No. 23-878

IN THE

Supreme Court of the United States

JAVIER HERRERA,

Petitioner,

v.

KWAME RAOUL, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases

Rules

Other Authorities

REPLY

Respondents' oppositions confirm that the Second Amendment will remain a "'second-class right'" unless this Court intervenes. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 70 (2022). Dr. Herrera seeks to keep his common semiautomatic rifle and magazines in his home. Respondents prohibit him from doing so, even though this Court has already held that States cannot categorically ban commonly owned arms in the home. *District of Columbia v. Heller*, 554 U.S. 570, 628-36 (2008). As a result, he can't use his rifle for SWAT training, endangering himself and his team. Pet.5-7.

Respondents do not dispute that they must justify their bans under this Court's text-and-history approach. But they join the Seventh Circuit in rewriting that standard. On plain text, "all firearms" are "'arms.'" *Heller*, 554 U.S. at 581. But Respondents insist that Dr. Herrera's common semiautomatic firearms are not "Arms" at all because they deem them too much "like … military-grade weaponry." BIO.22; Cnty.BIO.10. On tradition, this Court has held that the weapons "protected were those 'in common use'" for lawful purposes. *Heller*, 554 U.S. at 624-27. But Respondents conclude that this test allows them to prohibit weapons they consider "unsuitable and unnecessary for civilian self-defense" or "especially dangerous." BIO.23, 25; Cnty.BIO.12. Respondents' opinions about what weapons Americans should use is not the text-and-history standard established by this Court.

Respondents' efforts to gin up vehicle issues only show that there is no obstacle to this Court's review. They primarily argue that review would be premature because the Seventh Circuit's decision was only a "preliminary look" at the cases. BIO.15; Cnty.BIO.14. But whatever issues remain open, there was nothing preliminary about the Seventh Circuit's precedential defiance of the text-and-history approach adopted by this Court. Further litigation under the wrong legal standard would only waste resources while doing nothing to sharpen the issues for this Court's review.

Since Respondents have failed to identify any way to square the Seventh Circuit's decision with this Court's precedent, this Court should grant the petition and summarily vacate. Alternatively, this Court should grant the petition for merits review.

I. The Seventh Circuit defied this Court's precedent on a question of exceptional importance.

A. Respondents don't dispute that whether law-abiding citizens like Dr. Herrera can keep popular semiautomatic rifles and standard magazines in their homes is a question of exceptional importance. They instead insist that the Seventh Circuit's holding that Dr. Herrera could be prohibited from keeping his semiautomatic rifles and common magazines was correct. BIO.21; Cnty.BIO.32. But Respondents' merits arguments don't take away from the plain importance of the questions here. See Sup. Ct. R. 10(c).

On the merits, Respondents' arguments do nothing to bridge the chasm between the decision below and this Court's precedents (and the Second Amendment). Instead, they follow the Seventh Circuit in flouting this Court's Second Amendment holdings in favor a test that asks what weapons the government thinks Americans should possess. This approach is irreconcilable with this Court's decisions, Sup. Ct. R. 10(c), and it would render the Second Amendment a dead letter.

B. Starting with plain text, Respondents insist that the Seventh Circuit correctly defined "Arms" to mean only weapons that did not seem too "militaristic." BIO.22; Cnty.BIO.39. But they ignore that this Court has held that "Arms" means "'[w]eapons of offence.'" *Heller*, 554 U.S. at 581. For that reason, "the Second Amendment extends, prima facie, to all [modern] instruments that constitute bearable arms"—including "all firearms." *Id.* at 581-82. The Seventh Circuit and Respondents concede that semiautomatic rifles are bearable weapons of offense. BIO.22; Cnty.BIO.2-4, 34-35. That should have been the end of the plain-text inquiry.

Respondents insist that the ordinary meaning of "Arms" cannot control because fully automatic weapons also meet that definition. BIO.29; Cnty.BIO.34-35. But that ignores the fact that conduct covered by the "plain text" is only "presumptively protect[ed]." *Bruen*, 597 U.S. at 24. Weapons that can be prohibited because of "historical tradition" are still "Arms." *Heller*, 554 U.S. at 581, 627. But they fall within a "historical tradition of

firearm regulation" that "demark[s] the limits" of the Second Amendment right. *Bruen*, 597 U.S. at 21, 24.

