No. 22A948

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
Intervenor-Respondent.

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

RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION FOR INJUNCTION PENDING APPELLATE REVIEW

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INTRODUCTION

In accordance with Justice Barrett's order of May 1, 2023, Intervenor-Respondent the State of Illinois responds to the "Emergency Application for Injunction Pending Appellate Review" filed by Applicants National Association for Gun Rights, Robert C. Bevis, and Law Weapons, Inc., d/b/a Law Weapons & Supply.

Applicants' extraordinary request to enjoin a presumptively valid state statute while their interlocutory appeal is pending in the United States Court of Appeals for the Seventh Circuit should be denied. Applicants have not attempted to make—and cannot make—the essential threshold showings that this Court would be likely to grant certiorari in this interlocutory appeal or that an injunction pending appeal would be in aid of this Court's jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a). On those grounds alone, the application should be denied.

Beyond that, applicants have not shown that it is indisputably clear that they will prevail on their claim that the Protect Illinois Communities Act, Illinois Public Act 102-1116 ("Act"), violates the Second Amendment. Nor could they, since this Court has not addressed a Second Amendment challenge to a law similar to the Act, and—after applying the two-step framework set forth in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022)—two district courts have declined to enjoin the Act and four more district courts have declined to enjoin similar laws. These decisions confirm that it is not indisputable that

applicants will succeed on the merits of their claim.[1]

Applicants also have failed to show that crucial or exigent circumstances exist that would require this Court's immediate intervention. Applicants delayed seeking an injunction pending appeal at each stage of these proceedings, belying their argument that they need emergency relief. Then, to support the existence of an emergency, applicants rely on a presumption of irreparable harm that this Court has never applied outside of First Amendment cases, again demonstrating that their right to relief is not indisputably clear. Otherwise, they rely on inapposite court of appeals precedent and the alleged financial losses of a single gun store, neither of which shows that they will incur irreparable harm absent an injunction pending appeal.

STATEMENT OF THE CASE

A. Regulatory background.

On July 4, 2022, a shooter armed with a semiautomatic AR-15 rifle and 30-round magazines opened fire on an Independence Day parade in Highland Park, Illinois.[2] The weapon allowed the shooter to fire 83 rounds in less than a minute, killing 7 and wounding 48.[3] Among the victims were an eight-year-old boy left

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[1] The district court in *Barnett v. Raoul*, No. 3:23-cv-00209-SPM, 2023 U.S. Dist. LEXIS 74756 (S.D. Ill. Apr. 28, 2023), entered a preliminary injunction precluding the State from enforcing the Act, but the Seventh Circuit has stayed that injunction pending further order of the court, *Barnett v. Raoul*, No. 23-1825, ECF No. 9 (7th Cir.).

[2] Victoria Kim & Amanda Holpuch, What We Know About The Shooting In Highland Park, N.Y. Times, http://bit.ly/3ytxFZv (July 7, 2022).

[3] Peter Hancock, Lawmakers Hear from Advocates for Assault Weapon Ban, Capitol News Illinois, http://bit.ly/3Jw80WG (Dec. 12, 2022); Shia Kapos, Illinois

paralyzed from the waist down and both parents of a two-year-old child.[4] A Highland Park ordinance prohibited the sale of assault weapons, but the shooter had legally purchased the murder weapon elsewhere in Illinois.[5]

One month later, Naperville passed an ordinance prohibiting the sale of assault weapons within city limits. Doc. 57-2.[6] And on January 10, 2023, the State passed the Act, which restricts the sale, purchase, manufacture, delivery, or importation of "assault weapon[s]" and "large capacity ammunition feeding device[s]" ("LCMs") in Illinois subject to certain exceptions, including for law enforcement, members of the military, and other professionals with similar firearms training and experience. 720 ILCS 5/24-1.9, 1.10. The Act adopts a two-fold definition of assault weapons, in which it identifies specific weapons by name (*e.g.*, AR-15 and AK-47 rifles) and lists features that, individually or in combination, make specific firearms "assault weapons" (*e.g.*, flash suppressors, barrel shrouds, or grenade launchers). *Id.* 24-1.9(a)(1)(A)-(L). The Act excludes most commonly owned handguns, as well as firearms operated by bolt, pump, lever, or slide action, from that definition. *Id.* 24-1.9(a)(2). LCMs are defined as a magazine or similar

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House Passes Assault Gun Bill, Politico, http://bit.ly/3YwxU0E (Jan. 6, 2023).

[4] Associated Press, Highland Park Parade Shooting Suspect Pleads Not Guilty, http://bit.ly/423ISxG (Aug. 3, 2022); ABC7 Chicago Digital Team, Highland Park Shooting: Orphaned Toddler Doesn't Know Parents Are Dead, https://bit.ly/3J7WI9v (July 8, 2022).

[5] Kim & Holpuch, *supra* note 2.

[6] The emergency application is cited as "App.__." The appendix attached to that application is cited as "Appx. ___." Citations to the district court docket are identified by the docket number and page number if applicable, *e.g.*, "Doc. __ at __." Similarly, the Seventh Circuit docket is cited as "7th Cir. Doc. __ at __."

device that can accept more than 10 rounds of ammunition for a long gun or more than 15 rounds for handguns. *Id.* 24-1.10(a)(1).

Individuals who lawfully possessed assault weapons and LCMs prior to the Act can continue to do so. *Id.* 1.9(c)-(d) & 1.10(c)-(d). To continue lawfully possessing an assault weapon, an individual must submit to the State Police an endorsement affidavit by January 1, 2024. *Id.* 24-1.9(d). This requirement does not extend to LCMs. *Id.* 24-1.10(d).

B. Applicants file suit and seek preliminary injunctive relief.

In September 2022, applicants—an advocacy group, a gun store, and the store's owner—filed a complaint against Naperville claiming that its ordinance banning the commercial sale of certain assault rifles within the city limits violated their Second Amendment rights. Doc. 1 at 1-3. Two months later, applicants moved for a temporary restraining order and preliminary injunction to prohibit the Naperville ordinance from taking effect. Doc. 10. Naperville filed a response and supplemental brief defending the ordinance's constitutionality. Docs. 12, 34. As support, Naperville relied on declarations from experts that addressed the historical underpinnings of state and local regulations of assault weapons, the evolution of firearms technology, and the emergence of deadly mass shootings in recent decades, among other topics. Doc. 34-1.

