NO. 23-879

In the Supreme Court of the United States

CALEB BARNETT, ET AL.,

Petitioners,

v.

KWAME RAOUL, ATTORNEY GENERAL OF ILLINOIS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE ILLINOIS SHERIFFS' ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

Amicus curiae, the Illinois Sheriffs' Association ("ISA"), is comprised of some 40,000 citizens and business leaders that support its mission. Since 1928, the ISA has been dedicated to improving public safety and assisting Illinois' 102 County Sheriffs with training, communication, and the necessary resources for them to serve local communities more efficiently. In today's complex society, there are rigorous demands and requirements for law enforcement. The ISA is dedicated to supporting the time-honored Office of Sheriff in Illinois by upholding each sheriff's rights to perform their sworn duty to serve and protect Illinois citizens. ISA promotes sound legislation to help our law enforcement officers and better serve the public. The ISA also continues a long-term commitment to helping young people prepare for the future through scholarships, drug awareness, and community involvement.

The ISA's interest in this action derives principally from the fact that the sheriffs it represents are regularly the face of the laws that the Illinois legislature enacts. These peace officers take pride in protecting the citizens of Illinois through the enforcement of its laws and doing so in a manner that simultaneously respects the rights and privileges of law-abiding citi-

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[1] Pursuant to this Court's Rule 37.3(a), all parties have received notice of and consented to the filing of this brief. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party wrote this brief in whole or in part, and no party, party's counsel or any person other than *amicus* made a monetary contribution intended to fund the brief's preparation or submission.

zens across the State. Because actions that interfere with the rights of law-abiding citizens—particularly rights enshrined in the United States Constitution—create conflicts and are contrary to the fundamental objectives of law enforcement, they impede law enforcement officers' ability to work respectfully with and among members of the public in the enforcement of the laws necessary to protect and enhance the communities they serve.

The ISA supports efforts to make Illinois and all of its citizens safe, but it also recognizes that those efforts must be within the bounds set by the Constitution. The Illinois legislature's HB 5471 crosses those bounds, and in doing so, demands that sheriffs enforce a law that deprives the law-abiding citizens they serve of their constitutional right to keep and bear arms for lawful purposes, including sport and self-defense. Because law enforcement should never be compelled to violate the constitutional rights of Illinois citizens, and because the Seventh Circuit Court of Appeals failed to recognize and follow the precedent set by this Court less than two years ago, the ISA believes that Petitioners have demonstrated that this case is an excellent vehicle for the Court to re-affirm that it meant what it said in its prior rulings recognizing the fundamental rights guaranteed by the Second Amendment.

SUMMARY OF ARGUMENT

Until this Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), Congress and the lower courts in this country approached the Second Amendment's right to keep and bear arms not as an individual right worthy of full constitutional protection, but as a privilege to be dispensed by the government under constraints designed to discourage rather than enhance the exercise of those rights. In *Heller*, the Court held that a ban on handguns could not be squared with the constitutional protection accorded an individual's right to own, possess and use firearms, including handguns, for self-defense. The Court later characterized the right to keep and bear arms as "among those fundamental rights necessary to our system of ordered liberty." *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010). And in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 28 (2022), the Court specified the analytical approach for courts addressing Second Amendment issues, under which states bear the burden to show that restrictions on firearms are consistent with this Nation's historical tradition.

Despite the recency of this Court's elucidation of the proper test, the Seventh Circuit's majority decision failed to faithfully execute it. Incredibly, based on a misreading of *Heller*, the majority determined that the more than 1,000 rifles, pistols, shotguns and ammunition feeding devices covered by Illinois' HB 5471 are not even "Arms" that are presumptively protected as covered by the plain text of the Second Amendment. The majority has fashioned a new dis-

tinction for firearms that "may be reserved for military use," and for firearms the government puts in that category, giving the government a pass on justifying its regulation of those firearms. Nothing in the Second Amendment or this Court's prior decisions supports such an outcome.

Nor does the majority's analysis of historical regulations justify a prohibition on the expansive list of firearms and ammunition feeding devices covered by HB 5471. Those firearms are without question commonly used by Americans for self-defense, hunting and shooting sports. None of the historical regulations identified by the majority reflects a ban on common weapons, but instead reflected regulations such as prohibitions on public use of the weapons or on concealed carry.

As the frontline law enforcement in Illinois counties, the sheriffs represented by ISA are deeply vested in respect for the rule of law. As such, the ISA believes that allowing unconstitutional laws like HB 5471 to remain on the books for any extended period makes the execution of their duties significantly more difficult. And even if it were relevant to the constitutional analysis, crime data does not align with the popular narrative that such a ban on the acquisition and possession of the affected firearms and ammunition feeding devices will have an appreciable impact on public safety.

