No. 23-880

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,
Petitioners,

v.

CITY OF NAPERVILLE, ILLINOIS, JASON ARRES, AND THE STATE OF ILLINOIS

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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April 25, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

REPLY BRIEF

I. The State Does Not Even Try to Defend its Unconstitutional Handgun Ban

Petitioners pointed out that under *D.C. v. Heller*, 554 U.S. 570, 628-29 (2008), a categorial ban on possession of handguns even for self-defense in the home is unconstitutional. Pet. 13-14. The State[1] admits it has banned possession of certain handguns. Resp. 5. Thus, the stage was set for the State to explain why its handgun ban is distinguishable from the one struck down in *Heller*. But it did not. Instead, like the Seventh Circuit before it, the State failed to advance any argument whatsoever in support of its handgun ban. The most obvious conclusion to be drawn from this lacuna in the State's Response is that it has all but admitted that its handgun ban is indefensible.

II. The State's Defense of *Friedman* is Unsupportable

Petitioners demonstrated that all three factors of the Second Amendment test announced by the Seventh Circuit in *Friedman v. City of Highland Park, Illinois*, 784 F.3d 406, 410 (7th Cir. 2015), are flatly foreclosed by this Court's precedents. Pet. 28. *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 20 and 28 (2022), and *Caetano v. Massachusetts*, 577 U.S. 411 (2016) (*per curiam*) (*citing Heller*, 554 U.S. at 582).

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[1] Petitioners will refer to the State of Illinois and the City of Naperville collectively as the "State."

In response, the State quoted the Seventh Circuit for the proposition that *Friedman's* approach was "basically compatible" with *Bruen* because it looked to "history and tradition." Resp. 9. But the only historical inquiry under the *Friedman* test is whether the law bans weapons that were in common use *at the time of ratification*. 784 F.3d at 410. And *Caetano* unambiguously prohibited that exact historical inquiry. 577 U.S. at 411. It is a mystery why the State believes the *Friedman* historical inquiry is "basically compatible" with this Court's precedents.[2]

III. The State Requests the Court to Treat the Right to Keep and Bear Arms as a Second-Class Right

Bruen settled once and for all that the right to keep and bear arms is not a second-class right. 597 U.S. at 70. The Court said the Second Amendment protects the right to bear arms in the same way the First Amendment protects unpopular speech. *Id.* In other words, the former protection of constitutional rights is as strong as the latter.

The State disagrees and argues that the right to keep and bear arms should be subject to an entirely different body of rules than the right to free speech. Resp. 16. In particular, the State acknowledges that *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976), held that the loss of First Amendment freedoms unquestionably constitutes irreparable injury for purposes of a

[2] Moreover, *Friedman* noted that Second Amendment rights must give way if an arms ban "makes the public feel safe." 784 F.3d at 412. It is difficult to imagine a rationale for upholding an arms ban that is less compatible with *Bruen*.

preliminary injunction analysis. Apparently, however, the State believes the *Elrod v. Burns* rule is reserved only for first-class rights like the right to free speech and has no application to second-class rights like the right to keep and bear arms. Resp. 16.

The State's argument is obviously incompatible with *Bruen*. