friedman*, this class of arms is in fact protected by the Second Amendment.

The district court's opinion cannot be reconciled with *Heller* or *Bruen*. As set forth in detail below, Plaintiffs have shown that (1) their Second Amendment claims are likely to prevail; (2) denying them relief would lead to irreparable injury; and (3) granting relief would not harm the public interest. Accordingly, Plaintiffs respectfully request that the Circuit Justice grant this application or refer it to the full Court.

DECISIONS BELOW

The district court's order is available at *Bevis v. City of Naperville, Illinois*, 2023 WL 2077392 (N.D. Ill. Feb. 17, 2023) and is reproduced at App.3-35. The Seventh Circuit's order is unreported and reproduced at App.36-37.

JURISDICTION AND STANDARD OF REVIEW

Applicants have a pending interlocutory appeal in the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1292. This Court has jurisdiction pursuant to 28 U.S.C. § 1651.

Applicants for injunctive relief pending appellate review must show that (1) their Second Amendment claims are likely to prevail; (2) denying

them relief would lead to irreparable injury; and (3) granting relief would not harm the public interest. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020).

PROCEDURAL HISTORY

On August 17, 2022, the City Council of the City enacted Chapter 19 of Title 3 of the Naperville Municipal Code (the "Ordinance"). App.67. Section 3-19-2 of the Ordinance states that beginning January 1, 2023, "[t]he Commercial Sale of Assault Rifles within the City is unlawful and is hereby prohibited." App.65. Section 3-19-3 of the Ordinance provides for substantial penalties for any violation of its provisions. App.66.

On January 10, 2023, the State enacted Public Act 102-1116 (the "Act"). The Act generally prohibits the purchase and sale of so-called "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) subject to certain exceptions for law enforcement, members of the military, and others. 720 ILCS 5/24-1.9 and 1.10. The Act will also prohibit the possession of assault weapons and magazines except for those possessed prior to the Act. *Id.* §§ 1.9(c)-(d) & 1.10(c)-(d). The Act provides for substantial criminal penalties for violation of its provisions. 720 ILCS 5/24-1(b) and 1.10(g).

Plaintiffs brought this action challenging the Ordinance and the Act (collectively, the "challenged laws") under the Second Amendment. App.76-77.

Plaintiffs filed a motion for preliminary injunction with respect to the Ordinance on November 18, 2022. App.38. Plaintiffs filed a motion for preliminary injunction with respect to the Act on January 24, 2023. App.138.

The State moved to intervene in the district court, and the district court granted the State's motion. App.85. The State also moved to intervene in the Seventh Circuit, and the Seventh Circuit granted the State's motion to intervene as an intervening appellee. App.105.

The district court denied Plaintiffs' motions for preliminary injunction in an order dated February 17, 2023. App.35. Plaintiffs appealed the district court's order to the Court of Appeals for the Seventh Circuit on February 21, 2023. App.83. On March 7, 2023, Plaintiffs filed a Motion for Injunction Pending Appeal in the Seventh Circuit. App.164. On April 18, 2023, the Seventh Circuit denied Plaintiffs' motion. App.37. The following is the entirety of the Seventh Circuit's order: "**IT IS ORDERED** that the motion for an injunction pending appeal is **DENIED**." *Id.*[3]

REASONS FOR GRANTING THE APPLICATION

I. Plaintiffs Will Prevail on the Merits of their Constitutional Claim

A. The Banned Arms are Commonly Possessed for Lawful Purposes

[3] Since the Court of Appeals declined to engage in any analysis, this Court is in the position of evaluating the court's bare order in light of the district court's order. *See Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006).

It is beyond dispute that the banned firearms are in common use. AR platform rifles are just one of the many types of rifles banned by name and/or by feature. 720 ILCS 5/24-1.9(a)(1)(A), (B), (J). At least 20 million AR-15s and similar rifles are owned by millions of American citizens who use those firearms for lawful purposes. App.184 ¶ 6. In a 2022 national survey, the Washington Post found that 6% of American adults (approximately 16 million citizens) own an AR-15-style rifle. Emily Guskin, Aadit Tambe, and Jon Gerberg, The Washington Post, *Why do Americans own AR-15s?* (March 27, 2023) (available at bit.ly/3G0vbG9).