The Court should accept the Petition for Certiorari in order to re-establish the principles set forth in *Heller* and *Bruen*. The Seventh Circuit has gone to great lengths to limit—not respect—the fundamental rights afforded individuals by the Second Amend-

ment. That approach cannot be reconciled with this Court's decisions and should not be allowed to stand.

ARGUMENT

I. THE SEVENTH CIRCUIT'S DECISION CANNOT BE SQUARED WITH THIS COURT'S PRECEDENT

The Second Amendment to the United States Constitution preserves "the right of the people to keep and bear Arms" and declares that this right "shall not be infringed." U.S. Const. amend. II. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court made abundantly clear that a ban on the possession of handguns—an "entire class of 'arms' that is overwhelmingly chosen by American society for [the] lawful purpose [of self-defense]"—runs afoul of this constitutional provision. 554 U.S. at 628. The *Heller* Court also made clear that the Second Amendment's protections apply even to firearms that did not exist when the Constitution was adopted, so long as they are commonly used today for legal purposes by law-abiding citizens. *Id.* at 624-25; *see also Bruen*, 597 U.S. at 21 (noting that the Second Amendment's protections extend to "any weapon" commonly used today). "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Heller*, 554 U.S. at 634-35.

In evaluating the constitutionality of laws potentially implicated by the Second Amendment, the Supreme Court has established a two-part analytical

approach that puts the onus on the government. First, a court must evaluate whether the Second Amendment's plain text covers the conduct at issue. *Bruen*, 597 U.S. at 24. That threshold inquiry is straightforward, as it asks courts to look to the text and the text alone. Second, where the Second Amendment is applicable, the question becomes whether the government can justify the restriction by showing that it is consistent with the nation's historical tradition of firearm regulation. *Id.*

The Illinois legislature passed HB 5471 in the face of this Court's clear and unambiguous recognition that individual rights under the Second Amendment are on equal footing with other fundamental rights enshrined in the Bill of Rights. The Illinois bill modified multiple Illinois code sections, sweeping within its scope a broadly defined panoply of more than 1,000 semiautomatic rifles, handguns, shotguns and ammunition feeding devices. 720 ILCS 5/24-1.9(a)(1). And the state police can add to the list of firearms covered by HB 5471 each year, including copies, duplicates, variants and altered facsimiles of the already identified weapons. 720 ILCS 5/24-1.9(d)(3).

Despite the breadth of prohibitions imposed by the Illinois legislature, the Seventh Circuit failed to faithfully adhere to this Court's framework for reviewing Second Amendment issues, instead reverting to that court's pre-*Bruen* approach designed to force individuals' constitutional rights under the Second Amendment to take a back seat to legislative political judgments regarding those individuals' access to certain firearms. *See* App-24-25, 41-42 (citing *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015)). In doing so, the Seventh Circuit's decision sends a

message to the constituents served by Illinois' sheriffs that the government remains free to undermine their constitutional protections—even in defiance of principles established by this Court. That message plants seeds of mistrust with respect to our government institutions, which ultimately makes the sheriffs' job that much more difficult.

A. The Majority's Refusal to Recognize That the Firearms and Ammunition Feeding Devices Banned by HB 5471 Are "Arms" Demonstrates Its Determination to Undermine This Court's Holdings

The rifles, pistols, shotguns and ammunition feeding devices banned by HB 5471 come within the plain text of the Second Amendment. In *Heller*, the Court noted that the meaning of "Arms" has not changed since the 18th Century and gave as one of its examples a reference that had enumerated a more "limited" definition while nevertheless noting that even that source acknowledged that "all firearms constituted 'arms.'" 554 U.S. at 581-82 (citing 1 J. Trusler, *The Distinction Between Words Esteemed Synonymous in the English Language* 37 (3d ed. 1794)). Consequently, the Court recognized that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Heller*, 554 U.S. at 582. And the Court reaffirmed this fundamental principle in *Bruen*, stating that the "general definition covers modern instruments that facilitate armed self-defense." 597 U.S. at 28.

Despite these holdings defining "Arms" under the Second Amendment, the Seventh Circuit created a different approach—one divorced from both the text and the historical understanding of the scope of the Second Amendment. In so doing, the majority ignored this Court's conclusion that "Arms" means exactly what it sounds like—a weapon that can be used "to cast at" another. *Heller*, 554 U.S. at 581. The majority below concluded that this approach was too simplistic because it believed (incorrectly) that this Court in *Heller* determined that machine guns—a bearable weapon that can be used to cast at an adversary—are not "Arms" as used in the Second Amendment. App-31. But this Court made no such finding, and, instead, recognized only that the Second Amendment did not preclude regulation of machine guns. *Heller*, 554 U.S. at 627. That conclusion is obviously significantly different than the majority's interpretation that machine guns are not arms and that the Second Amendment did not even come into play.

