No. 23-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

Renewed Emergency Application for Injunction Pending Review

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QUESTIONS PRESENTED

1. Is the State of Illinois' absolute 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 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 ("NAGR"), Robert C. Bevis, and Law Weapons, Inc. d/b/a Law Weapons and Supply ("LWI"). Applicants are the Plaintiffs in the district court and the appellants in the Court of Appeals for the Seventh Circuit.

NAGR is a nonprofit corporation. It neither issues stock nor has a parent corporation. LWI 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**

Pursuant to this Court's Rules 22 and 23, Plaintiffs respectfully request that the Circuit Justice enter an injunction pending the disposition of Plaintiffs' petition for rehearing en banc in the Seventh Circuit and the filing and disposition of any follow-on petition for writ of certiorari.

This action concerns the Protect Illinois Communities Act, Pub. Act 102-1116 (2023) ("the Act"). The Act is unconstitutional, because it bans certain handguns and because the so-called "assault weapons" and "large capacity magazines"[1] that it bans are possessed by millions of law-abiding Americans who overwhelmingly use them for lawful purposes, including self-defense in the home. Indeed, the Act bans the most popular rifle in America.[2] The Act thus bans weapons in common use for lawful purposes and is manifestly unconstitutional under *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).

In *Bruen*, the Court observed that the last decade of Second Amendment litigation had taught it that the lower federal courts too often deferred to the determinations of legislatures under the banner of intermediate scrutiny. *Id*., 142 S. Ct. at 2131. In response, *Bruen* rejected means-end scrutiny in the

[1] Both "assault weapon" and "large capacity magazine" are terms of political derision, not accurate firearm terminology.
[2] App. 196, n. 9 (Brennan, J., dissenting) (AR-15 banned by the Act 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)).

Second Amendment context, reiterated *Heller's* text, history and tradition framework, and called on lower courts to stop treating the right to keep and bear arms as a "second-class right." *Id*., 142 S. Ct. at 2131, 2156. Unfortunately, when it comes to bans on firearms in common use, nothing changed after *Bruen*. *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). As Professor Smith points out, after *Bruen* instead of following *Heller*, lower courts have circumvented it. As a result, the lower courts have *without exception* upheld bans on firearms and LCMs in common use.[3] This is one such case.

Plaintiffs moved for a preliminary injunction, but the district court denied their motion, holding that these weapons may be banned because they are "particularly dangerous." Appendix ("App.) 30. Plaintiffs appealed and on November 3, 2023, a divided panel of the Seventh Circuit affirmed the district court's denial of Plaintiffs' motion for preliminary injunction. App. 175. The court held that Plaintiffs failed to demonstrate the Act is likely unconstitutional. App., 159. But as noted, the banned firearms and magazines are in common use for lawful purposes, and the Act is clearly unconstitutional under *Heller* and *Bruen*. The Act's handgun ban[4] is particularly problematic, because *Heller* held that handgun bans are categorically unconstitutional. 554 U.S. at

[3] See Section VIII, *infra*, for a list of cases upholding bans.
[4] Most of the "assault weapons" banned by Act are long guns. While the principles announced in *Heller* apply to long guns, the panel's disregard of *Heller's* specific holding regarding handguns is particularly problematic.

628. The panel majority acknowledged that citizens have a constitutional right to keep and bear handguns. App. 131. It also acknowledged that the Act bans certain handguns. App. 134. But other than acknowledging the existence of the State's handgun ban, the court ignored it.

In addition, the panel majority failed to follow this Court's precedents in several other instances, including:

1. The court held the banned firearms are not even "arms" covered by the plain text of the Second Amendment. App. 154-55.

2. The court wrote that the common use test is the product of faulty circular reasoning and cannot be usefully employed in this or any other case. App. 148.

3. The court suggested that *Bruen's* history and tradition test is hypocritical because it employs the interest balancing the Court purported to eschew. App. 167-68.

4. The court failed to apply *Bruen's* history and tradition test in a meaningful way. App. 167-69.

5. The court held that an arm may be banned if a judge thinks it is "particularly dangerous." App. 167.

6. The court's decision rests on stealth interest balancing. App. 170.

7. The court held an arm may be banned merely because it is similar to a weapon formerly used by the military. App. 159.

In summary, the Seventh Circuit's decision was manifestly erroneous. 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, Plaintiffs respectfully urge you to take up this case and grant the requested injunctive relief.[5]

DECISIONS BELOW

The Seventh Circuit's opinion is available at *Bevis v. City of Naperville, Illinois*, 2023 WL 7273709 (7th Cir. Nov. 3, 2023), and is reproduced at App. 129-223. On November 21, 2023, Plaintiffs moved for an injunction pending review in the Seventh Circuit. App.310-334. The Seventh Circuit denied their motion. App.335.