On January 24, 2023, applicants filed an amended complaint adding a claim that the Act violated the Second Amendment. Doc. 48 at 1, 6-7. They named no state officials as defendants, but named Naperville Police Chief Jason Arres on the

theory that he was responsible for enforcing the Act against them. *Id.* at 1, 3. That same day, applicants filed a motion for a temporary restraining order and preliminary injunction seeking to enjoin Arres from enforcing the Act. Doc. 50 at 1, 13-25. Their motion did not include any argument related to inadequate remedy at law, irreparable harm, or equitable balancing. *Id.* In support, applicants attached a declaration from an employee of a firearms industry trade association, stating that, between 1990 and 2021, more than 20 million AR-platform rifles were manufactured in the United States, such rifles were "owned by millions of persons," and there were at least 150 million LCMs "in possession of American citizens." Doc. 50-3 ¶ 7. They also attached a declaration from the gun store's owner stating that a "substantial part" of his business included sales of assault weapons and LCMs. Doc. 50-2 ¶ 3.

Naperville responded, arguing that applicants were unlikely to succeed on the merits because the Act was constitutional under *Bruen*'s text-and-history standard. Doc. 57 at 9-14. In support, Naperville attached eight expert declarations. Many of these described the unique danger and lethality of assault weapons, Doc. 57-4 ¶¶ 25-57; Doc. 57-6 ¶¶ 12-35; Doc. 57-9 ¶¶ 19-30, and explained that they were developed and marketed as military-style offensive weapons rather than as a means for self-defense, Doc. 57-5 ¶¶ 24-42; Doc. 57-11 ¶¶ 56-58. In fact, the experts recounted, assault weapons and LCMs are not as effective or suitable for self-defense as handguns and shotguns, Doc. 57-4 ¶¶ 58-61, and are not in common use for those purposes, Doc. 57-4 ¶ 36; Doc. 57-7 ¶¶ 27-29. On the

contrary, they are increasingly used in crimes of violence, including mass shootings. Doc. 57-4 ¶¶ 41-57; Doc. 57-7 ¶¶ 10-22; Doc. 57-8 ¶¶ 54-61.

Naperville also presented historical evidence demonstrating that from the colonial era onward, States have regulated weapons that were thought to be especially dangerous and unusual—from knives, clubs, pistols, and revolvers in the 18th and 19th centuries to automatic and semiautomatic firearms in the early 20th century. Doc. 58-7; Doc. 57-10; Doc. 57-11. In particular, it offered evidence that there is a longstanding and regular course of practice in this country whereby a weapon is introduced into society, proliferates to the point where its use has become a significant threat to public safety, and is then regulated by the government to curb violence and protect the public. *E.g.*, Doc. 57-10 ¶ 8.

C. The district court denies preliminary injunctive relief.

On February 17, the district court denied applicants' motions. Doc. 63. First, the court determined that they "are unlikely to succeed on the merits of their claim because Naperville's Ordinance and the . . . Act are consistent with the Second Amendment's text, history, and tradition." *Id.* at 5. In particular, the court explained, "the text of the Second Amendment is limited to only certain arms, and history and tradition demonstrate that particularly 'dangerous' weapons are unprotected." *Id.* at 18. "Because assault weapons are particularly dangerous weapons and high-capacity magazines are particularly dangerous weapon accessories, their regulation accords with history and tradition." *Id.* at 30.

The court also found that applicants had not demonstrated that they would suffer irreparable harm because the gun store could "still sell almost any other type of gun" and the advocacy group's members could acquire "other effective weapons for self-defense." *Id.* at 32. Finally, as to the balancing of equities, the court found that Naperville had "compellingly argue[d]" that the Act and the ordinance would protect public safety. *Id.* at 33.

D. Applicants' motions for an injunction pending appeal are denied.

On February 21, applicants filed a notice of appeal. Doc. 64. Two days later, the State filed motions to intervene in the district court and the Seventh Circuit under 28 U.S.C. § 2403(b) and Federal Rule of Civil Procedure 5.1, which were allowed. Docs. 68, 70; 7th Cir. Docs. 3, 7. On February 28, 11 days after the district court denied their motions for a preliminary injunction, applicants filed a motion for an injunction pending appeal in the district court, arguing for the first time that they established irreparable harm and that any injunction protecting their alleged constitutional rights would be in the public interest. Doc. 71. As support, applicants cited a supplemental declaration from the gun store's owner claiming that it would be "forced out of business." Doc. 71-1 ¶ 10. The State filed a motion for leave to respond. Doc. 72. On March 2, the district court denied applicants' motion based on the reasoning of its February 17 order and denied the State's motion as moot. Doc. 73.

Five days later, on March 7, applicants moved for an injunction pending appeal in the Seventh Circuit, seeking an injunction based on the same arguments

they pressed below. 7th Cir. Doc. 8. Defendants filed responses objecting to entry of an injunction. 7th Cir. Docs. 13, 17. The State submitted appendices in support of its response that included expert declarations it has submitted in defense of the Act in other federal cases and that it intends to submit in the district court when afforded the opportunity. 7th Cir. Docs. 14, 15.

On April 3, applicants filed their opening brief on the merits in the Seventh Circuit. 7th Cir. Doc. 27. On April 18, the Seventh Circuit denied applicants' motion for injunction pending appeal. 7th Cir. Doc. 51. Eight days later, on April 26, applicants submitted their emergency application for an injunction pending appeal to this Court. App. 30. And on May 3, the State and Naperville filed their response briefs in the Seventh Circuit. 7th Cir. Docs. 56, 59.

ARGUMENT

The application for an injunction pending appeal should be denied. Because applicants ask this Court to disturb the Seventh Circuit's decision to deny their motion for injunction pending appeal, they "bear an augmented burden" of showing "that the Court eventually either will grant certiorari or note probable jurisdiction." *Certain Named and Unnamed Non-citizen Children v. Texas*, 448 U.S. 1327, 1331 (1980) (Powell, J., in chambers). Furthermore, any injunction pending appeal must be "necessary or appropriate in aid of [this Court's] jurisdiction." 28 U.S.C. § 1651(a); see also *Wis. Right to Life, Inc. v. Fed. Elections Comm'n*, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers) (same).

And as with any request for an injunction, applicants must make a "strong showing" that they are likely to prevail on the merits, that they will suffer irreparable harm absent an injunction, and that an injunction would not harm the public interest. *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) (cleaned up). Moreover, applicants' request would "not simply suspend judicial alteration of the status quo"; they seek to alter the status quo and obtain "judicial intervention that has been withheld by lower courts." *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers) (cleaned up). Such relief thus "demands a significantly higher justification" than that needed for a stay. *Ohio Citizens for Reasonable Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers). To obtain it, "an applicant must demonstrate that the legal rights at issue are indisputably clear," *Lux*, 561 U.S. at 1307 (cleaned

up), and that "the most critical and exigent circumstances" exist before "the enforcement of a presumptively valid state statute" will be enjoined, *Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J., in chambers) (cleaned up).