This Court has described semi-automatic rifles such as AR-15s as "widely accepted as lawful possessions." *Staples v. United States*, 511 U.S. 600, 603, 612 (1994). This makes sense because tens of millions of Americans own AR-15s or similar rifles. William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* at 2 (May 13, 2022) (hereinafter "English") (available at bit.ly/3K6rL7s), p. 2 (estimating over 24 million AR-15s and similar rifles owned). A Congressional Research Service study shows that in 2020 alone, "2.8 million … AR- or AK-type rifles" "were introduced into the U.S. civilian gun stock." *See* Cong. Rsch. Svc., *House-Passed Assault Weapons Ban of 2022* (H.R. 1808), at 2 (Aug. 4, 2022) (available at bit.ly/3ZsvpwY). In 2022, the Bureau of Alcohol, Tobacco, Firearms, and Explosives acknowledged that "the AR-15-type rifle" is "one of the most popular firearms in the United States," including "for civilian use." 87

Fed. Reg. 24652, 24655 (Apr. 26, 2022). AR-platform rifles accounted for nearly half of all rifles produced in 2018 and nearly 20% of all firearms of any type sold in 2020. NSSF, *Firearm Production in the United States* 18 (2020) (available at bit.ly/3z67cBx); NSSF, 2021 Firearms Retailer Survey Report 9 (available at bit.ly/42Dw3KB). The challenged laws ban America's "most popular semi-automatic rifle." *Heller v. D.C. ("Heller II")*, 670 F.3d 1244, 1287 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). *See also Kolbe v. Hogan*, 849 F.3d 114, 153 (4th Cir. 2017) (Traxler, J., dissenting) ("In terms of absolute numbers, these statistics lead to the unavoidable conclusion that popular semiautomatic rifles such as the AR-15 are commonly possessed by American citizens for lawful purposes within the meaning of *Heller*.").

AR-style rifles are overwhelmingly possessed for lawful purposes. The 2022 Washington Post survey found that AR-15s are owned for a variety of lawful purposes such as self-defense (33% of respondents), target shooting (15%), recreation (15%), and hunting (12%). The Washington Post, *Why do Americans own AR-15s?*, *supra*. In a 2021 survey of 16,708 gun owners, recreational target shooting was the most common reason (cited by 66% of owners) for possessing an AR-style firearm, followed closely by home defense (61.9% of owners) and hunting (50.5% of owners). English, at 33-34. The "AR-15 type rifle . . . is the leading type of firearm used in national matches and in other matches sponsored by the congressionally established Civilian Marksmanship program." *Shew v. Malloy*, 994 F. Supp. 2d 234, 245 n.40 (D. Conn. 2014).

The fact that AR-platform rifles are used extremely rarely in crime underscores that the banned firearms are commonly possessed by law-abiding citizens for lawful purposes. Well under 1% of gun crimes are committed with "assault rifles." Gary Kleck, *Targeting Guns: Firearms and their Control* 112 (1997). This conclusion is borne out by FBI statistics. In the five years from 2015 to 2019, there were an average of 14,556 murders per year in the United States. U.S. Dept. of Just., *Expanded Homicide Data Table 8: Murder Victims by Weapon, 2015-2019, Crime in the United States*, 2019, FBI (available at https://bit.ly/31WmQ1V). On average, rifles of all types (of which assault weapons are a subset) were identified as the murder weapon in 315 (or 2.5%) of the murders per year. *Id*. By way of comparison, on average 669 people per year are murdered by "personal weapons" such as hands, fists, and feet. *Id*. Thus, according to FBI statistics, a murder victim is more than twice as likely to have been killed by hands and feet than by an assault weapon. Even in the counterfactual event that an assault weapon had been involved in each rifle-related murder from 2015 to 2019, an infinitesimal percentage of the approximately 24 million "assault rifles" in circulation in the United States during that time period (0.006%) would have been used for that unlawful purpose.

The banned magazines are, if anything, even more common. At least 150 million magazines with a capacity greater than ten rounds are owned by law-abiding American citizens, who use those magazines for lawful purposes. App.184 ¶ 7. The most popular handgun in America, the Glock 17 pistol, comes

