No. 22A948

In the Supreme Court of the United States

NATIONAL ASSOCIATION FOR GUN RIGHTS, ET AL.,

Applicants,

v.

CITY OF NAPERVILLE, ET AL.

Respondents.

ON EMERGENCY APPLICATION FOR INJUNCTION PENDING APPEAL

BRIEF FOR *AMICUS CURIAE* JAVIER HERRERA IN SUPPORT OF APPLICANTS

Gene P. Hamilton
Reed D. Rubinstein
Michael Ding
AMERICA FIRST LEGAL FOUNDATION
511 Pennsylvania Ave. SE, Ste. 231
Washington, D.C. 20003
(202) 964-3721

Thomas R. McCarthy
Jeffrey M. Harris
Taylor A.R. Meehan
Counsel of Record
Gilbert C. Dickey
Matt Pociask*
C'Zar Bernstein*
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
taylor@consovoymccarthy.com

* *Supervised by principals of the firm who are members of the Virginia bar*

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE [1]

Dr. Javier Herrera is an appellant in a related appeal also pending in the U.S. Court of Appeals for the Seventh Circuit. *See Herrera v. Raoul*, No. 23-1793 (7th Cir.). Dr. Herrera is an ER doctor, a professor of medicine, and a medic for a Chicago-area SWAT team—a team that responds to hostage and active shooter situations and executes high-risk search warrants in Chicagoland's most dangerous neighborhoods. Dr. Herrera is also a law-abiding gun owner and, like Applicants, has brought a lawsuit to challenge the constitutionality of the same Illinois firearms ban and similar local bans. For Dr. Herrera, the combination of state and local laws precludes him from keeping the most commonly owned semiautomatic rifle in America in his home and purchasing replacement magazines or other components for it. They make it a practical impossibility for Dr. Herrera to participate in regular shooting drills with that rifle and other firearms training with his SWAT team—training that, consistent with best practices prescribed by the American College of Emergency Physicians for tactical medicine, would ensure that Dr. Herrera could safely disarm downed officers' firearms and otherwise safely handle the firearms that SWAT officers use for the team's dangerous and unpredictable missions. These laws also deem the 17-round magazine that comes standard with his handgun (and millions of others) an illegal "high-capacity" magazine.

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae* and his counsel, made any monetary contribution toward the preparation or submission of this brief.

Dr. Herrera's appeal raises similar constitutional questions as those in Applicants' case. At bottom, can the government ban the purchase and possession of commonly owned firearms—even in law-abiding Americans' homes? Relying on the denial of the preliminary injunction in Applicants' case, *see Bevis v. City of Naperville*, 2023 WL 2077392 (N.D. Ill. Feb. 17, 2023), the district court in Dr. Herrera's case denied his motion for preliminary injunction. *See Herrera v. Raoul*, 2023 WL 3074799, at *4 (N.D. Ill. Apr. 25, 2023). Both cases are now pending before the Seventh Circuit. Meanwhile, another district court preliminarily enjoined the same Illinois law on Second Amendment grounds, *see Barnett v. Raoul*, 2023 WL 3160285, at *1 (S.D. Ill. Apr. 28, 2023), and a state appellate court affirmed temporary injunctions on state-law grounds, *see Accuracy Firearms, LLC v. Pritzker*, 2023 IL App (5th) 230035, 2023 WL 1930130 (Ill. App. 2023). The State appealed those decisions and, relevant here, filed an emergency motion to stay the *Barnett* preliminary injunction order in the Seventh Circuit. Yesterday afternoon, the Seventh Circuit granted the State's motion and stayed the *Barnett* preliminary injunction pending further order from the Seventh Circuit. The order gives the *Barnett* plaintiffs until next week to respond regarding the stay and instructs them to address the Seventh Circuit's pre-*Bruen* decisions in *Friedman v. Highland Park*, 784 F.3d 406 (7th Cir. 2015), and *Wilson v. Cook County*, 937 F.3d 1028 (7th Cir. 2019). *See* Order of May 4, 2023, *Barnett v. Raoul*, No. 23-1825 (7th Cir.).