Rather than apply the Supreme Court's straightforward definition of "Arms," the majority undercut the constitutional protections by resting the decision on whether a Second Amendment analysis is even required on the government's classification of "weapons that may be reserved for military use." App-32 (emphasis added); *see also* App-48 (reach of Second Amendment dependent on government's "distinction between military and civilian weaponry"). Nothing in the Second Amendment or the Supreme Court's precedent gives the government the power to determine as a predicate matter which firearms it can exclude from the reach of the Second Amendment. For a fun-

damental right that "shall not be infringed," the majority has created a significant loophole that leaves the ability to infringe up to the discretion of the infringer. No one would suggest that the government could be left to determine that certain words are not "speech" and, therefore, outside the reach of the First Amendment, even if some words can ultimately be regulated within the contours of the First Amendment. The rights granted by the Second Amendment deserve no less.

Moreover, to be clear, the majority cited nothing in the record that the firearms and ammunition feeding devices covered by HB 5471 are now—or ever have been—"reserved for military use." Indeed, millions of Americans own and lawfully use the rifles, pistols, shotguns and ammunition feeding devices targeted by the Illinois legislature in HB 5741. Petitioners' Br. 5-9. Instead, it was enough for the majority that semi-automatic weapons shared some characteristics with fully automatic weapons used by the military. Yet this Court has previously made clear that semi-automatic weapons, including those on the AR-15 platform, are not even in the same category as the M-16 used in the military, and the semi-automatic rifles "traditionally have been widely accepted as lawful possessions." *Staples v. United States*, 511 U.S. 600, 615 (1994).

B. The Majority's Reliance on Dissimilar Historical Regulation Undermines This Court's Holdings

While the majority concluded that banning a wide swath of firearms owned by millions of law-abiding Americans somehow did not even implicate

the Second Amendment, it went further to find that HB 5471 could be justified by historical regulations of weapons such as the Bowie knife. App-45-51. But as the dissent aptly recognized, critical distinctions demonstrate that the regulations cited by the majority cannot support HB 5471. App-78-80. For example, restrictions on public carry of certain weapons in the past is not comparable to an outright ban on the acquisition of more than 1,000 rifles, pistols, shotguns and ammunition feeding devices.

Nor is it an answer for the majority to state that "[t]he laws before us have one huge carve-out: people who presently own the listed firearms or ammunition are entitled to keep them, subject only to a registration requirement that is no more onerous than many found in history." App-45. First, registration is by far not the only burden placed on pre-existing owners. HB 5471 also places severe restrictions on where such pre-existing owners can "keep and bear" such firearms. 720 ILCS 5/24-1.9(d). Even registered firearms can only be possessed on private property belonging to the owner or another granting permission, at licensed gun ranges or shooting competitions, or at licensed dealers or gunsmiths for repairs. *Id.* Even in the exercise of those limited rights as to registered firearms, the individual must transport the weapons unloaded and sealed in a storage device. *Id.*

And, of course, the limited rights granted to pre-existing owners do nothing to protect the fundamental rights of individuals who may wish to acquire such common firearms in the future. Scores of Illinois citizens who will come of age in the coming years and who would have otherwise elected to "keep and bear" firearms or ammunition feeding devices classified by

Illinois as "assault weapons" for lawful purposes, including self-defense, will be prohibited from doing so by HB 5471. That some small subset of citizens is grandfathered into a universe of restricted access to or use of the affected rifles, pistols, shotguns and ammunition feeding devices does not eliminate or excuse the deprivation of constitutional rights for the multitude of remaining law-abiding persons in Illinois.

II. THIS COURT'S IMMEDIATE INTERVENTION IS REQUIRED TO AVOID COMPELLED ENFORCEMENT OF REGULATIONS THAT ARE FACIALLY UNCONSTITUTIONAL

As demonstrated in the prior section, HB 5471's ban on an entire class of firearms is facially unconstitutional and ignores the consistent treatment of the Second Amendment by the Supreme Court since *Heller* nearly 16 years ago and the analysis mandated by *Bruen*. It is the conspicuous nature of HB 5471's conflict with the Second Amendment that not only justified the district court's preliminary injunction, but also makes such relief significant for law enforcement officers.

The sheriffs represented by the ISA unquestionably share a commitment to the rule of law in Illinois. But that rule of law starts first and foremost with the United States Constitution. In fact, sheriffs are required to take an oath prescribed in the Illinois Constitution that begins with an affirmation that "I do solemnly swear (affirm) that I will support the Constitution of the United States . . . ." Ill. Const. art. XIII, § 3. Police officers across Illinois commonly take the same oath. *See*, *e.g.*, Code of Oak Park, IL, § 19-1-2, available at https://codelibrary.amlegal.com/codes/oakparkil/latest/oakpark_il/0-0-0-9329 ("I do solemnly

swear that I will support the Constitution of the United States").