standard with a 17-round magazine. *Duncan v. Becerra ("Duncan III")*, 366 F. Supp. 3d 1131, 1145 (S.D. Cal. 2019).[4] The AR-15, the most popular rifle in America as discussed above, is typically sold with a 30-round magazine. *Id*. The Beretta Model 92 is another popular handgun used for self-defense, and it comes standard with a sixteen-round magazine. *Duncan IV*, 970 F.3d at 1142. Indeed, many popular handguns commonly used for self-defense come standard with magazines that are banned by the Act, such as the Smith & Wesson M&P 9 (17-round capacity), the Ruger SR9 (also 17-round capacity) and the Springfield Arms XD non-subcompact pistol (up to 19 rounds). *Id*., n. 4. Recent industry data indicates that over three quarters of "assault rifle" magazines in the country have a capacity of more than 10 rounds. *See* Modern Sporting Rifle Comprehensive Consumer Report, at 31, NSSF (July 14, 2022) (available at https://bit.ly/3GLmErS). *See also* David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 ALB. L. REV. 849, 859 (2015) ("The most popular rifle in American history is the AR-15 platform, a semiautomatic rifle with standard magazines of twenty or thirty rounds.").

These magazines, moreover, are typically possessed for lawful purposes. According to the National Firearms Survey, the most common reasons cited for owning these magazines are target shooting (64.3% of owners), home defense

[4] *aff'd*, 970 F.3d 1133 (9th Cir. 2020), *reh'g en banc granted, opinion vacated*, 988 F.3d 1209 (9th Cir. 2021), and on *reh'g en banc sub nom. Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021), *cert. granted, judgment vacated on other grounds*, 142 S. Ct. 2895 (2022), and *vacated on other grounds and remanded*, 49 F.4th 1228 (9th Cir. 2022).

(62.4%), hunting (47%), and defense outside the home (41.7%). English, *supra*, at 23. And they may be lawfully owned in nearly all states.

The data conclusively demonstrate that the banned magazines are in common use for lawful purposes. Indeed, "courts throughout the country … agree that large-capacity magazines are commonly used for lawful purposes." *Duncan IV*, 19 F.4th at 1155-56 (Bumatay, J., dissenting); *see also Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015); *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*; *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 255 (2d Cir. 2015) ("Even accepting the most conservative estimates cited by the parties and by amici, the … large-capacity magazines at issue are 'in common use' as that term was used in *Heller*."); *Heller II*, 670 F.3d at 1261 ("fully 18 percent of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten rounds, and approximately 4.7 million more such magazines were imported into the United States between 1995 and 2000").

B. Plaintiffs Prevail Under *Heller/Bruen's* Simple Rule

Bruen noted that in the years between 2008 and 2022, the circuit courts failed to apply *Heller* properly and therefore the appropriate test for Second Amendment challenges needed to be reiterated. *Id.*, 142 S. Ct. at 2129. The Court then wrote: "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.*, 142 S. Ct. at 2129-30.

Plaintiffs desire to acquire, possess, carry, sell, purchase, and transfer for lawful purposes (including defense of their homes) the semi-automatic firearms and firearm magazines banned by the challenged laws. App.82 ¶ 3; App.79-80 ¶ 4. The challenged laws prohibit or soon will prohibit Plaintiffs from doing so. "[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms." *Bruen*, 142 S. Ct. at 2132. Therefore, because the Second Amendment's plain text covers Plaintiffs' conduct – i.e., acquiring, keeping, and bearing certain bearable arms – "the Constitution *presumptively* protects that conduct." *Id.*, 142 S. Ct. at 2126 (emphasis added). Plaintiffs have met their burden.

C. Respondents Cannot Meet Their Burden Because There is No Founding Era Precedent for an Absolute Ban on Commonly Possessed Arms

Since the Second Amendment presumptively protects Plaintiffs' conduct, Respondents must justify the challenged laws by demonstrating that they are consistent with the Nation's historical tradition of firearm regulation. But because the banned arms are commonly possessed by law-abiding citizens for lawful purposes, it is impossible for Respondents to carry their burden under *Heller* and *Bruen*. The reason for this is apparent from *Heller* and *Bruen*

themselves – there is no historical analogue to such a ban. "[A]fter considering 'founding-era historical precedent,' including 'various restrictive laws in the colonial period,' and finding that none was analogous to the District's ban, *Heller* concluded that the handgun ban was unconstitutional." *Bruen*, 142 S. Ct. at 2131.

Similarly in this case, Respondents have been unable to identify a founding era regulation analogous to their absolute bans. This is unsurprising. After a no doubt exhaustive search, D.C. was unable to identify a single founding era analogue (far less a widespread American tradition) of banning any category of commonly held firearms. No one else has come close to doing so in the intervening 15 years, so there is no reason to expect Respondents would be able to do so now. This is not to say that they have not proposed analogues. But as discussed in more detail below, their search was no more successful than D.C.'s, and their proposals can be rejected for the same reason *Heller* rejected D.C.'s proposals – i.e, they do not "remotely burden the right of self-defense as much as [Respondents'] absolute ban." *Heller*, 554 U.S. at 632.