This *amicus curiae* brief brings Dr. Herrera's case and other related cases to the attention of the Court. And it addresses the critical error underlying the

erroneous denial of preliminary injunction motions in both Dr. Herrera's case and in Applicants' case—mistaking Justice Stevens's views in his dissenting opinion in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), as the opinion of this Court.

INTRODUCTION

The State of Illinois, as well as its largest county and city, have decided that they may ban commonly owned firearms and magazines from American homes—firearms and magazines that are more common than lawyers, teachers, and Ford F-150s in America.[2] The state and local governments defend these bans by focusing their sights on the dangers of *publicly carrying* such arms. Across the related cases, they have submitted hundreds of pages of expert reports detailing the statistically rare but universally horrific instances of public shootings perpetuated by evil and deranged killers. From there, they argue that the banned firearms are so dangerous that they are not covered by the Second Amendment's plain text. *See New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2129-30 (2022) (asking whether "Second Amendment's plain text covers an individual's conduct"). These are the same policy arguments that *Bruen* rejected as "one step too many," *id.* at 2117.

As for the historical inquiry that *Bruen* requires, the state and local governments are picking the wrong starting point. They have likened late-19th and 20th-

[2] *See* American Bar Association, *ABA Profile of the Legal Profession*, at 22 (2022), www.americanbar.org/content/dam/aba/administrative/news/2022/07/profile-report-2022.pdf (estimating 1.3 million lawyers); National Center for Education Statistics, *Teacher Characteristics and Trends*, https://nces.ed.gov/fastfacts/display.asp?id=28 (estimating 4 million teachers); *Miller v. Bonta*, 542 F. Supp. 3d 1009, 1022-23 & n.32 (S.D. Cal. 2021).

century laws regulating how particular arms could be carried in public with today's bans of semiautomatic rifles. Unless the government can constitutionally ban such arms anywhere and everywhere, including in law-abiding Americans' *homes*, then the governments must go back to the drawing board. The laws cannot continue as-is. They cannot infringe law-abiding citizens' constitutional rights, exercized in the privacy of their homes, or "those closely related acts necessary to their exercise," *Luis v. United States*, 578 U.S. 5, 26 (2016) (Thomas, J., concurring), including purchasing such arms and learning how to safely use them, *see Andrews v. State*, 50 Tenn. 165, 178 (1871) ("right of keeping arms … necessarily involves the right to purchase and use them in such a way as is usual"); *see also Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) ("[T]he core Second Amendment right to keep and bear arms for self-defense 'wouldn't mean much' without the ability to acquire arms." (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011))).

Reading the same history, another district court in a related case had told the State to do just that—go back to the drawing board. The court preliminarily enjoined the Illinois law after Applicants filed their emergency request for an injunction pending appeal here. *See Barnett v. Raoul*, 2023 WL 3160285 (S.D. Ill. Apr. 28, 2023). But yesterday, the Seventh Circuit stayed the *Barnett* preliminary injunction pending further order from the Seventh Circuit. There is now every reason for this Court to grant Applicants' request for relief pending appeal.

There was no basis for the Seventh Circuit to stay the *Barnett* district court's preliminary injunction. The Illinois law defies *Heller*, it defies *Bruen*, and it defies