JURISDICTION AND STANDARD OF REVIEW

The Seventh Circuit has jurisdiction over Plaintiffs' appeal pursuant to 28 U.S.C. § 1292. This Court has jurisdiction pursuant to 28 U.S.C. § 1651. On November 21, 2023, Plaintiffs moved for an injunction pending review in the Seventh Circuit. App.310-324. The Seventh Circuit denied their motion. App.335.

[5] On April 26, 2023, Plaintiffs filed a previous Emergency Application for Injunction Pending Appellate Review in Case No. 22A948. On May 12, the State notified the Court that the Seventh Circuit had ordered an expedited briefing schedule and set oral argument for June 29. After receiving this notice, the Court denied Plaintiffs' application on May 17. Plaintiffs believe that the Court may have been influenced to deny their prior application when the Seventh Circuit expedited its review of the district court's denial of injunctive relief. Unfortunately, while the Seventh Circuit did review the matter expeditiously, it failed to remedy the constitutional violation.

Applicants pursuant to Rule 23 must show that (1) their 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).

FACTUAL AND PROCEDURAL HISTORY

The Act became effective on January 10, 2023.[6] This action concerns the arms bans in the Act that are codified at 720 ILCS 5/24-1.9 and 5/24-1.10. 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). Effective January 1, 2024, the Act will also prohibit 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). 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. 125. Plaintiff LWI is engaged in the commercial sale of firearms. *Id.* Plaintiff NAGR is a Second Amendment advocacy organization. App. 75. Plaintiffs and/or their members and/or customers desire to exercise their Second Amendment right to acquire, possess, carry, sell, purchase, and transfer the

[6] On August 17, 2022, the City Council of Naperville, Illinois enacted Chapter 19 of Title 3 of the Naperville Municipal Code (the "Ordinance"). The Ordinance bans the sale of so-called "assault rifles." The prohibitions of the Ordinance largely overlap with those of the Act. Therefore, like the court below, Plaintiffs will focus on the Act.

banned arms for lawful purposes including, but not limited to, the defense of their homes. App. 76.

Plaintiffs brought this action challenging the Act under the Second Amendment. App. 65-72. On January 24, 2023, Plaintiffs filed a motion requesting the district court to preliminarily enjoin the Act.[7] App. 78-103. The district court denied Plaintiffs' motion in an order dated February 17, 2023. App. 1-33. Plaintiffs appealed, and the Seventh Circuit panel affirmed the district court's denial of Plaintiffs' motion for preliminary injunction in an opinion dated November 3, 2023. App. 129-233. Plaintiffs filed a petition for rehearing en banc on November 11, 2023. App. 224. That petition is pending.

REASONS FOR GRANTING THE APPLICATION

I. Introduction

As summarized above and discussed in detail below, the Seventh Circuit's decision is fundamentally at odds with a number of this Court's precedents, particularly *Heller* and *Bruen*. 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 take up this case and grant the requested injunctive relief.

[7] Plaintiffs also filed a motion for preliminary injunction with respect to the Ordinance. App. 35-35.

II. Plaintiffs Will Prevail on the Merits

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

In *Heller,* the Supreme 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 per se 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.*, 142 S. Ct. at 2129-30. 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*, 142 S. Ct. at 2127 (*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, 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 facia* 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*, 142 S. Ct. at 2132. 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.[8] *See also, Miller v. Bonta*, 2023 WL 6929336, at *33 (S.D. Cal. Oct. 19, 2023) (stayed) (Citing Dr. Klarevas, the court noted there

[8] App. 256. 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." For reasons that are unclear, he suggests that those rifles owned by law enforcement officers do not count as in circulation. Even granting this dubious premise, it is undisputed that tens of millions of the weapons are in circulation.

are 24.4 million "assault weapons" in circulation). Dr. Klarevas also stated that in 2022 in the United States, 63 people were killed in seven mass shootings. App. 309. Thus, according to Defendants' own expert, at least 23,999,937 of the 24.4 million "assault weapons" in circulation last year were not used in mass shootings. Defendants insist that the 99.9999% of such weapons that were not used in mass shootings last year may be banned because of the .0001% that were. Defendants are wrong.

The panel used the AR-15 semi-automatic rifle as the paradigmatic example of the kind of weapon banned by the Act. App.134. The State's own expert, Dr. Klarevas, acknowledged that Americans own tens of millions of AR-15 and similar rifles. The overwhelming majority of those weapons are used for lawful purposes. Under the Supreme 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. *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*)[9].

