No. 19-704

In The Supreme Court of the United States

MATTHEW D. WILSON and TROY EDHLUND,

Petitioners,

v.

COOK COUNTY, a public body and corporate, TONI PRECKWINKLE, Board President, in her official capacity, and its Board of Commissioners in their official capacities, namely: JERRY BUTLER, DEBORAH SIMS, PETER N. SILVESTRI, JOHN F. DALEY, LARRY SUFFREDIN, GREGG GOSLIN, TIMOTHY O. SCHNEIDER, LUIS ARROYO JR., RICHARD R. BOYKIN, DENNIS DEER, JOHN A. FRITCHEY, BRIDGET GAINER, JESUS G. GARCIA, EDWARD M. MOODY, STANLEY MOORE, SEAN M. MORRISON, JEFFREY R. TOBOLSKI, and THOMAS DART, Sheriff of Cook County, in his official capacity,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

I. The Seventh Circuit's *Friedman* Decision Completely Disregarded *Heller*, Meriting Supreme Court Rule 10(c) Review

Respondents' Brief in Opposition (BIO) wrongly insists that the decision in *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015) comports with the decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), but that does not make it so, and *Friedman*'s departure from *Heller* is so stark that Supreme Court Rule 10(c) review is necessary to establish a guideline for Second Amendment analysis.

Petitioners note, however, that while Respondents argued against S. Ct. R. 10(a) review, expressing this Court should not hear this matter in the absence of a Circuit split, Petitioners reiterate that such is not necessary for a case to be important enough that this Court's review is warranted. Justice Thomas noted this in *Jackson v. City and Cnty. of San Francisco*, 135 S. Ct. 2799, 2802 (2015) (Thomas, J., dissenting from denial of certiorari), where he listed cases when this Court showed a "repeated willingness to review splitless decisions involving alleged violations of other constitutional rights." Therefore, the fact that the lower courts have widely disregarded *Heller* is not a disqualifier for this Court granting review; it is a point in favor of doing so.

Respondents' arguments themselves reveal why this is so. The lower courts in this case based their reasoning on the flawed *Friedman* decision, a precedent in

the Seventh Circuit that flies in the face of both *Heller* and all other Seventh Circuit decisions on the issue of Second Amendment analysis, such as *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011). But because *Friedman* is now precedent in the Seventh Circuit, Respondents feel they can assert that their unconstitutional ordinance is beyond reproach. This must change.

The Respondents' erroneous reasoning starts with their reliance on *United States v. Miller*, 307 U.S. 174, 178 (1939). Respondents assert that *Miller* stands only for the proposition "that the Second Amendment does not provide a limitless right to keep and bear arms" (BIO 10). While Petitioners do not challenge that most basic of restriction, Respondents gloss over what this Court actually took from *Miller*: "We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625.

This Court went on to say:

> *Miller* said, as we have explained, that the sorts of weapons protected were those "in common use at the time." 307 U.S., at 179, 59 S. Ct. 816, 83 L. Ed. 1206. 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.

Though the Respondents get to that point eventually (BIO 10), and even acknowledge the two-part

analysis discussed in *Ezell* (BIO 11), the Respondents go far afield when they argue the *Friedman* test bears any relationship to this Court's dictates.

Respondents claim that "Petitioners do not dispute that the Seventh Circuit's doctrinal test aligns with *Heller*" (BIO 11). However, while Petitioners acknowledge that the two-part test in *Ezell* is the same as has been employed in most, if not all, Circuit Courts, as discussed herein that two-part test is often used as a vehicle not for careful analysis of the Second Amendment right under *Heller*, but of interest balancing in the name of achieving a desired result. Instead, Petitioners maintain that the correct and most faithful analysis that would actually "align" with *Heller* would be a test "based upon text, history, and tradition," without any interest balancing (Pet. 23). Either way, the result should not be the test crafted in *Friedman*.

Respondents go on to repeat the *Friedman* test in their Response, and it fares no better in the retelling.

The *Friedman* test's folly is revealed when Respondents argue: "Respondents cannot, and do not, point to case law contradicting this approach" (BIO 12). As if *Heller* did not exist. The Respondents note Justice Thomas' dissent from the denial of *certiorari* in *Friedman*, but ignore that Justice Thomas explained fully why the analysis in *Friedman* runs so afoul of *Heller.*

As to the first *Friedman* factor – "whether a regulation bans weapons that were common at the time of ratification" (*Friedman*, 784 F.3d at 410) – the *Heller*

Court called that argument "bordering on the frivolous." *Heller*, 554 U.S. at 582.