millions of law-abiding Americans' constitutionally protected liberty to purchase and keep commonly owned firearms for lawful purposes, including in defense of hearth and home. The Seventh Circuit's order is unreasoned as to why the court believed it appropriate to issue a stay at this time. But the order includes these telling instructions: Any response regarding the Seventh Circuit's stay of the district court's preliminary injunction order "should discuss the bearing of *Friedman v. Highland Park*, 784 F.3d 406 (7th Cir. 2015), and *Wilson v. Cook County*, 937 F.3d 1028 (7th Cir. 2019)." Order of May 4, 2023, *Barnett v. Raoul*, No. 23-1825 (7th Cir.). *Friedman* and *Wilson* are Seventh Circuit decisions predating this Court's decision in *Bruen*. They were irreconcilable with *Heller* then, and they are irreconcilable with *Bruen* now. *See Friedman v. City of Highland Park, Ill.*, 136 S. Ct. 447, 448-49 (2015) (Thomas, J., dissenting from denial of certiorari). In upholding AR-15 bans like those at issue here, *Friedman* and *Wilson* reasoned that such "matters are left to the legislative process" and deferred to the government's policy reasons for such laws. *Friedman*, 784 F.3d at 411-12 (discussing ban's "substantial benefit"); *accord Wilson*, 937 F.3d at 1036. While *Friedman* and *Wilson* might have been consistent with the prevailing approach of the courts of appeals before *Bruen*, after *Bruen* it is clear that "the government may not simply posit that [its] regulation promotes an important interest." *Bruen*, 142 S. Ct. at 2126. For such matters touching on fundamental rights of law-abiding citizens, the government must instead "demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.*

ARGUMENT

Various plaintiffs are challenging an Illinois firearms ban enacted only months after this Court's decision in *Bruen*. District courts in Illinois have reached opposite conclusions about the constitutionality of this state law and similar local laws. In two cases in the U.S. District Court for the Northern District of Illinois, the court denied motions for preliminary injunctions. *See Bevis v. City of Naperville*, 2023 WL 2077392 (N.D. Ill. Feb. 17, 2023); *Herrera v. Raoul*, 2023 WL 3074799 (N.D. Ill. Apr. 25, 2023). Then last Friday, the U.S. District Court for the Southern District of Illinois granted motions for preliminary injunctions, with the effect of preliminarily enjoining enforcement of the Illinois law statewide. *See Barnett v. Raoul*, 2023 WL 3160285 (S.D. Ill. Apr. 28, 2023). Those district court decisions are all now before the U.S. Court of Appeals for the Seventh Circuit, which has so far sided with the government in denying Applicants' motion for an injunction pending appeal and granting the State's motion for a stay pending appeal pending further order from that court.

I. There is no historical tradition of banning commonly owned firearms and magazines from American homes.

One thing is clear—on the merits, the district courts that denied Applicants' and *amicus* Dr. Herrera's preliminary injunction motions did so by mistaking the dissenting opinion's views in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), as the majority opinion of this Court. Unsurprisingly then, the district courts' decisions are irreconcilable with this Court's decision in *Bruen*. In the Applicants' case, the district court concluded that there is a historical tradition of leaving firearms "unprotected" if they are "particularly 'dangerous' weapons"—meaning sales and possession

of otherwise commonly owned firearms could be banned entirely. *Bevis*, 2023 WL 2077392, at *9. In *amicus* Dr. Herrera's case, the district court went a step further, citing *McDonald* to support that supposed historical tradition of banning "particularly 'dangerous' weapons," including in law-abiding Americans' homes:

> The [Supreme] Court noted that "[f]rom the early days of the Republic, through the Reconstruction era, to the present day, States and municipalities ... banned altogether the possession of especially dangerous weapons." [*McDonald*, 561 U.S.] at 899–900. The Court remarked that "[t]his history of intrusive regulation is not surprising given that the very text of the Second Amendment calls out for regulation, and the ability to respond to the social ills associated with dangerous weapons goes to the very core of the States' police powers." *Id.* at 900–01.