In summary, the complete absence of regulations even remotely analogous to D.C.'s absolute ban allowed *Bruen* to characterize the *Heller* historical inquiry as "relatively simple." *Id*., 142 S. Ct. at 2132. It was simple because, under *Heller*, absolute bans of commonly held firearms are, in the words of the Seventh Circuit "categorially unconstitutional." *See Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011). ("Both *Heller* and *McDonald* suggest that

broadly prohibitory laws restricting the core Second Amendment right – like the handgun bans at issue in those cases … are categorically unconstitutional.").[5] *See also People v. Webb*, 2019 IL 122951, 131 N.E.3d 93 (absolute ban is "necessarily" unconstitutional).[6] Therefore, this case is simple. The challenged laws cannot withstand constitutional scrutiny because it is impossible for Respondents to carry their burden under *Heller* and *Bruen*.

II. The District Court's Order Was Clearly Erroneous

A. The District Court Erred When It Failed to Apply the *Heller/Bruen* Analytical Framework

As Justice Thomas noted in *Friedman*, *Heller's* central holding is that the Second Amendment protects arms that are typically possessed by law-abiding citizens for lawful purposes. *Id.*, 577 U.S. at 1039 (Thomas, J., dissenting from denial of certiorari). Americans own millions of AR-style rifles, and "that is all that is needed for citizens to have a right under the Second Amendment to keep such weapons." *Id*. *See also Bruen*, 142 S. Ct. at 2128, *citing Heller*, 554 U.S. at 629 (the Second Amendment does not countenance complete prohibition of weapons commonly possessed by Americans for self-defense in the home).

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[5] In *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015), the Seventh Circuit failed to follow its own precedent established in *Ezell*. But as Judge Manion noted in dissent, the *Friedman* majority opinion was in "direct conflict" with *Ezell*. *Friedman*, 784 F.3d at 420 (Manion, J., dissenting).

[6] In *Webb*, the Illinois Supreme Court held that a commonly held bearable arm may not be "subjected to a categorical ban." *Id*., 2019 IL 122951, ¶ 21, 131 N.E.3d 93, 98. And since the Illinois statute in question constituted a categorical ban, "that provision *necessarily* [could not] stand." *Id*. (emphasis added).

The evidence overwhelmingly demonstrates that Americans own tens of millions of the banned arms. One would suppose, therefore, that the district court would apply the *Heller/Bruen* rule proscribing an absolute ban on such commonly held weapons, or, failing that, at the very least explain why it believed the rule is not applicable. The district court did neither. The court failed to address the evidence that the arms banned by the challenged laws are commonly held by law-abiding citizens for lawful purposes. The court did not dispute the evidence; it simply ignored it. The district court also failed to address the *Heller/Bruen* rule that a categorical ban of commonly held arms is unconstitutional. As with the evidence, the court did not dispute the existence of the rule; it ignored it. Thus, the district court erred when it failed to apply the *Heller/Bruen* framework to Plaintiffs' Second Amendment challenge.

B. The "Particularly Dangerous Weapon" Doctrine Invented by the District Court Contradicts *Heller* and *Bruen*

In *Heller*, the Court explained that the nation's historical tradition prohibiting the "carrying of 'dangerous and unusual weapons'" supports the common use test. *Heller*, 554 U.S. at 627. *Heller* cited several authorities for this historical tradition, including 4 William Blackstone, *Commentaries on the Laws of England*, 148-49 (1769). The district court misapprehended Blackstone (and *Heller's* citation to that treatise) when it wrote that Blackstone "drew a clear line between traditional arms for self-defense and 'dangerous' weapons," and therefore under *Heller's* history and tradition test "particularly

'dangerous' weapons are unprotected" by the Second Amendment. App.20-21, *citing Heller*, 554 U.S. at 627.