[9] Plaintiffs point to Judge Bumatay's dissenting opinion because his reasoning is consistent with *Heller* and *Bruen*, as opposed to the majority opinion which, inexplicably, engaged in practically no analysis at all.

Indeed, this is *Heller's* central holding. 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 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 in *United States v. Rahimi* earlier this month, 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*, 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

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. 131. The panel majority also acknowledged that the "Illinois Act bans certain ... pistols." App. 134. 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. Indeed, other than acknowledging that

the State's handgun ban exists, the majority never mentioned it again. Far less did it demonstrate how the handgun ban can be reconciled with *Heller*. Thus, the opinion manifestly conflicts with *Heller*.

B. The Panel's 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"* would seem to include all fire*arms*. This is what *Heller* said. *Id*., at 581 (citing 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 esoteric meaning, and in the context of firearms it means "firearms that are not too 'militaristic.'" App. 167. 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 once wrote, a line based on a desire to restrict *Heller* is "not a sensible or principled constitutional line for a lower court to draw." *Heller v. D.C.* ("*Heller II*"), 670 F.3d 1244, 1286 (D.C. Cir. 2011) (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 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, and it expressed its disapproval using the same machine gun example used by Justice Breyer in his *Heller* dissent. App. 148. 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. 189. 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*. 189-90.

Judge Brennan was surely correct. The panel majority ignored the common use test and it is is obvious why they did so. As Justice Thomas observed, AR-15s are in common use for lawful purposes and that is all that is needed for citizens to have a Second Amendment right to keep them. *Friedman, supra*. Therefore, to avoid reaching the result that citizens have a right to keep these weapons, it was necessary to jettison the test. This was plain error.

D. *Bruen* was not Hypocritical

Bruen's step two history and tradition test involves reasoning by analogy[10] to determine whether the challenged regulation is "relevantly similar" to a Founding-era law. 142 S. Ct. at 2132. 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. 142 S. Ct. at 2133.

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*.

[10] As explained above, in the context of a ban on arms in common use, the history and tradition analysis was performed in *Heller*. The common use test is shorthand for the per se rule that such bans are not consistent with the Nation's history and tradition of firearm regulation.

App. 167-68 (emphasis added).

This is wrong. Balancing the merits of a firearms policy against a citizen's interest in exercising their right (i.e. interest balancing) is not at all the same thing as – or even comparable to – 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. 142 S. Ct. at 2133, n. 7 ("[C]ourts may [not] engage in independent means-end scrutiny under the guise of an analogical inquiry").

E. The Seventh Circuit's History and Tradition Analysis was a Failure

The panel majority in the court below did not 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. 137-68. 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. 167. But surely the point of the "how" question is to examine particulars of the historical regulations to discern whether they imposed a comparable burden. The lower court's "how" analysis fails on its face.

The lower court's analysis of the "why" question fares no better. The court literally 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. 142 S. Ct. at 2133. 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." 142 S. Ct. at 2132 (internal quotation marks and citation omitted). The Seventh Circuit failed to heed this warning. For the lower court, any justification, no matter how

[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. 142 S. Ct. at 2154.

general, is good enough. Indeed, the court went so far as to say that a recital that the purpose of the regulation is to exercise the police power demonstrates a sufficiently comparable justification. App. 169 (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.

F. 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. 30. Far from correcting the district court's error, the Seventh Circuit adopted it. App. 167. The panel majority held that the State's arms ban satisfies *Bruen* step two (history and tradition), 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., 142 S. Ct. at 2128.

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*, 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 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.

G. The Seventh Circuit Engaged in Stealth Interest Balancing

The Seventh Circuit's decision rests on a foundation of stealth interest balancing. The lower court held that the government may restrict citizens'

access to certain weapons that are "especially dangerous" or "militaristic" in character. App. 167, 170. 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. 166-67. The problem with this is that all firearms are capable of inflicting grisly damage. One might even say that is a firearm's purpose.

What is the dividing line between an ordinarily dangerous firearm and one that is "especially dangerous"? The court below held that in making this determination 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. 170, 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*. 142 S. Ct. at 2129.