Herrera, 2023 WL 3074799, at *5. But the quoted text is not the opinion of the Court. It is from Justice Stevens's dissenting opinion in *McDonald*. This Court has never endorsed a tradition of banning "especially dangerous weapons" or "particularly dangerous weapons." The notion that commonly owned arms like those at issue here could be "banned altogether" is contrary to *Heller*. *Compare District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (holding Second Amendment encompasses the individual right to "use arms in defense of heath and home," including handguns even if they were particularly dangerous among criminals), *with id.* at 694-95 (Breyer, J., dissenting) (noting pistols were "7 times more likely to be lethal than a crime committed with any other weapon" (quotation marks omitted)); *accord Caetano v. Massachusetts*, 577 U.S. 411, 418 (2016) (Alito, J., concurring) ("the relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes"). And it is contrary to *Bruen*. There's no historical tradition

of broadly banning commonly owned firearms, especially in Americans' homes. *See Bruen*, 142 S. Ct. at 2126, 2138, 2143.

History tells a different story. And it is that history that defendants must grapple with after *Bruen*. There is no historical tradition of banning arms in law-abiding citizens' homes. Instead, the most analogous history—militia acts preceding ratification of the Second Amendment—shows that colonial governments r*equired* colonists to keep commonly arms in their homes that would be suitable for both individual and collective self-defense. *See United States v. Miller*, 307 U.S. 174, 179-80 (1939).[3] Male colonists were often expected to supply their own firearms to form a civilian army for the collective defense of the colonies. *See id*. Fail to keep the required arms in their homes, and they would face fines. *See id.*

Firearms bans that extend into law-abiding citizens' homes thus forbid the very conduct that colonial- and founding-era statutes required, and that could still be useful today in times of unexpected wartime conflict. The State of Illinois seeks to extinguish widely popular semiautomatic rifles. But citizens' proficiency and familiarity with those civilian rifles and other firearms is what enables the armed forces to expand quickly in times of unexpected conflict by calling on everyday Americans to support the common defense. *See* Robert Leider, *Deciphering the "Armed Forces of the United States,"* 57 Wake Forest L. Rev. 1195, 1279 (2022) (explaining how the right

[3] In Dr. Herrera's case, Dr. Herrera supported his request for a preliminary injunction with a statutory appendix containing copies of militia acts. *See* Exhibit 1 at pp.75-183, Reply in Support of Preliminary Injunction, *Herrera v. Raoul*, No. 1:23-cv-532, ECF 63-1.

to keep and bear arms ensures that non-active duty citizens "can stay proficient with arms in peacetime so that they can use them effectively in wartime," including any "wartime emergencies that require an immediate expansion of the Armed Forces without time to retool civilian industry for wartime arms production"). In short, the arms banned by Appellees' laws are the modern-day version of the minuteman's musket—arms that in another era would have been required to have been kept in American homes.

II. If concealed carry regulations are sufficiently analogous to justify banning commonly owned firearms at home, then *Bruen* is a blank check.

The public carry regulations relied upon by the courts below—many of which this Court already parsed in *Bruen*—provide no support for banning firearms altogether, especially inside homes. These late-19th and 20th century laws regulated the concealed carry of certain arms, mainly Bowie knives and pistols, in *public*. The same laws *protected* possession and use of otherwise-restricted arms by travelers or on the premises of one's home.[4] Moreover, those late-19th and 20th century laws were *not* uniformly upheld. *But see Bevis*, 2023 WL 2077392, at *11 (misstating that the laws were "uniformly upheld"). The Court of Appeals of Kentucky invalidated an act proscribing the concealed carry of "a pocket pistol, dirk, large knife, or sword in a cane." *Bliss v. Commonwealth*, 12 Ky. 90, 90, 93-94 (1822). Likewise, the Supreme Court of

[4] *See, e.g.*, 1871 Tex. Laws 25, §1 (Apr. 12, 1871) (exempting premises or place of business); 1881 Ark. Acts 191, no. 96, §1 (exempting those "upon a journey or upon his own premises"); 1882 Acts of West Virginia 421-22, §7 ("about his dwelling house"); 1889 Ariz. Terr. Sess. Laws 16, §2 (exempting "premises or place of business" or "traveling"); *see also, e.g.*, *McDonald v. State*, 102 S.W. 703, 703 (Ark. 1907).