When this Court ruled that the Second Amendment's prohibition on the infringement of the right to keep and bear arms applied to the states under the Fourteenth Amendment, the Court found it "clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." *McDonald*, 561 U.S. at 778. That concept of "ordered liberty" is fully consistent with the fundamental objectives of the law enforcement members of the ISA, balancing the rules and limitations created by the State's laws with the principle of individual liberty that underpins society. And the Second Amendment provides the overarching guideline for how that balance must be achieved with respect to firearms.

Because the citizens of Illinois justifiably look to law enforcement officials to conduct themselves in a manner that respects their individual rights, those officials' standing and authority in their communities are compromised when they are challenged to enforce a facially unconstitutional law. This is particularly true where the statute at issue—like HB 5471—directly and significantly interferes with a recognized fundamental constitutional right. This harms the public perception of law enforcement, making their critical jobs even harder to perform, at a time when they are otherwise working to demonstrate their commitment to the recognition and protection of the rights of Illinois citizens. It is the open and obvious disregard of the Second Amendment's reach that puts law enforcement officials in an untenable position

and contributes to the need for immediate review by this Court.

And while the popular narrative is that banning the sale, purchase, and possession of "assault weapons" is a necessary step in the fight against crime, this purported justification for the legislative restrictions on firearms not only is empirically unsupported; it does not come into play in the straightforward application of the Second Amendment under the test this Court took pains to set out in *Bruen*. *See Bruen*, 597 U.S. at 29 n.7 (there can be no "independent means-end scrutiny under the guise of an analogical inquiry"). The fundamental protection afforded by the Second Amendment does not allow for bypassing that protection simply because the government thinks that is the better approach.

Moreover, even if a balancing of the strength of the right against the stated need for the restriction was appropriate, the purported rationale for imposing a ban on this class of firearms is not well supported. Indeed, while the prevalence of firearms falling within HB 5471's ban has been increasing,[2] the numbers for

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[2] *See Miller v. Bonta*, 542 F. Supp. 3d 1009, 1022 (S.D. Cal. 2021), *vacated and remanded*, No. 21-55608, 2022 WL 3095986 (9th Cir. Aug. 1, 2022) ("Over the last three decades . . . the numbers [of modern rifles] have been steadily increasing.") The Ninth Circuit vacated the decision of the district court and remanded the case for further consideration in light of *Bruen*. 2022 WL 3095986. On remand, the district court found that the plain text of the Second Amendment protected law-abiding individuals' right to possess semiautomatic weapons and that historical traditions did not justify California's similar ban on the possession or sale of such weapons. *Miller v. Bonta*, __ F. Supp. 3d __, No. 19-cv-01537 BEN (JLB), 2023 WL 6929336, *8, 12

violent crimes in Illinois have steadily decreased. In 1991, the Illinois violent crime rate was 1,039 per 100,000 population, while that number had dropped to 404 per 100,000 in 2018.[3] At the same time, even looking at murders committed with firearms in 2020, only 3% of those were committed with rifles, of which "assault weapons" were only a small subset.[4]

In the end, even if the court could properly consider a means-end analysis, that analysis would not justify the broad restrictions in HB 5471. Perhaps that is why research shows more than 2/3 of police officers in the United States oppose so-called "assault weapons" bans.[5] The ISA agrees with those police officers that these restrictions on the exercise of fundamental constitutional rights of law-abiding citizens cannot be justified by the misuse of these firearms by criminals.

* * *

(S.D. Cal. Oct. 19, 2023), *app. filed*, No. 23-2979 (9th Cir. Oct. 23, 2023).

[3] *See* Macrotrends, *Illinois Crime Rate, 1979-2018,* available at https://www.macrotrends.net/states/illinois/crime-rate-statistics.

[4] *See* John Gramlich, *What the data says about gun deaths in the U.S.*, Pew Research Center, Feb. 3, 2022 (available at https://www.pewresearch.org/fact-tank/2022/02/03/what-the-data-says-about-gun-deaths-in-the-u-s/).

[5] *See* Rich Morin, Kim Parker, Renee Stepler, Andrew Mercer, *Behind the Badge—Part 6. Police views, public views*, Pew Research Center, Jan. 11, 2017 (available at https://www.pewresearch.org/social-trends/2017/01/11/police-views-public-views/).

As the frontline face of law enforcement for the citizens of Illinois, the sheriffs of Illinois embody respect for the rule of law. The majority opinion addressing HB 5471 undermines that rule because it diminishes this Court's clear pronouncements regarding analysis of Second Amendment issues. At a time when government institutions, including law enforcement, face increasing challenges to their legitimacy, this Court should act promptly to reinforce the primacy of its rulings and re-assert its analytical framework for Second Amendment issues.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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