For several reasons, applicants have not met this heightened standard. First, they have ignored the essential threshold issues of whether the Court will grant interlocutory review in this case (which is unlikely) and whether an injunction pending appeal would be in aid of this Court's jurisdiction (which it would not). Second, applicants have not shown that they have an indisputably clear right to relief because this Court has not addressed the constitutionality of a law similar to the Act, and it is not indisputably clear that they will prevail under *Bruen*'s two-step test for Second Amendment challenges. And third, applicants have not shown that critical or exigent circumstances exist. In fact, they have delayed in seeking emergency relief, they have not shown that they will suffer any irreparable harm absent an injunction, and any alleged harm is outweighed by the public interest in keeping the Act in effect.

I. Applicants Have Not Shown That This Court Is Likely To Grant Certiorari Or That An Injunction Would Be In Aid Of The Court's Jurisdiction.

At the outset, applicants have not made the "exceptional" showing that the Court is likely to grant certiorari to review either the district court's denial of a preliminary injunction or the Seventh Circuit's forthcoming decision on appeal from that denial. *Certain Named and Unnamed Non-citizen Children*, 448 U.S. at 1331. In fact, the Court is unlikely to grant review because there is no circuit split on the

question presented in this appeal, further percolation on this question is warranted, and the Court generally declines to review interlocutory appeals.

1. To start, there is no conflict among the United States Courts of Appeal or the state courts of last resort as to the question presented in the emergency application. See U.S. Sup. Ct. R. 10. In fact, since *Bruen*, district courts have almost uniformly denied motions for preliminary injunctions as to the Act and similar statutes. See *Herrera v. Raoul*, No. 23 CV 532, 2023 U.S. Dist. LEXIS 71756 (N.D. Ill. Apr. 25, 2023) appeal docketed No. 23-1793 (7th Cir. Apr. 26, 2023); *Hanson v. Dist. of Columbia*, No. CV 22-2256 (RC), 2023 U.S. Dist. LEXIS 68782 (D.D.C. Apr. 20, 2023); *Del. State Sportsmen's Ass'n, Inc. v. Del. Dep't of Safety & Homeland Sec.*, No. CV 22-951-RGA, 2023 U.S. Dist. LEXIS 51322 (D. Del. Mar. 27, 2023) appeal docketed No. 23-1633 (3d Cir. Apr. 7, 2023); *Ocean State Tactical, LLC v. Rhode Island*, No. 22-CV-246 JJM-PAS, 2022 U.S. Dist. LEXIS 227097 (D.R.I. Dec. 14, 2022) appeal docketed No. 23-01072 (1st Cir. Jan. 23, 2023); *Or. Firearms Fed'n, Inc. v. Brown*, No. 2:22-CV-01815-IM, 2022 U.S. Dist. LEXIS 219391 (D. Or. Dec. 6, 2022) appeal voluntarily dismissed No. 22-36011 (9th Cir. Dec. 12, 2022); but see *Barnett*, 2023 U.S. Dist. LEXIS 74756 appeal docketed No. 23-1825 (7th Cir. May 1, 2023) and order stayed, ECF No. 9 (7th Cir. May 4, 2023). No courts of appeal have resolved any appeals from those decisions. Accordingly, this case does not satisfy the Court's criteria for certiorari review, and, at the very least, further percolation is warranted. See *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (per curiam) (describing "ordinary practice of denying

[certiorari] petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals").

2. The interlocutory posture of this case is an additional reason why the Court is unlikely to grant certiorari. As detailed *infra* pp. 14-32, this case and others like it present complex legal issues requiring fully developed evidentiary and historical records. The Court, therefore, would benefit from further development of the parties' evidence and argument. This is especially true because the district court denied applicants' motions for preliminary injunction before the State had intervened and presented any evidence or arguments as to the Act's constitutionality. See Docs. 63, 68, 70, 73. In fact, this Court usually denies review when a case is in an interlocutory posture—even when it presents a significant constitutional question. See, *e.g.*, *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Am. Constr. Co. v. Jacksonville, Tampa & Key West Ry. Co.*, 148 U.S. 372, 384 (1893); see also *Abbott v. Veasey*, 580 U.S. 1104, 1104-05 (2017) (Roberts, C.J., statement respecting denial of certiorari); *Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 945 (2012) (Alito, J., statement respecting denial of certiorari); *Wrotten v. New York*, 560 U.S. 959, 960 (2010) (Sotomayor, J., statement respecting denial of certiorari); *Va. Mil. Inst. v. United States*, 113 S. Ct. 2431, 2431-32 (1993) (Scalia, J., statement respecting denial of certiorari). That this is an interlocutory appeal thus is another reason why this Court is unlikely to grant certiorari.

3. Nor have applicants explained why an injunction pending appeal

would be in aid of this Court's jurisdiction, as required by 28 U.S.C. § 1651(a). Should the Seventh Circuit affirm the district court's denial of the preliminary injunction, applicants could petition this Court for a writ of certiorari. And if the district court proceedings are resolved by a final judgment in the State's favor, applicants could appeal that decision, too. Declining to enjoin the Act now will not preclude this Court from later exercising its jurisdiction when the record and arguments have further developed. *E.g.*, *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1404 (2012) (Sotomayor, J., in chambers) (injunction pending appeal would not be in aid of Court's jurisdiction because "applicants may continue their challenge to the regulations in the lower courts" and "file a petition for a writ of certiorari" after "final judgment"). And the parties are acting promptly in the Seventh Circuit—the opening and response briefs have been filed on schedule, the reply brief is to be filed on May 24, and the State stands ready for oral argument at the court's earliest convenience. See *Doe v. Gonzales*, 546 U.S. 1301, 1308 (2005) (Ginsburg, J., in chambers) (declining to vacate Second Circuit stay order where "principal briefs [had] been filed" and court appeared to be "proceeding to adjudication on the merits with due expedition").

As noted, applicants do not address these issues. See App. 6-30. Instead, they principally argue that the district court erred in denying a preliminary injunction, see *id.* at 14-27, but this Court is not a court of error correction, see U.S. Sup. Ct. R. 10. On this basis alone, therefore, their application should be denied. But as discussed below, applicants also have not established the remaining

requirements for emergency injunctive relief.

II. Applicants Have Not Shown That They Are Indisputably Entitled To Relief.

Applicants have not shown that it is indisputably clear that they would prevail on appeal to this Court. This Court has not addressed the validity of laws, like the Act, that restrict the manufacture, sale, or possession of assault weapons or LCMs. And as noted *supra* p. 11, lower courts are almost uniform in rejecting Second Amendment challenges to such laws since *Bruen*. For this reason, the application should be denied. See *Hobby Lobby*, 568 U.S. at 1403 (right to relief not indisputably clear where Court had not previously addressed issues raised in application).