But that is not what *Heller* held at all. In the passage cited by the district court, *Heller* stated: "We also recognize another important limitation on the right to keep and carry arms. *Miller*[7] 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 cited 12 authorities, including Blackstone, for the existence of this historical tradition. None of the cited authorities discussed categories of weapons as such. Instead, in all of the cited passages the authorities were discussing the common law offense of "affray." *See, e.g.*, Blackstone, 148-49 (describing the offense of affray and its origins). The offense of affray is essentially the carrying of weapons in public in such a way as to incite public terror.[8]

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[7] *United States v. Miller*, 307 U.S. 174 (1939).

[8] *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."). Thus, the offense did not prohibit any class of arms (including dangerous and unusual arms) as such. Instead, it prohibited the misuse of dangerous and unusual arms to terrorize the public. Since the core of the offense was inciting public terror, it would have been impossible to commit the offense with weapons kept for self-defense in the home. 1 W. Russell, A Treatise on Crimes and Indictable Misdemeanors 271–272 (1831) (bearing arms does not fall within the offense unless it is "apt to terrify the people"). 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, in the passage cited by the district court, *Heller* did not hold that particularly dangerous weapons are unprotected by the Second Amendment. Instead, it held that the "common use" test is supported by the historical tradition of prohibiting carrying dangerous and unusual weapons to commit the offense of affray. *Bruen* reiterates that the common use test is supported by the historical tradition of prohibiting carrying dangerous and unusual weapons as described in Blackstone:

> [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., 142 S. Ct. at 2128.

Both weapons in common use and weapons that are "dangerous and unusual" are obviously dangerous.[9] Thus, dangerousness is not what differentiates the two categories of weapons. Instead, in *Heller* and *Bruen*, this Court was contrasting weapons that were in common use from weapons that were unusual. In other words, it was the "unusual" part of the phrase "dangerous and unusual" that was relevant to the Court's discussion, because that is what contrasted the prohibited weapons from weapons that were in common use.

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 "particularly dangerous." This stands to reason. All weapons are dangerous, and if

[9] "Non-dangerous weapon" is an oxymoron.

the Second Amendment does not protect a weapon merely because a reviewing court finds a way to hang the epithet "particularly dangerous" on it, the Second Amendment protects nothing at all.

Judge Manion's dissent in *Friedman* 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.*, 784 F.3d 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*, 142 S. Ct. at 2128. 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 district court holding that Respondents' ban of commonly possessed firearms and magazines is constitutional merely because, in its view, the arms are "particularly dangerous" is clearly erroneous.

C. The District Court Erred When It Applied Means-End Scrutiny to the Challenged Laws

Bruen held that "[t]o justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.*, 142 S. Ct. at 2126. *See also, e.g., id.* (*Heller* does "not support applying means-end scrutiny in the Second Amendment context"). The district court acknowledged that *Bruen* prohibits means-end scrutiny. App.15. Nevertheless, several pages of the district court's opinion are devoted to a discussion of the governments' asserted public safety interest. App.28-32. The point of this discussion is that in the district court's view, the end sought to be achieved by Respondents (enhanced public safety) is justified by the means they have chosen to advance that end (banning certain semi-automatic weapons and magazines) and therefore the challenged laws are constitutional. In other words, the district court erred when it engaged in exactly the sort of means-end scrutiny forbidden by *Bruen*. To be sure, the district court did not acknowledge that it was engaging in means-end scrutiny. That scrutiny occurred under the guise of the "application" of the historical inquiry. App.28-32. But *Bruen* warned against this, stating that "courts may [not] engage in independent means-end scrutiny under the guise of an analogical inquiry." *Id.*, 142 S. Ct. at 2133 n. 7.

D. The District Court's Basic Assumption is Flawed

The basic assumption underlying the district court's analysis – i.e., that *Heller* surely never contemplated that the Second Amendment might protect a category of firearms that can be used in mass shootings – is unfounded. *Heller* was decided shortly after the Virginia Tech mass shooting, and D.C. made sure this Court was aware that the worst mass shooting in U.S. history up until then had recently been committed with handguns like those banned by its ordinance. Brief of Petitioners, *D.C. v. Heller*, 2008 WL 102223, 53. Thus, when it decided *Heller*, this Court was keenly aware that semiautomatic handguns can be used in mass shootings. Nevertheless, it struck D.C.'s ban as unconstitutional. In doing so, the Court wrote:

> *We are aware of the problem of handgun violence* in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution. The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns, [] *But the enshrinement of constitutional rights necessarily takes certain policy choices off the table*. These include the absolute prohibition of handguns held and used for self-defense in the home.

Heller, 554 U.S. at 636 (emphasis added).