H. The Panel Misconstrued *Heller's* "Useful for Military Service" Passage

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. 156. As noted, the panel used the AR-15 as the paradigmatic example of the kind of weapon the statute covers. App. 134. The panel then held that AR-15s are similar to the M-16s that were once used in the

military and are therefore not protected by the Second Amendment. App. 154, 159, 162 (*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. 210. 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.[12] 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

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

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

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. 162-63. As Judge Brennan correctly wrote, this holding directly conflicts with *Staples v. United States*, 511 U.S. 600 (1994). App. 195. *Staples* held that the difference between semi-automatic weapons like the AR-15 and the automatic M-16 is legally significant. Indeed, the contrast between semiautomatic weapons and automatic weapons like the M-16 was key to the Court's analysis. *Id.*, at 603. The Court contrasted ordinary firearms such as the AR-15 at issue in that case with "machineguns, sawed-off shotguns, and artillery pieces," and stated that guns falling outside of the latter categories "traditionally have been *widely accepted as lawful possessions*." *Id.*, at 612 (emphasis added). The point of the discussion was that guns like the AR-15 have been widely accepted as lawful possessions, and therefore *mens res* was not established merely by establishing that the defendant knew he was in possession of an AR-15. Thus, the panel's 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

Concerning the Act's ban of "large capacity magazines," the court below wrote:

> 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. 162.

The Court might wonder what else the panel said to justify its decision to uphold the magazine ban. But that's it, one paragraph. 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 magazines of the permitted size? 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*, 142 S. Ct. at 2132 (cleaned up).

[2] The Second Amendment's operative clause "does not depend on service in the militia." *Bruen*, 142 S. Ct. at 2127.

[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 decisions that knocked out *Friedman's* three legs.

VI. 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. *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (loss of constitutional freedom "for even minimal periods of time" unquestionably constitutes irreparable injury). 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 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 LWI out of business. App.127 ¶ 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 much 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." Here, the Court should enter an injunction to prevent further irreparable harm.

VII. An Injunction Would Not Harm the Public Interest

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).

VIII. Cases Upholding Arms Bans

Plaintiffs include this section to inform the Court of the post-Bruen cases that have upheld bans on firearms or LCMs in common use: *Duncan v. Bonta*, 83 F.4th 803 (9th Cir. 2023) (staying injunction of California's LCM ban on ground that state is likely to prevail on merits); *Miller v. Bonta*, Case No. 23-2979 (ECF 13) (9th Cir. 2023) (staying injunction of California's assault weapon ban on ground that state is likely to prevail on merits); *Bevis v. City of Naperville, Illinois*, 2023 WL 7273709 (7th Cir. Nov. 3, 2023); *Or. Firearms Fed'n v. Kotek*, 2023 WL 4541027, at *55 (D. Or. July 14, 2023) (upholding Oregon's law restricting LCMs); *Or. Firearms Fed'n v. Brown,* 644 F. Supp. 3d

782, 813 (D. Or. 2022) (denying plaintiffs' motion for TRO); *Brumback v. Ferguson*, 2023 WL 6221425, at *12 (E.D. Wash. Sept. 25, 2023) (denying plaintiffs' motion for a preliminary injunction in challenge to Washington's law restricting LCMs); *Hartford v. Ferguson*, 2023 WL 3836230, at *7 (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, at *26 (D. Conn. Aug. 3, 2023) (same, as to Connecticut's assault weapon and LCM laws); *Hanson v. District of Columbia*, 2023 WL 3019777, at *5 (D.D.C. Apr. 20, 2023) (same, as to D.C.'s LCM law); *Del. State Sportsmen's Ass'n, Inc. v. Del. Dep't of Safety & Homeland Sec.*, 2023 WL 2655150, at *3 (D. Del. Mar. 27, 2023) (same, as to Delaware's assault weapon and LCM laws); *Ocean State Tactical, LLC v. Rhode Island*, 646 F. Supp. 3d 368, 373 (D.R.I. 2022) (same, as to Rhode Island's LCM law).

Plaintiffs are unaware of a single contested court decision upholding a challenge to a ban of a firearm or LCM in common use.[13]

CONCLUSION

Plaintiffs have established all of the elements required to demonstrate that they are entitled to injunctive relief pending the disposition of Plaintiffs' petition for rehearing en banc in the Seventh Circuit and the filing and disposition of any follow-on petition for writ of certiorari. Therefore, they respectfully request that the Circuit Justice grant this application or refer it to the

[13] The three district court decisions upholding challenges (*Duncan, Miller* and *Barnett*) have been reversed or stayed by circuit courts on the ground that the plaintiffs are unlikely to succeed on the merits.

full Court. Specifically, Plaintiffs move the Court for entry of an injunction restraining enforcement of the challenged laws pending the disposition of their petition for rehearing en banc in the Seventh Circuit and the filing and disposition of any follow-on petition for writ of certiorari.

Respectfully submitted this 27th day of November 2023.

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CERTIFICATE OF COMPLIANCE

I certify pursuant to Rule 33.1(h) of the Rules of this Court that foregoing application contains **7,613** words, excluding the parts of the application that are exempted by Rule 33.1(d).

Barry K. Arrington