Nor have applicants shown that it is indisputably clear that they will prevail under the two-step test developed in *Bruen*. At the first step of that test, applicants bear the burden of showing that assault weapons and LCMs are "bearable arms" in "common use today for self-defense." *Bruen*, 142 S. Ct. at 2132, 2134 (cleaned up). If they satisfy that burden, then at the second step, the government "must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 2126. At either step, applicants' right to relief is not indisputably clear.

A. It is not indisputably clear that the Act regulates conduct protected by the Second Amendment.

To satisfy their burden at step one, applicants must prove that the regulated items fit within the category of "bearable arms" that are presumptively protected by

the Second Amendment. *Bruen*, 142 S. Ct. at 2132. *Bruen* reiterated that the Second Amendment right "'is not unlimited.'" *Id.* at 2128 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)). On the contrary, it "extends only to certain types of weapons." *Heller*, 554 U.S. at 623; see also *id.* at 626 (no "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose"). Namely, the Amendment protects firearms that are "commonly used" for self-defense. *Bruen*, 142 S. Ct. at 2138; see also *id.* at 2132 (Amendment protects only "instruments that facilitate armed self-defense"); *McDonald v. City of Chi.*, 561 U.S. 742, 749-50 (2010) ("[T]he Second Amendment protects the right to keep and bear arms for the purpose of self-defense."). Accordingly, firearms that do not fit within that category, such as "weapons that are most useful in military service—M-16 rifles and the like—may be banned." *Heller*, 554 U.S. at 627.

1. To begin, it is not indisputable that applicants will satisfy their step-one burden with respect to the LCM restrictions because LCMs are accessories, not "arms," and thus are not within the scope of the Second Amendment. As a historical matter, the term "arms" referred to weapons and excluded related accessories like ammunition or ammunition containers, which were referred to as "accoutrements." *Heller*, 554 U.S. at 581 (citing 1773 edition of dictionary defining "arms" as "[w]eapons of offence, or armour of defence"); *Ocean State Tactical*, 2022 U.S. Dist. LEXIS 227097, *33 (from Founding through Reconstruction, "[t]he word 'Arms' was a general term for weapons such as swords, knives, rifles, and pistols,

but it did not include ammunition, ammunition containers, flints, scabbards, holsters, or 'parts' of the weapons such as the trigger, or a cartridge box"); 7th Cir. Doc. 15 at A522 (common phrase "arms and accoutrements" distinguished weapons from items that stored ammunition); *id.* at A538 (compiling examples of this distinction and explaining that "in literally hundreds of cases, 'arms' and 'accoutrements' are treated as separate categories of military gear").

In fact, there is ample historical evidence that, during the Founding era and Reconstruction, cartridge cases and boxes were "viewed as accoutrements," not "arms." 7th Cir. Doc. 15 at A529-30; see also *id.* at A531-36 (collecting historical examples of cartridge boxes being considered "accoutrements"). Because LCMs, like cartridge cases and boxes, "are containers which hold ammunition," 7th Cir. Doc. 15 at A492, it is not indisputable that they are "arms" within the meaning of the Second Amendment. *E.g.*, *id.*; see also *Ocean State Tactical*, 2022 U.S. Dist. LEXIS 227097, *31 ("LCMs, like other accessories to weapons, are not used in a way that 'cast[s] at or strike[s] another.'") (quoting *Heller*, 554 U.S. at 581); 7th Cir. Doc. 37-7 at A496 ("Because a [LCM] is not a required component for a firearm to operate, it is characterized as an accessory by the industry.").

2. Even if LCMs indisputably were "arms," applicants have not shown that it is indisputable that assault weapons or LCMs are commonly used for self-defense. To satisfy their step-one burden, applicants rely on a handful of sources providing ownership and manufacture estimates for varying categories of firearms and accessories. App. 7-10. Much of this evidence was not before the district court,

however, further demonstrating that the evidentiary record is inadequate to warrant emergency relief. See Appx. 150-56; Docs. 50-1 through 50-3; see also, *e.g.*, *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 486 n.3 (1986) (Court will not consider "facts not part of the record").

This evidence also is insufficient for several reasons. For starters, it is not probative of the relevant question: whether the instruments regulated by the Act are commonly used for self-defense. *Bruen*, 142 S. Ct. at 2132, 2138; see also *supra* p. 15. Rather, as applicants admit, their evidence purports to show commonality of manufacture, sale, and ownership for any lawful purpose. *E.g.*, App. 6-8. But this proves nothing about whether assault weapons and LCMs are commonly used for self-defense.

And even if relevant, applicants' evidence—primarily online studies and news articles—is unreliable and otherwise flawed. Applicants rely heavily on the claim that 24 million Americans have, at some point, owned "AR-15 or similar rifles" for lawful purposes. App. 7. This estimate, however, comes from an unpublished, non-peer-reviewed paper recounting an online survey that does not disclose its sources of funding or measurement tools, *ibid.* (citing William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* (May 13, 2022)), and is contradicted by industry and government data showing that only 6.4 million gun owners (less than 8% of the 81 million gun owners in the United States and 2% of all Americans) possess assault weapons, Doc. 57-7 ¶ 27.[7] Several of

[7] One of the expert reports Naperville submitted noted that while there are approximately 24.4 million assault weapons (out of an estimated 461.9 million

applicants' other sources also do not address whether each of the regulated instruments is commonly used for self-defense and instead provide ownership or manufacturing statistics. *E.g.*, App. 7-8 (citing Washington Post survey for proposition that "6% of American adults . . . own an AR-15-style rifle," Congressional Research Service Study indicating that "in 2020 alone, 2.8 million AR- or AK-type rifles were introduced into the U.S. civilian gun stock," and trade industry survey stating that AR-platform rifles were "nearly half of all rifles produced in 2018 and nearly 20% of all firearms . . . sold in 2020").

Applicants next contend that "AR-platform rifles are used extremely rarely in crime," App. 9, but these statistics are unhelpful because they also offer no insight into whether assault weapons are commonly used for self-defense. And they overlook the evidence that these firearms are disproportionately used in high-fatality incidents. Doc. 57-7 ¶ 12 ("62% of all high-fatality mass shooting deaths" from 2019 to 2022 "involve[ed] assault weapons"). And another of applicants' sources confirms that assault weapons are not commonly used for self-defense, indicating that handguns—not assault weapons—accounted for the large majority of defensive firearms use. English, *supra* p. 17, at 10-11 (cited at App. 10-11). According to the paper, only 13% of incidents of self-defense with guns involve rifles of any kind. *Ibid.* And because the paper does not distinguish among types of rifles, it is unclear whether *any* of this 13% includes weapons restricted by the

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firearms) in circulation, they are owned by only 6.4 million Americans. Doc. 57-7 ¶ 24, n.21.