As for the second factor – whether the firearm in question has "some reasonable relationship to the preservation or efficiency of a well-regulated militia" (*Friedman*, 784 F.3d at 410) – *Heller* specifically found that the Second Amendment is unconnected to service in a militia (554 U.S. at 593-94), or that the firearms must have some connection to a militia. *Id.* at 627-29. It strains credulity to assert that this factor of *Friedman* comports with *Heller*, when the opposite is clearly true.

Finally, the third *Friedman* factor is "whether law-abiding citizens maintain adequate means of self defense." *Friedman*, 784 F.3d at 410. *Heller* could not have been more adamant in its assertion that the protected arms are those in common use for lawful purposes. *Heller*, 554 U.S. at 625. Beyond that boundary, it should not be for state and local governments to decide what is sufficient for a person to defend herself, especially given that every persons' needs and situations are unique, based on physical ability, health, coordination, or other individual differences. *See Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (Thomas, J., dissenting from denial of *certiorari*).

The lower court claimed that *Friedman* "merely represents the application and extension of [*Ezell*'s] principles to the specific context of a ban on assault weapons and large-capacity magazines" (App. 18). But that cannot possibly be true, when all three prongs of

the test violate *Heller*, and there was not even a shred of the two-part *Ezell* analysis performed by the lower courts. Instead, this is a situation where there has been a desired conclusion by the lower courts, and then the justification for that conclusion is filled in to fit that result, which is why the Respondents state: "the Seventh Circuit in *Wilson* refined its *Ezell I* inquiry – consistent with analyses in other appellate circuits – **for the limited purposes of considering assault-weapons bans** (BIO 18) (citing App. 17-18) (emphasis added). The lower court's ruling is nothing more than a pre-ordained result in search of validation, and now the Respondents disingenuously claim it to be merely a "refined" version of *Ezell*. Respondents and the lower court can claim they were following and applying *Ezell*, but further review shows this was not at all the case.

After defending the lower court's faulty attempt to tie its decision to *Ezell*, Respondents again cite to *Miller* arguing that the only protected arms are those with a connection to a militia (BIO 15) (citing *Heller*, 554 U.S. at 622). This conclusion is completely wrong, as the *Heller* decision thoroughly debunked that idea two pages later (*Id.* at 624-26). It is yet another example of how the made-up *Friedman* test contaminated the analysis of this case, especially since the lower court relied on *Friedman* as a reason to do no further analysis.

This Court did not choose to hear *Friedman*, but that is neither dispositive nor a limitation on this Court's authority now, and this case offers another opportunity to send a message to the lower courts

that the holdings in *Heller* must be given more than lip-service.

Respondents cite to numerous lower court decisions upholding bans on the arms at issue in this case, but Petitioners maintain that those decisions are likewise based on results-oriented and interest-balancing analyses that do not follow the text of the Second Amendment, and the history and tradition of firearm use and regulation, as *Heller* instructs. *See*, *e.g.*, *Worman v. Healey*, 922 F.3d 26 (1st Cir. 2019) (*cert.* petition pending); *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017); *Association of New Jersey Rifle and Pistol Clubs, Inc. v. Attorney General New Jersey*, 910 F.3d 106 (3d Cir. 2018); *New York State Rifle and Pistol Association, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2018). Petitioners do not disregard those decisions, but continue to assert that if those decisions had actually followed *Heller* instead of engaging in the type of interest balancing that *Heller* eschewed, the results would have been different.

II. *Caetano* Also Demonstrates Why This Court's Review Is Necessary And Proper

Respondents cite to *Caetano v. Massachusetts*, 136 S. Ct. 1029 (2016) (*per curiam*), but misstate its holding. Though *Caetano* involved a stun gun, the Court reiterated that the Second Amendment did not just protect bearable arms that were in existence "at the time of the founding." *See id.* Limiting *Caetano*'s holding to a stun gun is as common a tactic by detractors

as limiting *Heller*'s holding to protecting only a handgun in the home.