Contra Cook County, *Bruen* did not "consider common use" as part of the plain-text inquiry. Cnty.BIO.22. Before starting with the plain-text inquiry on the right to carry handguns, *Bruen* listed issues that were "undisputed." 597 U.S. at 31-32. One of those undisputed issues was "that handguns are weapons 'in common use' today for self-defense." *Id*. at 32. Acknowledging the absence of a dispute did not make common use part of the plain-text inquiry. In fact, *Bruen* explains that "common use" follows from "the historical tradition" of regulating "dangerous and unusual weapons," and applies it in that context. *Id*. at 21, 47.

C. Turning to tradition, Respondents embrace the Seventh Circuit's rejection of the "common use" test. They argue that it is enough that the Seventh Circuit "properly stated" the rule. Cnty.BIO.20, 22; *see also* BIO.22. The Seventh Circuit was right—they assert—to ignore which weapons law-abiding Americans typically choose for self-defense because that inquiry would be "circular." BIO.19; Cnty.BIO.22.

This Court has already rejected Respondents' position. While historical tradition supports regulation of "dangerous and unusual" weapons, *Heller* found that weapons in "common use" or "typically possessed by law-abiding citizens for lawful purposes" are "protected." 554 U.S. at 625, 627. It recognized that handguns are protected because they are "overwhelmingly chosen by American society for

[the] lawful purpose" of self-defense. *Id*. at 628. The majority reached this holding despite Justice Breyer's objection in dissent that protecting a weapon "once it becomes popular" resulted from "circular reasoning." *Id.* at 721. And in *Bruen*, this Court reiterated that even weapons that could have been prohibited before are protected if they are "in common use today." 597 U.S. at 47.

Like the Seventh Circuit, Respondents reject this common-use test in favor of their own assessment of what weapons ought to be used for self-defense. They think popular semiautomatic rifles and standard magazines are "unsuitable and unnecessary for civilian self-defense." BIO.23. They fall outside the traditional protection of common firearms, say Respondents, because they are "best suited for offensive combat" and "their defining characteristics are unnecessary for self-defense." BIO.27.

Respondents never explain what their assessment has to do with whether a weapon is in common use or is unusual. Nor do they acknowledge that this Court has already rejected their view that the government can ban weapons that it deems too dangerous. *Heller* held that handguns are protected because they are "the most popular weapon chosen by Americans for self-defense in the home." 554 U.S. at 629. It did not matter that the District of Columbia thought Americans ought not choose them. *Caetano v. Massachusetts* summarily vacated a decision for failing to consider whether "stun guns" were "unusual" today. 577 U.S. 411, 412 (2016) (per curiam). And *Bruen* confirmed that even weapons that

could have been considered "dangerous and unusual" are protected if they are "in common use today." 597 U.S. at 47. The only support for Respondents position that they can ban weapons they deem "especially dangerous" is Justice Stevens's *dissent*. *McDonald v. City of Chicago*, 561 U.S. 742, 899-900 (2010). BIO.25; Pet.App.42.

Heller's view that fully automatic "M-16 rifles and the like[] may be banned" cannot justify Respondents' rejection of the common-use test. 554 U.S. at 627. This language responded to an objection to the common-use test—the "fit between" the militia and the "protected right" might be "limited" when military weapons are not in common use. *Id*. at 627-28. Respondents turn this recognition that dangerous and unusual weapons can be banned despite their military utility on its head, insisting that Dr. Herrera's popular semiautomatic rifles and standard magazines can be banned because the government deems them "like" uncommon weapons.

The County warps this Court's common-use test in another way. It argues that the common-use test requires that a weapon be frequently utilized in actual self-defense encounters. Cnty.BIO.32-33; CA7.Dkt.41 at 19-20. By that illogic and the County's own statistics, not even handguns protected in *Heller* would be in common use. CA7.Dkt.41 at 19 ("victims of violent crimes do not use any firearms to defend themselves 99.2% of the time"). Even the dissenting Justices recognized that *Heller* "struck down the … handgun ban not because of the *utility* of handguns for lawful self-defense, but rather because of their

popularity for that purpose." *McDonald*, 561 U.S. at 890 n.33 (Stevens, J., dissenting).

Respondents' quibbles about the precise number of Americans who own the banned semiautomatic rifles and standard magazines only highlight the need for this Court's intervention. See BIO.32-33 Even Respondents' own experts conceded that these weapons are owned by millions. D.Ct.Dkt.52-4 ¶27 & n.23. Any remaining evidentiary concerns can be addressed only if a court applies the common-use test. But that inquiry can only occur after this Court corrects the Seventh Circuit's rejection of common use. Pet.App.22, 39.