If anything, the case for upholding Second Amendment rights is even more compelling here than in *Heller*. Then-Judge Kavanaugh expressed the matter this way in his dissent in *Heller II*:

> [C]onsidering just the public safety rationale invoked by D.C., semi-automatic *handguns are more dangerous* as a class than semi-automatic rifles . . . [H]andguns 'are the overwhelmingly favorite weapon of armed criminals.'… So it would seem a bit backwards – at least from a public safety perspective – to interpret the Second Amendment to

> protect semi-automatic handguns but not semi-automatic rifles. … Put simply, *it would strain logic and common sense to conclude that the Second Amendment protects semi-automatic handguns but does not protect semi-automatic rifles*.

Heller v. D.C., 670 F.3d 1244, 1286 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (emphasis added).

E. The District Court's Historical Analysis Fails

As discussed above, in *Heller* this Court noted that no founding era analogue to a modern law imposing a categorical ban on arms commonly possessed for lawful purposes has been identified. Nevertheless, the district court advanced several historical statutes as potential analogues to the challenged laws. App.21-28. Unsurprisingly given *Heller's* holding, none of the historical regulations identified by the district court burdens the right to keep and bear arms remotely as much as Respondents' absolute ban on commonly possessed arms.

The district court advanced 93 statutes as potential analogues to the challenged laws. Exhibit 1 (App.106-120) is a list of the 93 laws with all 19th century and earlier laws set out at length.[10] Without examining a single law, the Court can know with certainty that none of them is analogous to a categorial ban of commonly possessed arms. Because if such a law existed, surely the district court would have quoted the law in its opinion and said something to the effect of: "Law X from the founding era categorically banned possession of

[10] Plaintiffs have only listed 20th century laws. They did not set those laws out at length because, as discussed below, such laws are irrelevant to the historical analysis.

a weapon commonly held by law-abiding citizens of the time." Of course, the court did not identify any such law, because we have known since *Heller* that no such law exists.

The laws identified by the district court fall into the following categories:

1. 20th Century Laws. Over half of the laws identified by the district court (47 of 93) are from the 20th century. Such precedents do "not provide insight into the meaning of the Second Amendment." *Id.* 142 S. Ct. at 2154, n. 28.

2. **Territorial, Kingdom and Municipal Laws**. The district court identified 19 laws from various cities and territories and the Kingdom of Hawaii. But *Bruen* rejected the use of territorial and municipal regulations as historical analogues. *Id.*, 142 S. Ct. at 2154–55.[11]

3. Laws Banning Concealed Carry. The district court identified 10 laws banning concealed carry. But in *Heller*, the Court specifically noted that restrictions on concealed carry outside the home were supported by the Nation's historic tradition of firearms regulation. *Id.*, 554 U.S. at 626. Thus, if a tradition of restricting concealed carry outside the home were sufficient to support a law categorically banning arms commonly possessed for defense in the home, *Heller* would have come out the other way.

4. Regulations on Manner of Use of Weapons. The district court identified seven laws regulating the use of weapons, primarily laws

[11] *Bruen* did not specifically address laws from foreign countries, but presumably such laws cannot establish an American tradition of firearm regulation.

prohibiting "trap guns." A "trap gun" is a device rigged to fire a gun without the presence of a person. App.69-70. These laws did not ban any class of arms. Rather, they regulated the manner of using them. That is, they banned setting loaded, unattended guns to prevent unintended discharges. Obviously, a regulation of the use of an arm is not analogous to a complete prohibition on the possession of the arm.

5. Laws That Applied to Slaves or Minors Only. Two of the laws identified by the court prohibited possession of arms by slaves and/or minors. It should go without saying that such prohibitions provide no support for the challenged laws. *See Bruen*, 142 S. Ct. at 2151 (systematic efforts to disarm blacks provide no support for firearm restrictions).

6. Sensitive Place Regulation. One of the laws prohibited arms at polling places on election day. *Heller* noted that laws forbidding carrying firearms in sensitive places like schools or government buildings are supported by the Nation's historic tradition of firearms regulation. *Id*., 554 U.S. at 626. Such laws provide no support, however, for a categorical prohibition on the possession of commonly held arms in the home.