Act. *Ibid.*

For LCMs, applicants cite an estimate that 150 million magazines with a capacity greater than 10 rounds are "owned by law-abiding American citizens." App. 9. But this estimate was proffered by a declarant who provided no information on how he reached that number. Appx. 184. Nor do applicants make any attempt to explain how these statistics, which use undefined and otherwise vague terms, line up with the items regulated by the Act. See *Del. State Sportsmen's Ass'n*, 2023 U.S. Dist. LEXIS 51322, *13 (plaintiffs failed to carry burden at first step of *Bruen* without evidence that "assault pistols" as defined by Delaware statute are in common use). For example, they cite an online survey in which 48% of respondents reported "own[ing] a handgun or rifle magazine that holds more than 10 rounds," English *supra* p. 17 at 22 (cited at App. 10-11), overlooking that the Act does not prohibit the manufacture or sale of handgun magazines between 10 and 15 rounds, see 720 ILCS 5/24-1.10(a).

3. In addition to applicants' failure to demonstrate that assault weapons or LCMs indisputably are in common use for self-defense, defendants also presented evidence that these instruments are designed for offensive, militaristic use rather than self-defense. *E.g.*, *Bruen*, 142 S. Ct. at 2134 (handguns protected by the plain text because they are "in common use today for self-defense") (cleaned up); *Heller*, 554 U.S. at 627 ("weapons that are most useful in military service—M-16 rifles and the like—may be banned"). These instruments derive from rifles and magazines designed for the military with features that "increase the effectiveness of killing

enemy combatants in offensive battlefield situations." Doc. 57-5 ¶ 25; see also 7th Cir. Doc. 15 at A596 ("The lineage of high capacity detachable magazines can be traced directly to a military heritage."); Doc. 57-4 ¶ 35 (military origin is "featured heavily in [their] marketing to the civilian public"). Indeed, the AR-15 models in circulation today trace their origin to rifles designed in the 1950s for use by the American military. Doc. 57-4 ¶ 25; 7th Cir. Doc. 37-9 at A585-87. Following field tests in Vietnam in the early 1960s, which demonstrated the potency of these rifles on the battlefield, the Army adopted the AR-15 as a combat rifle, rechristening it the M-16. Doc. 57-4 ¶¶ 26-32.

Not only do assault weapons and LCMs derive from military-grade weaponry, their features render them uniquely suitable as weapons of war but not commonly used or suitable for personal self-defense. Assault weapons are designed to allow high-velocity rounds to be fired at "a high rate of delivery" and "a high degree of accuracy at long range." Doc. 57-6 ¶ 14 & n.5; accord Doc. 57-4 ¶ 39. But these features are unnecessary in the civilian self-defense context, where "most confrontations involving gunfire are at close range," and therefore do not require the long-distance accuracy of assault weapons. Doc. 54-4 ¶ 59; *ibid.* ("most armed defense takes place within 3-7 yards"); 7th Cir. Doc. 15 at A598 ("Home defense and/or self-defense situations are rarely, if ever, lengthy shootouts at long ranges with extensive exchanges of gunfire."). In fact, assault weapons are inherently dangerous in "a home defense scenario" because they "pose a serious risk of over-penetration in most home construction materials." 7th Cir. Doc. 15 at A598-99.

Firing an assault weapon in close quarters thus poses "substantial risks to individuals in adjoining rooms, neighboring apartments or other attached dwelling units." *Id.* at A599. And as compared with handguns, assault weapons produce much larger cavities in the body, making them especially catastrophic for children, given the relative proximity of vital organs in their smaller bodies. Doc. 57-6 ¶¶ 32-35.

Similarly, LCMs' round capacity is not useful for self-defense. 7th Cir. Doc. 15 at A600 ("an abundance of ammunition" is no substitute for "weapons familiarization and shot placement"). As studies examining "armed citizen" incidents have confirmed, "the average number of shots fired in self-defense was 2.2 and 2.1, respectively." *Kolbe v. Hogan*, 849 F.3d 114, 127 (4th Cir. 2017) (en banc), abrogated on other grounds by *Bruen*, 142 S. Ct. 2111; see also *Hanson*, 2023 U.S. Dist. LEXIS 68782, *30 (relying on the "2.2 bullets per incident figure" when denying preliminary injunction) (citing Robert J. Spitzer, *Gun Accessories and the Second Amendment*, 83 J.L. & Contemp. Probs. 331, 244-45 (2020)). Smaller magazines, moreover, are preferable for self-defense purposes: "the physical size/profile of the shorter magazine is easier to carry, shoot and conceal." Doc. 57-5 ¶ 23. This is why the most "respected," "popular," and "effective self-defense firearms," like the "Model 1911" and "Sig P938," are handguns built to function with magazines that hold 15 or fewer rounds. *Ibid.*

In fact, it is "widely accepted" that handguns and shotguns, which remain legal to manufacture and sell in Illinois, are preferable for self-defense. Doc. 57-5 ¶

21; see also, *e.g.*, Doc. 57-4 ¶ 61 ("shotguns and 9mm pistols are generally recognized as the most suitable and effective choices for armed defense"); Doc. 57-7 ¶ 25 (between 2000 and 2021, "only 1 incident out of 406" active shootings "involved an armed civilian intervening with an assault weapon," whereas 12 incidents involved the defensive use of handguns).

4. Finally, not only do their characteristics make AR-15s and other, similar assault weapons poorly suited for self-defense, they make them as effective on the battlefield (if not more so) as automatic weapons like the M-16, which this Court deemed permissible to ban. *Heller*, 554 U.S. at 627; see also*, e.g.*, Doc. 57-4 ¶ 33 (Army's 2008 Field Manual stressed that semiautomatic fire is "the most important firing technique during fast-moving modern, combat," in part because it is "devastatingly accurate") (cleaned up); Doc. 57-5 ¶ 26 (semiautomatic is "the mode that is most often deployed in battle to efficiently target and kill enemy troops" and is viewed by Special Forces trainers as "the preferred and most lethal setting in most wartime scenarios"). In fact, the most commercially successful weapons regulated by the Act—AR-15 rifles—are M-16s in every way except one: the ability to toggle between semiautomatic and automatic fire. Doc. 57-11 ¶ 55 ("The military M-16 and the civilian AR-15 are closely related."); 7th Cir. Doc. 15 at A604 (civilian AR-type rifles "retain the identical performance capabilities and characteristics (save full automatic capability) as initially intended for use in combat" and are not less dangerous or lethal).

In short, applicants must demonstrate that it is indisputably clear that

assault weapons and LCMs are in common use for self-defense to be protected by the Second Amendment's plain text. Given applicants' lack of relevant evidence, on the one hand, and the substantial evidence showing that assault weapons and LCMs are offensive, militaristic weapons not suitable for self-defense, on the other, applicants cannot meet this burden and certainly have not done so in this application.