Georgia explained that prohibitions "against bearing arms openly"—including Bowie knives—are unconstitutional and "void." *Nunn v. State*, 1 Ga. 243, 251 (1846). And the Supreme Court of Texas affirmed that the "right to carry a bowie-knife for lawful defense is secured," despite being "an exceeding[ly] destructive weapon." *Cockrum v. State*, 24 Tex. 394, 402 (1859). While later knife restrictions were upheld or unchallenged, the courts below were wrong to give this "postenactment history more weight than it can rightly bear." *Bruen*, 142 S. Ct. at 2136-37; *id.* at 2147 n.22 (rejecting "statute enacted … nearly 70 years after the ratification of the Bill of Rights"); *id.* at 2154 (rejecting "late-19th century" evidence). If those laws are sufficiently analogous to ban commonly owned firearms from law-abiding Americans' homes, as the government contends they are, then *Bruen*'s historical inquiry is a blank check.

At most, these public carry restrictions are related to an earlier historical tradition that permits governments to regulate the "*carrying*" of certain "dangerous and unusual weapons" in public. *Heller*, 554 U.S. at 627 (emphasis added). That historical tradition dates back to the common-law offense of affray.[5] But that common-law tradition of prohibiting menaces from going into public ("riding or going armed") to

[5] Both "dangerous *and* unusual weapons" and "dangerous *or* unusual weapons" appear in other 18th-century legal treatises summarizing the offense of affray. *See*, *e.g.*, 1 Hawkins, *A Treatise of the Pleas of the Crown* 266 (1777); 4 Blackstone, *Commentaries on the Laws of England* 148–149 (1769); 3 Wood, *An Institute of the Laws of England* 430 (1754). Different treatises use different conjunctions. *Compare* 1 Hawkins 266 *and* 3 Wood 453 ("and"), *with* 4 Blackstone 149 ("or"). The phrase, read in context, is akin to a term of art to describe a class of weapons that would implicate the common-law offense of affray. "[C]ommon weapons" would not implicate that common-law offense. *See* "Affray," 1 T. Cunningham, *A New and Complete Law Dictionary* (1764); *accord Caetano*, 577 U.S. at 417 (Alito, J., concurring) (weapons must be not just "dangerous" but also "unusual").

"terrify[]" others, 4 Blackstone 148-49, is not tantamount to a historical tradition that can justify today's bans on the most popular rifles in the country.

For these reasons and those raised by Applicants and other *amici*, there is no historical tradition of banning "particularly dangerous arms," let alone a historical tradition of imposing criminal punishments on otherwise law-abiding Americans who wish to purchase semiautomatic rifles and keep them inside their homes. The government cannot deprive the "constitutional privilege" of those law-abiding citizens by pointing to the acts of "cowardly and dishonorable" criminals. *Wilson v. State*, 33 Ark. 557, 560 (Ark. 1878). Those "evil[s] must be prevented by the penitentiary and gallows," *id.*, not by banning the country's most commonly owned rifles and magazines from law-abiding Americans' homes.

CONCLUSION

For the foregoing reasons, especially in light of the Seventh Circuit's intervening stay of the *Barnett* preliminary injunction, the Court should grant the application.

Respectfully submitted,

Gene P. Hamilton
Reed D. Rubinstein
Michael Ding
AMERICA FIRST LEGAL FOUNDATION
511 Pennsylvania Ave. SE, Ste. 231
Washington, D.C. 20003
(202) 964-3721

Thomas R. McCarthy
Jeffrey M. Harris
Taylor A.R. Meehan
Counsel of Record
Gilbert C. Dickey
Matt Pociask*
C'Zar Bernstein*
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
taylor@consovoymccarthy.com

* *Supervised by principals of the firm who are members of the Virginia bar*

Counsel for Amicus Curiae

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