7. Historical Regulation of Sales. The district court identified three statutes (from Alabama, Georgia, and Tennessee) regulating or taxing sales of weapons. The Georgia Supreme Court held in *Nunn v. State*, 1 Ga. 243, 251 (1846), that the Georgia statute could not constitutionally deprive a citizen of his right to keep and bear arms and was unconstitutional to the extent

it prohibited a citizen from bearing arms openly. Thus, the statute did not even prohibit carrying arms openly in public, much less possessing them in the home. Similarly, in *Aymette v. State*, 21 Tenn. 154, 160 (1840), the Tennessee Supreme Court held that the statute could not deprive a citizen of his "unqualified" right to bear arms. As for the Alabama statute, a tax on sale is not a prohibition on possession and even if it were, a single state statute does not establish an enduring and widespread American tradition. *See Bruen*, 142 S. Ct. at 2154.

8. Surety Laws. The district court pointed to two surety laws. But such laws do not even support a restriction of the public carry of arms (*Bruen*, 142 S. Ct. at 2150), much less a categorical prohibition on possession of a class of commonly held arms for self-defense in the home.

9. Regulation of Carry Generally. The district court identified a single law that generally prohibited public carry (though not private possession) of arms. In *Bruen*, the Court held that when States generally prohibited both open and concealed carry of handguns, state courts usually upheld the restrictions when they exempted army revolvers or read the laws to exempt at least that category of weapons. *Id*., 142 S. Ct. at 2155. But those courts that "upheld broader prohibitions without qualification generally operated under a fundamental misunderstanding of the right to bear arms, as expressed in *Heller*." *Id*. In short, *Bruen* already addressed this history and held that "American governments simply have not broadly prohibited the

public carry of commonly used firearms." *Id.*, 142 S. Ct. at 2156. It necessarily follows that there is no history of broadly prohibiting keeping and using such firearms in one's home.

In summary, even if *Heller* had not settled this matter, the district court's proffered statutes are striking in their uniform inapplicability to the relevant constitutional question: whether the government may ban purchasing, keeping, and using a class of commonly possessed arms for self-defense in the home. All of the laws identified by the district court are either silent on that question or expressly affirm the right to keep firearms in homes even if they could not be carried publicly. Moreover, two-thirds of the laws identified by the district court are irrelevant to the constitutional question because they were from the 20th century or enacted by territories or cities. The remaining hodgepodge of laws identified by the district court,[12] like the laws identified by D.C. in *Heller*, are not analogous because they do not burden the right to keep and bear arms – especially in the home – anywhere near as much as the challenged laws. Accordingly, the district court failed to identify any law – far less an enduring American tradition – analogous to the laws challenged in this action, and therefore its decision to uphold the constitutionality of those laws is clearly erroneous.

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[12] Most of these remaining laws are from the latter half of the 19th century. Laws from that time period are not relevant to determining the scope of rights guaranteed by the Bill of Rights. *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2259 (2020) (holding Montana's ban on aid to religious schools unconstitutional even though majority of states had enacted such bans by the latter half of the 1800s). Plaintiffs have not focused on this issue because, as in *Bruen*, "the lack of support for [the challenged laws] in either period makes it unnecessary to choose between them." *Id.*, 142 S.Ct at 2163) (Barrett, J., concurring).

F. Far from Banning Common Arms, Founding Era Laws *Required* Them

In *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020), this Court held Montana's "no aid" law unconstitutional because there was no founding era tradition supporting a ban on aid to religious schools. *Id.*, 140 S. Ct. at 2258. Far from banning such aid, founding era laws actively encouraged it. *Id.* A similar dynamic is in play with respect to laws banning the possession of commonly used arms. Far from banning the possession of such arms, founding-era militia acts affirmatively required citizens to possess them. Those militia acts are the best evidence that the challenged laws are unconstitutional.

"In all the colonies, as in England, the militia system was based on the principle of the assize of arms," where – instead of a large standing army – there was a "general obligation of all adult male inhabitants to possess arms, and, with certain exceptions, to cooperate in the work of defence." Herbert L. Osgood, The American Colonies in the Seventeenth Century 499 (MacMillan 1904) (digitally archived at bit.ly/3lMoa50). Those laws required "the possession of arms and ammunition by all who were subject to military service" and that those individuals "appear in all the important enactments concerning military affairs. Fines were the penalty for delinquency, whether of towns or individuals." *Id.* at 500. In general, men between the ages of 16 and 60 were required to furnish themselves with muskets and ammunition. The typical infantry soldier was outfitted with a matchlock musket, his bandoleer ("a belt

two inches wide, to which were attached twelve small cylindrical boxes, each holding one charge of powder," and hanging from it "a priming wire, a bullet bag, and a case containing several yards of match"), and "a short sword." Osgood, 501-02. The required arms evolved as flintlocks, firelocks, or carbines, and pistols became more common as the colonies neared the 18th century. *Id.* See Exhibit 2 (App.121-137) for three examples of founding-era militia laws.