B. It is not indisputably clear that the Act is inconsistent with the Nation's history of regulating firearms.

1. Even if applicants had shown that the Second Amendment's plain text applies to assault weapons or LCMs, their application should be denied because they did not show that the State indisputably will be unable to satisfy its burden at the second step of the *Bruen* test. As explained, the Second Amendment permits the regulation of arms in common use for self-defense when the government can show the regulation is "consistent with the Nation's historical tradition" by demonstrating that it is analogous to historical regulations. *Bruen*, 142 S. Ct. at 2130. To determine whether a historical regulation is an appropriate analogue, courts must assess "whether the two regulations are relevantly similar." *Id.* at 2132 (cleaned up).

Bruen acknowledged that, although some historical analogies are "straightforward," others are not "simple to draw." *Id.* at 2130, 2132. This is because "[t]he regulatory challenges posed by firearms today" are not the same as those that "preoccupied the Founders in 1791 or the Reconstruction generation in 1868." *Id.* at 2132. Yet, the Court recognized, the Second Amendment must "apply

to circumstances beyond those . . . anticipated" during the Founding era and Reconstruction. *Ibid.* To resolve the difficulties in applying historical evidence to circumstances unanticipated by previous generations, courts should apply a "more nuanced approach" to analogical reasoning in cases involving "unprecedented societal concerns or dramatic technological changes." *Ibid.* Also, "a regular course of practice can liquidate & settle the meaning of disputed or indeterminate terms & phrases in the Constitution." *Id.* at 2136 (cleaned up).

2. Because the Act regulates instruments that would not exist without significant advancement in firearms technology and have generated unprecedented public-safety concerns, application of the "more nuanced" approach is appropriate here. See *Hanson*, 2023 U.S. Dist. LEXIS 68782, *46 (LCMs reflect dramatic technological changes and pose unprecedented societal concerns); *Or. Firearms*, 2022 U.S. Dist. LEXIS 219391, *32-34 (same). During the Founding era, Americans typically owned muskets for militia service and fowling pieces to hunt birds and control vermin. Doc. 57-8 ¶ 15. Single-shot, muzzle-loading firearms remained the standard weapon up to and including the Civil War. Doc. 57-10 ¶¶ 43-44; see also *id.* ¶¶ 35-38 ("experimental, multi-shot guns" in existence were flawed curiosities that were dangerous to the shooter, highly unusual, and, in most instances, "never advanced beyond the prototype stage") (cleaned up). Reliable rifles capable of firing more than one round, such as the 1866 Winchester rifle, did not appear in significant numbers until after the Civil War, and even then lacked semiautomatic capabilities. *Id.* ¶ 45. Modern technological advancements have allowed for the

near-instantaneous reloading of an assault weapon, making it materially different than these weapons. Doc. 57-6 ¶ 28. Likewise, the destructive potential of assault weapons is more significant than the Thompson submachine gun, handguns, muskets, and hunting rifles. *Id.* ¶¶ 29, 32; see also Doc. 57-8 ¶ 54 (danger posed by semiautomatic rifles "is intrinsically different from past weaponry").

3. The Act also responds to unprecedented societal concerns about lone shooters equipped with assault weapons and LCMs murdering dozens of people in minutes, if not seconds, and bringing entire communities to a halt. The first known mass shooting by a single individual resulting in 10 or more deaths occurred in 1949; it took 17 years (until 1966) for another comparably lethal shooting to occur, another 9 (to 1975) before the third such shooting, and 7 more before the fourth (in 1983). Doc. 57-7 ¶¶ 18-19. But in recent years—and especially since the expiration of the federal assault weapons ban in 2004—the frequency and cumulative lethality of mass shootings has increased dramatically. See *id.* ¶ 21 (describing six-fold increase in shootings with double-digit fatalities since 2004).

According to one estimate, "an assailant with an assault rifle is able to kill and injure twice the number of people compared to an assailant with a non-assault rifle or handgun." Doc. 57-4 ¶ 40. And when used in combination with LCMs, "semiautomatic rifles cause an average of 299 percent more deaths and injuries than regular firearms." Doc. 57-8 ¶ 56; Doc. 57-7 ¶ 15 (average death toll for incidents involving LCMs is 11.5 fatalities per shootings, as compared with 7.3 fatalities without LCMs). Assault weapons also pose a "disproportionate risk to law

enforcement": in 2016 and 2017, 25% of law enforcement officers slain in the line of duty were killed with assault weapons. Doc. 57-4 ¶ 52; see also, *e.g.*, Doc. 57-8 ¶ 54 (threat to law enforcement is "modern phenomenon"). Under a "more nuanced approach," these changes matter when engaging in *Bruen*'s historical analysis. 142 S. Ct. at 2132.

4. Applying this approach, it is not indisputably clear that applicants will succeed on the merits of their claim. The Act is "relevantly similar" to historical regulations with respect to dangerous and unusual weapons. See *Bruen*, 142 S. Ct. at 2128 (recognizing longstanding tradition of regulating dangerous and unusual weapons); *Heller*, 554 U.S. at 627 (same). The origins of this tradition pre-date the Founding era. *E.g.*, 4 William Blackstone, *Commentaries on the Laws of England*, 148-49 (1769) ("riding or going armed with dangerous or unusual weapons is a crime against the public peace, by terrifying the good people of the land"). For instance, a 1686 East New Jersey law restricted concealed carrying of "any pocket pistol, skeines, stilettoes, daggers or dirks, or other unusual or unlawful weapons," 1686 N.J. 289, 289-90, ch. 9; see Doc. 57-10 ¶ 81, and other colonies regulated dangerous and unusual weapons like trap guns, clubs, and knives. *E.g.*, Doc. 57-10 ¶¶ 81-85; see also, *e.g.*, 1750 Mass. Acts 544, ch. 17, § 1 (cited at Doc. 57-10, Ex. E); Records of the Colony of New Plymouth in New England, Boston 230 (1671) (trap guns) (Doc. 57-10, Ex. F); 1642 N.Y. Laws 33 (outlawing the drawing of knives).

During the Early Republic and Founding eras, legislatures continued to impose restrictions on specific dangerous or unusual weapons. See Doc. 57-10 ¶¶

72, 76, 79 (describing restrictions on "objectional" and "vicious" weapons like clubs in response to use by criminals and as fighting instruments) (cleaned up); *id.* ¶ 75 (compiling six state laws enacted between 1750 and 1799 restricting the carrying of weapons like clubs); see also*, e.g.*, *A Collection of the Statutes of the Parliament of England in Force in the State of North-Carolina* 60, ch. 3 (1792) (cited at Doc. 57-11 ¶ 8 n.5). And as homicide rates increased in the 19th century, in part due to knife-dueling, so did laws restricting the use, sale, and possession of Bowie knives. Doc. 57-10 ¶¶ 63, 69; Doc. 57-8 ¶ 24; see also Doc. 57-10 ¶¶ 64-68 (discussing state court decisions upholding convictions under these regulations).