On top of mangling the common-use test, Respondents continue to ignore the most on-point tradition. Despite having no burden, Dr. Herrera introduced evidence of a longstanding tradition of protecting firearms useful for the common defense in the home. Pet.23, 27-28. "All decisions and treatises"* from the 19th-century confirmed that militia rifles "suitable for the general defence of the community" are at the core of the individual right. E.g., Cooley, *General Principles of Constitutional Law* 281-83 (2d ed. 1891). As one court explained, "rifle[s] of all descriptions" are protected. *Andrews v. State*, 50 Tenn. 165, 179 (1871); Pet.23 & n.4. In fact, for much of this Country's history, federal militia acts required

* See Robert Leider, "Are Rifles Constitutionally Protected Arms?" (Apr. 16, 2024), https://perma.cc/7CHT-LWRM.

individuals to keep common firearms suitable for common defense in their home. See Pet.27-28.

Throughout this litigation, no one has explained how prohibiting common weapons that seem too "militaristic" can be squared with this history. The Seventh Circuit never mentioned this history. And Respondents don't address it in their oppositions.

The history that Respondents do discuss falls far short of supporting an in-home ban of common civilian weapons. Respondents don't deny that the Seventh Circuit's two lead examples are kinds of regulations *Heller* rejected as disanalogous. Pet.29. And Respondents follow the Seventh Circuit by relying on concealed-carry regulations and regulations of arms like Bowie knives. BIO.25-26. But *Bruen* already rejected those kinds of regulations as disanalogous. See Pet.30. They "applied only to certain 'unusual'" weapons, and "did not prohibit … long guns for self-defense—including the popular" ones of the time. *Bruen*, 597 U.S. at 48-49. Respondents say nothing about that holding.

Respondents next turn to the history of regulating devices like trap and spring guns that not even the Seventh Circuit thought relevant enough to mention. BIO.25, 34; Cnty.BIO.38; Pet.App.46-48. This history cannot support the Seventh Circuit's invented tradition of banning common weapons. As Dr. Herrera explained below, trap and spring guns "were used to defend *property* by rigging a firearm to discharge automatically when a trespasser tripped a rope." CA7.Dkt.63 at 32 n.8. They "fire indiscriminately."

Pet.App.85 (Brennan, J., dissenting). These laws did not ban the firearms that were part of the traps and bear little resemblance to an outright ban of common rifles. See *id.*

The County argues that the common law makes using semiautomatic rifles categorically unlawful as "immoderate." Cnty.BIO.9, 36-39. But the Seventh Circuit did not adopt this argument. And in any event, the County bases this claim on a misconstruction of Blackstone, as Dr. Herrera explained below. CA7.Dkt.63 at 34-35. The County quotes from Blackstone's discussion of unintentional killings while performing lawful acts, like "moderately correcting [a] child." 4 Blackstone, *Commentaries on the Laws of England* *183; Cnty.BIO.36. Where Blackstone discusses self-defense, it's clear that a well-placed shot against a deadly aggressor is lawful. 4 Blackstone, *Commentaries* *181-82 ("If any person attempts a … murder of another … and shall be killed in such attempt, the slayer shall be acquitted[.]"). And even taking the County's other examples at face value, they all concern an act disproportionate to the particular threat. See Cnty.BIO.36-37. None of them hold that using a bearable arm for self-defense was unlawful in all circumstances. *Id.*

II. The absence of decisions faithfully applying *Bruen* highlights the need for review.

The Ninth Circuit's vacatur of a straightforward application of this Court's definition of "Arms" only underscores the need for review. The Ninth Circuit

vacated a decision holding that a kind of "pocketknife" falls within the plain meaning of "Arms." *Teter v. Lopez*, 76 F.4th 938, 950 (2023), *reh'g granted, opinion vacated*, 93 F.4th 1150 (2024). The Ninth Circuit's vacatur does not show that "review is premature." Cnty.BIO.25. It confirms that without this Court's intervention not even clear applications of the Second Amendment are safe. *See Duncan v. Bonta*, 83 F.4th 803, 808 (9th Cir. 2023) (Bumatay, J., dissenting) (outlining the Ninth Circuit's history of rejecting "clear direction" in Second Amendment cases).

Respondents don't deny that "before *Bruen*" some circuit courts found that common rifles and magazines are "Arms." BIO.14; Cnty.BIO.25-26. Instead, Respondents insist that these cases don't support granting review because they found the weapons unprotected under the balancing approach *Bruen* abrogated. BIO.14; Cnty.BIO.25. But respondents cannot argue that *Bruen* abrogated holdings that these weapons are "Arms" since *Bruen* reiterated that the Second Amendment presumptively covers "all instruments that constitute bearable arms." 597 U.S. at 28. The prospect that courts might change their tune now that they can no longer balance away protection for covered activity would only heighten the need for this Court's review.