Beyond that, however, it was a fact established in *Caetano* that there were "hundreds of thousands" of stun guns owned in 45 states, and the Court found that constituted "common use." 136 S. Ct. at 1032-33 (Alito, J., concurring). It has been established in all the decisions cited above that the Banned Arms are far more numerous than that. *See Friedman*, 784 F.3d at 421, n.2 (Manion, J., dissenting).

Further, *Caetano* reiterated that "the relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes." *Caetano*, 136 S. Ct. at 1031 (citing *Heller*, 554 U.S. at 627). Therefore, while Respondents make much that *Friedman* cited *Heller*'s restrictions on "dangerous and unusual weapons" *Friedman*, 784 F.3d at 407-08 (citing *Heller*, 554 U.S. at 623, 627) (BIO 15), the relevant inquiry is whether the *Banned Arms* fall into that category. They do not, and at the least Petitioners should have been allowed to show that. Instead, Petitioners were denied the opportunity because of the erroneous belief that the definition of "dangerous" for purposes of Second Amendment analysis is purely based on the features of the firearm, instead of the circumstances surrounding its use, which is just another way of asking whether law-abiding persons use them for lawful purposes.

This is why it was unacceptable for the lower court to state:

> in *Friedman* we evaluated the importance of the reasons for the Highland Park Ordinance to determine whether they justified the ban's intrusion on Second Amendment rights. We concluded, as our sister circuits had, that "reduc[ing] the overall dangerousness of crime" and making the public feel safer were "substantial" interests that justified the city's action in adopting the Highland Park Ordinance. *Friedman*, 784 F.3d at 412

(App. 18).

This contradicts the lower court's rejection of Petitioners' request for discovery, when it stated that "our analysis in *Friedman* did not rest at all on the types or frequency of crime that a Highland Park resident may face. Such considerations never are mentioned, much less analyzed, in our decision" (App. 14).

Plaintiffs requested the opportunity to obtain information about the types and frequency of crime a resident of Cook County, Illinois may face. The lower court stated this was an important inquiry in *Friedman*. Yet Petitioners were denied the ability to make their case. Respondents conclude their Response by citing to "[s]ignificant information . . . of which this court may take judicial notice" (BIO 19), and then state the lower courts did so in this case *via Friedman*. But the Petitioners were not a part of *Friedman*. They did not get an opportunity to submit facts in *Friedman*, or challenge the government's proffered evidence in that case.

They did not get an opportunity to compare and contrast the evidence in *Friedman* with that of the much larger demographic area in this case, *i.e.*, Cook County, Illinois. In this case, as in *Friedman*, the lower courts have decided that "If it has no other effect, [the] ordinance may increase the public's sense of safety" (*Friedman*, 784 F.3d at 412), and "If a ban on semiautomatic guns and large-capacity magazines reduces the perceived risk from a mass shooting, and makes the public feel safer as a result, that's a substantial benefit." *Id.* Respondents make no attempt to explain how the deprivation of enumerated constitutional rights can be justified by speculation that a law might make the public feel safer in the absence of any evidence that it actually will make the public any safer. Apparently, however, for the lower courts such speculations and conclusions are sufficient, but the Constitution requires a greater justification than feelings.

There are ways to regulate short of a total ban on possession of arms and magazines owned lawfully by millions of people across the United States, even within one's home. But this is just another area Petitioners were not even given the opportunity to explore. Respondents close their Response with examples of tragic shootings (notwithstanding that most gun violence is committed with handguns), and a plea to legislative deference (BIO 20). But such deference is not to be absolute or blind. It is supposed to be subject to rigorous scrutiny, based on "substantial evidence." *See Turner Broad. Sys. v. FCC*, 512 U.S. 622, 666 (1994). Part of that rigor should include the ability of the party

challenging the government's conclusions to test the evidence and theories upon which the government is relying. But that was not done here, as the lower court decided that relying on a similar case with different parties and a different geographic area was good enough. Petitioners ask this Court to demand more.

This Court should grant certiorari to reaffirm the fundamental nature of the Second Amendment right, that it applies to all law-abiding persons and the firearms in common use that they may wish to use for law-abiding purposes, and that denying the ability to exercise the right in the name of interest-balancing and analyses, untethered to this Court's holdings, violates the Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 17, 2020