Likewise, advancements in firearms technology during the 19th century rendered pistols more effective for criminal purposes, prompting states to enact prohibitions on carrying pistols, revolvers, and other concealable weapons. *E.g.*, Doc. 57-10 ¶ 81; Doc. 57-8 ¶¶ 16-17, 25-28. In fact, by the turn of the century, there was near unanimity among the States in prohibiting or severely restricting concealable firearms and other weapons*,* Doc. 57-8 ¶ 28, a practice that has since been deemed constitutional, *e.g.*, *Bruen*, 142 S. Ct. at 2128.

The historical tradition of regulating firearms in response to technological advancements and criminal misuse continued into the 20th century. During World War I, advancements in weapons technology led to the invention of hand-held semiautomatic and automatic weapons. Doc. 57-10 ¶¶ 14-15. Like the 18th and 19th century technological advancements, these new weapons proliferated, and "their uniquely destructive capabilities" began to impact civilian life through

criminal violence. *Id.* ¶ 15. The Thompson submachine gun and the Browning Automatic Rifle, in particular, were used in high-profile crimes. *Id.* ¶¶ 14-15, 21-22. And although these weapons were used "relatively infrequently by criminals generally, . . . when they were used, they exacted a devastating toll and garnered extensive national attention." *Id.* ¶ 15.

As in prior eras, States responded: between 1925 and 1934, "at least 32 states enacted anti-machine gun laws." *Id.* ¶ 22. Seven of these laws banned both automatic and semiautomatic weapons. *Id.* ¶ 27 & Ex. B. States also regulated removable magazines and magazine capacity: between 1917 and 1934, 23 States enacted regulations on "ammunition magazines or similar feeding devices, and/or round capacity." *Id.* ¶ 31. In 1932, Congress took similar action, banning machine guns in the District of Columbia. *Id.* ¶ 23. Two years later, Congress enacted the National Firearms Act, which severely restricted the sale, transfer, and transport of machine guns and other firearms associated with criminal violence, like short-barreled shotguns and rifles. *Id.* ¶ 24. That statute was upheld over challenges to the effective ban on short-barreled shotguns in *United States v. Miller*, 307 U.S. 174, 178 (1939), and its effective ban on machine guns was recognized as permissible in *Heller*, 554 U.S. at 624, 627.

6. By prohibiting the manufacture and sale of weapons and magazines increasingly used in the deadliest mass shootings, the Act comfortably fits within this pattern of regulation in response to new forms of violent crime perpetrated with technologically advanced weapons. The public safety justifications underlying the

Act are nearly identical to those that prompted 18th, 19th, and 20th century legislatures to regulate categories of weapons associated with an increase in homicides attributable to specific weapons and other criminal misuse. The incremental expansion of firearm regulation over the course of three centuries, as well as the corresponding judicial approval of such measures, has "liquidate[d] & settle[d]" the meaning of the Second Amendment to allow for such restrictions. *Bruen*, 142 S. Ct. at 2136.

The Act is also "relevantly similar," *id.* at 2130, to historical regulations in that it imposes, at most, a minimal burden on an individual's right to armed self-defense. *E.g.*, *Del. State Sportsmen's Ass'n*, 2023 U.S. Dist. LEXIS 51322, *37 (assault weapon and LCM restrictions impose "slight" burden on self-defense). The instruments regulated by the Act are best suited for offensive combat: their defining characteristics are unnecessary (and often counterproductive) for self-defense, with the result that handguns and shotguns are preferred for self-defense scenarios. *Supra* pp. 20-22. And because the Act preserves access to a vast array of handguns, rifles, and shotguns, it is consistent with its historical predecessors in that it imposes tailored restrictions on the dangerous and unusual instruments causing harm to the public while retaining the ability for Americans to own and carry weapons for self-defense.

7. For their part, applicants attempt to isolate individual laws and distinguish them by claiming that none "is analogous to a categorical ban of commonly possessed arms." App. 21-25. Initially, as discussed, the relevant

question is not whether the assault weapons and LCMs the Act restricts are commonly possessed but whether they are commonly used for self-defense. *Supra* p. 17. In any event, applicants have not shown that it is indisputable that the Act restricts "commonly possessed arms" when only a small percentage of gun owners (and an even smaller percentage of Americans) possess the restricted instruments. *Supra* pp. 17-18 & n.7. Nor can applicants overcome the evidence, *supra* pp. 26-28, that the Act is consistent with the historical tradition—beginning with restrictions on knives, pistols, and other melee weapons and culminating in bans on machine guns and other dangerous firearms—demonstrating that categorical bans are contemplated by the Second Amendment. Each of these categorical restrictions, including the materially indistinguishable state and federal restrictions of the early 20th century, is permissible under that Amendment. *Bruen*, 142 S. Ct. at 2128 (carriage restrictions); *Heller*, 554 U.S. at 624, 627 (machine gun ban).

And to the extent there is any difference in scope between Founding- or Reconstruction-era regulations and the Act, that is because dramatic technological and societal shifts have occurred in the interim. *Supra* pp. 24-26. At bottom, these historical regulations and the Act share the same justifications (protecting the public from new forms of violence) and impose the same minimal burden on self-defense (by restricting only those weapons that were causing this violence while leaving other means of self-defense available).

8. Applicants further contend that any 20th-century evidence is irrelevant under *Bruen*. App. 21. But as explained, *supra* pp. 24-28, 20th-century

evidence is relevant to the historical inquiry both to show that the regulated items reflect "dramatic technological changes" that have caused "unprecedented societal concerns," *Bruen*, 142 S. Ct. at 2132, and as evidence of "a regular course of practice [that] can liquidate & settle the meaning of disputed or indeterminate terms & phrases in the Constitution," *id.* at 2136 (cleaned up). Here, the historical evidence confirms that the Act responds to technological changes and societal concerns and is also part of a regular course of practice of restricting dangerous and unusual weapons. It is, therefore, appropriate for courts to consider the early 20th-century restrictions, both because *Heller* stated that those restrictions were obviously constitutional, 554 U.S. at 624 (deeming suggestion that federal restrictions on machine guns "might be unconstitutional" "startling"), and because the Act's restrictions on assault weapons and LCMs are *consistent* with analogues from the 18th and 19th centuries, *Bruen*, 142 S. Ct. at 2136, 2154 n.28 (declining to consider late 19th and early 20th century evidence because it "contradict[ed] earlier evidence" that overwhelmingly established a contrary tradition).