Respondents portray the Seventh Circuit's rejection of pre-*Bruen* decisions faithfully applying the common-use test as mere "methodological differences on discrete components of a complex analysis." BIO.14. But whether to follow this Court's lead in treating common use as a "'largely statistical

inquiry,'" *Hollis v. Lynch*, 827 F.3d 436, 449 (5th Cir. 2016), or dismiss it as "circular" and instead ask whether a weapon seems too "militaristic," Pet.App.22, 39-42, is no debate on finer points of methodology. It is a dispute over whether lower courts must follow this Court's instructions.

III. No vehicle issue stands in the way of this Court's review.

This case's "interlocutory posture" should not insulate the Seventh Circuit's rejection of the Second Amendment and this Court's precedents. BIO.15. This Court has not hesitated to review denials of preliminary injunctions in disputes over the correct constitutional standard. *Fulton v. Philadelphia*, 593 U.S. 522 (2021); *NIFLA v. Becerra*, 585 U.S. 755 (2018); *Obergefell v. Hodges*, 576 U.S. 644 (2015). It routinely reviews denials of preliminary injunctions when a lower court has failed to ask the right question or apply the correct legal standard. See *Trump v. Mazars*, 591 U.S. 848, 871 (2020); *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 488 (1999). And it has summarily vacated when a lower court "incorrectly read[s] a [section] in [this Court's] opinion" on its way to denying a preliminary injunction. *Wisc. Right to Life v. F.E.C.*, 546 U.S. 410, 412 (2006) (per curiam).

This case presents a similar dispute. This Court would review purely legal questions arising from the Seventh Circuit's refusal to follow the standards set forth by this Court. The Seventh Circuit issued a precedential opinion rejecting this Court's definition of "Arms" in favor of a circular definition that includes

only "non-militaristic weapons." Pet.App.42. And it fashioned a historical tradition allowing bans of common civilian weapons in the home because of mere dangerousness, even though this Court has rejected that standard. Pet.App.44-46. These distortions of the legal standard are no less final and binding because the Seventh Circuit announced them in a decision denying a preliminary injunction.

Nor would further development of "evidentiary and historical records" aid in this Court's review. BIO.15. The Seventh Circuit has already rejected this Court's precedents, and any evidentiary development will be constrained by the Seventh Circuit's erroneous legal standards. Respondents don't try to explain how factual development under those faulty standards will help clarify whether "Arms" should be given its plain meaning, whether "common use" should be rejected as "circular," or whether tradition permits governments to ban any weapon they deem "especially dangerous." Pet.App.22, 28-29, 40-42. Further evidentiary proceedings would only delay correction of the Seventh Circuit's defiance, increase the cost to the parties, and deny Dr. Herrera's right to keep common semiautomatic firearms and magazines in his home.

Respondents' assertion that irreparable harm might be "alternate grounds for affirmance" is no obstacle to review. BIO.16. The Seventh Circuit did not reach irreparable harm, and this Court wouldn't need to either. Pet.App.50. Respondents can speculate that on remand a court might find that the denial of Dr. Herrera's core constitutional right to keep common civilian weapons in his home is not

irreparable. But see *Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) ("[I]rreparable harm is presumed."). But that is no reason to leave the Seventh Circuit's decision rejecting this Court's precedents in place.

The County falsely asserts that Dr. Herrera "forfeited" common use below by arguing in his brief that "'*no* firearms [are] in common use.'" Cnty.BIO.19. But the full sentence from which the County draws this snippet says that "[u]nder [*the County's*] logic, *no* firearms would be in common use." CA7.Dkt.63 at 25. Dr. Herrera rejected the County's view that only weapons frequently deployed in violent confrontations are protected. He did so because that is not this Court's common-use test. In fact, the very next sentence notes that the County's view "misstates *Heller* and *Bruen*," which protect arms "'typically *possessed* by law-abiding citizens *for lawful purposes*.'" *Id.* at 25-26.

Finally, the County's misunderstanding of this litigation is not an obstacle to review. Cnty.BIO.33. Dr. Herrera sued so he can keep his rifle, its magazines, and his handgun magazines at home. Pet.5-9. To prevail, he must show that the provisions barring him from possessing his rifle and magazines are unconstitutional. He does not have to show that other provisions banning "grenade launchers" are also unconstitutional. Contra Cnty.BIO.33.

CONCLUSION

For the above-stated reasons, the Court should grant the petition.

Respectfully submitted,

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