There is no way to reconcile this history with the Respondents' laws. Far from being subjected to arms bans, in the founding era, male citizens of eligible age who failed to arm themselves with common weapons and standard ammunition faced fines and punishment. Had the commonly possessed weapons banned by Respondents existed centuries ago, based on this history, they presumably would have been required – not banned – in every household.

III. Plaintiffs Are Suffering Irreparable Harm

There can be no question that the challenged laws are causing irreparable harm. "'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (*quoting Elrod v. Burns*, 427 U.S. 347, 373, (1976) (plurality opinion)) (granting injunction pending appeal). The rule in this case should be the same because the constitutional right to bear arms is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald*, 561 U.S. at 780 (plurality opinion). *See also Bruen*, 142 S. Ct. at 2156 (equating

protection of Second Amendment rights with protection of First Amendment rights). Though it failed to apply its own precedent in this case, the Seventh Circuit itself has held as much in a Second Amendment case. In *Ezell*, *supra*, the court wrote: "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Id.*, 651 F.3d at 699, *quoting* Charles Alan Wright, *et al*, *Federal Practice and Procedure* § 2948.1 (2d ed. 1995).

Moreover, Plaintiffs are applying for emergency relief because they are suffering much more than intangible harm to constitutional rights. Respondents are literally destroying Mr. Bevis's livelihood, because the challenged laws are forcing Law Weapons, Inc. ("LWI") out of business. App.187 ¶ 13. 85% of the firearms LWI sells are now banned. *Id.*, ¶ 12. LWI's cash reserves have been depleted, and as a result, it has had to lay off employees and ask the Bevis family to work without pay. *Id.*, ¶ 13. Mr. Bevis has extended his personal credit, missed personal payments like home and car payments, maxed his credit limits, and taken out loans to pay the monthly bills. *Id.* LWI will not be able to abide by the terms of its 15-year commercial lease for its business real property or pay equipment leases and purchase inventory if these bans remain in effect any longer. *Id.* In short, LWI will be put out of business if these laws are enforced. *Id.* In *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544, 546 (7th Cir. 2007), the court held that the plaintiffs "made a compelling case that it needs

the injunction pending appeal to avert serious irreparable harm—the uncompensated death of its business."

IV. An Injunction Would Not Harm the Public Interest

The district court denied Plaintiffs' motion for preliminary injunction because, in its view, the challenged laws further the public interest of protecting public safety. App.35. But however strong Respondents' 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.*, 142 S. Ct. at 2126.

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). The district court's opinion suggests that the continued possession of the banned arms by the citizens of Naperville will cause a massive public safety crisis. See App.28-31. But as this Court has held, "[t]he right to keep and bear arms … is not the only constitutional right that has controversial public safety implications." *Bruen*, 142 S. Ct. at 2126, n. 3 (*quoting McDonald v. Chicago*, 561 U.S. 742, 783 (2010) (plurality opinion)).

Moreover, the district court's analysis is surely overblown. As discussed in detail above, according to FBI statistics, on average, rifles of all types (of which assault weapons are a subset) were identified as the murder weapon in 315 (or 2.5%) of murders per year. U.S. Dept. of Just., *Expanded Homicide Data Table 8: Murder Victims by Weapon, 2015-2019, Crime in the United States*, 2019, FBI (available at https://bit.ly/31WmQ1V). By way of comparison, on average, 669 people per year are murdered by "personal weapons" such as hands, fists, and feet. *Id*. Thus, despite the district court's histrionics, the possession of these weapons poses no more of a public safety threat than the possession of hands and feet. In summary, therefore, granting relief would not harm the public interest.

CONCLUSION

Plaintiffs have established all of the elements required to demonstrate that they are entitled to injunctive relief pending appellate review. Therefore, they respectfully request that the Circuit Justice grant this application or refer it to the full Court. Applicants move the Court for entry of an injunction restraining enforcement of the challenged laws pending full appellate consideration of the district court's order denying their motion for an injunction preliminaryly enjoining enforcement of the challenged laws.

Respectfully submitted this 26th day of April 2023.

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