9. Applicants next assert that assault weapons and LCMs are not "dangerous and unusual" because popular weapons cannot be "unusual." App. 16-17. As explained, *supra* pp. 17-18 & n.7, applicants have not shown that it is indisputable that these instruments are owned by more than a small percentage of Americans. In any event, as discussed *supra* pp. 26-29, historical evidence shows that weapons only came to be considered dangerous and unusual—thus requiring a regulatory response—after their widespread use created new societal problems. See

also *State v. Huntly*, 25 N.C. 418, 422 (1843) (rejecting argument "that a double-barrelled gun, or any other gun, cannot in this country come under the description of 'unusual weapons'" just because many "in the community . . . own[ed] and occasionally use[d] a gun"). The Act, which was enacted in response to the modern problem of assault weapons and LCMs being used in mass shootings, adheres to that historical tradition.

10. Finally, applicants contend that early laws requiring "male citizens of eligible age" to appear for militia service "with common weapons and standard ammunition" demonstrate that the Act's restrictions are inconsistent with the country's historical tradition. App. 27. But the government's authority to organize the militia is a separate question from the scope of the individual right to keep and bear arms for self-defense. As both *Heller* and *Bruen* recognized, the right to armed self-defense is "unconnected to militia service." *Heller*, 554 U.S. at 610; see also *Bruen*, 142 S. Ct. at 2127 (individual Second Amendment right "does not depend on service in the militia"); *Heller*, 554 U.S. at 627 (recognizing that a militia today might "require sophisticated arms that are highly unusual in society at large" but also that such weapons "may be banned"). Applicants, therefore, have failed to show that it is indisputably clear that their Second Amendment challenge will prevail.

III. No Critical Or Exigent Circumstances Exist That Would Warrant An Injunction Pending Appeal.

1. Finally, applicants have not shown that they face the "most critical and exigent circumstances" that would entitle them to an injunction pending their

interlocutory appeal. *Brown*, 533 U.S. at 1303 (cleaned up). Indeed, their conduct suggests otherwise. Despite labeling their application to this Court as an emergency, they waited 11 days from the district court's denial of their preliminary injunction motions to seek an injunction pending appeal in that court, another 5 days to seek that relief in the Seventh Circuit after the district court denied their request, and another 8 days to seek emergency relief in this Court after the Seventh Circuit denied their request, even though their emergency application is a nearly word-for-word reproduction of their opening merits brief in the Seventh Circuit (which they filed before the Seventh Circuit denied their motion for injunction pending appeal). Appx. 3, 36, 86, 164; see also 7th Cir. Doc. 27. Nor have applicants requested that the Seventh Circuit expedite their appeal, which, as noted *supra* p. 13, is proceeding without undue delay. Thus, any contention that their application presents exigent circumstances warranting this Court's intervention rings hollow.

2. Moreover, applicants have not shown why this Court's intervention is necessary to avoid impending irreparable harm. First, applicants note that the temporary loss of First Amendment freedoms may constitute irreparable harm, contending that this principle should extend to the Second Amendment as well. App. 27 (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020)). But in recognizing that this Court has not applied this principle outside the First Amendment context, applicants again demonstrate that their right to relief is not indisputably clear. See *Fenner v. Boykin*, 271 U.S. 240, 243 (1926) (stating

general rule that an injunction may issue to protect "constitutional rights," but only when there is a "danger of irreparable loss"). Nor have justices of this Court applied this presumption to grant applications for injunctions pending appeal claiming First Amendment violations. *E.g.*, *Lux*, 561 U.S. at 1307-08 (denying application claiming deprivation of First Amendment right to political expression); *Brown*, 553 U.S. at 1302 (denying application claiming Establishment Clause violation).

Applicants also cite *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011), for the proposition that a probable violation of Second Amendment rights presumptively establishes irreparable harm. App. 28. But in *Ezell*, an ordinance required firing range training "as a prerequisite to lawful gun ownership, yet at the same time prohibit[ed] all firing ranges in the city." 651 F.3d at 690 (cleaned up). Because the ordinance made it "impossible" to qualify for gun ownership, it burdened the Second Amendment's "central component"—"the right to possess firearms for protection"—and the Seventh Circuit thus presumed that "[i]nfringements of this right [could not] be compensated by damages." *Id.* at 698-99. By contrast, the Act does not preclude anyone from purchasing any number of handguns, shotguns, or other weapons for self-defense, or continuing to possess assault weapons or LCMs purchased prior to its effective date.

Applicants further allege that the gun store and its owner will suffer financial loss. App. 28-29. As support, they rely on *Cavel International, Inc. v. Madigan*, 500 F.3d 544, 545 (7th Cir. 2007), but there, a horsemeat exporter challenged a statute that would have outlawed its entire business and made its

failure "a virtual certainty." And the defendants were "state officials sued in their official capacities" from whom the exporter "could not obtain monetary relief." *Id.* at 546. Here, the gun store does not exclusively sell assault weapons and LCMs; it sells firearms not covered by the Act and offers gunsmithing and firearms training services.[8] Nor did applicants' declaration make clear that the store would close during this appeal; it gave no estimate of how long the business could survive. Appx. 185-86. Applicants also have not even attempted to explain why a damages award, should they obtain one, could not make the store's owner whole. Doc. 48 at 7 (seeking compensatory damages); *Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("[T]he temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury.").

3. Finally, the balance of equities and public interest also favor denying the application. As discussed, applicants have not shown that their inability to purchase or sell a narrow category of firearms—assault weapons and LCMs—will irreparably harm them. By contrast, the Act's restrictions on assault weapons and LCMs promote a compelling interest in protecting the public and saving lives. Doc. 57-6 ¶¶ 31-35 (assault weapons cause wounds that are more destructive than other firearms); Doc. 57-7 ¶ 37 (assault weapon and LCM bans resulted in 72% decrease in deaths from mass shootings); Doc. 57-9 ¶¶ 33-40 (assault weapons cause high mortality rate as compared to handguns); Doc. 63 at 33 (finding that Act furthered

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[8] Law Weapons & Supply, Online Store, http://bit.ly/3ZTimoU (last visited May 6, 2023); Law Weapons & Supply, Law Weapons In-House Gun-Smithing Service, https://bit.ly/3Fby3jk (last visited May 6, 2023); Law Weapons & Supply, Law Weapons Training Courses, https://bit.ly/3ZBbtJ8 (last visited May 6, 2023).

"protection of public safety," which was "unmistakably a public interest") (cleaned up); see also *N.Y. State Rifle & Pistol Ass'n. v. Cuomo*, 804 F.3d 242, 262 (2d Cir. 2015) (assault weapons "are disproportionately used in crime," including "mass shootings" and murders of law enforcement officers); *Ocean State Tactical*, 2022 U.S. Dist. LEXIS 227097, *46 (public interest in prohibiting LCMs "could not be more undeniably compelling"). All told, the applicants have not shown, and cannot show, that they meet the heightened standard to obtain an injunction pending appeal.

CONCLUSION

For these reasons, the application should be denied.

Respectfully submitted,

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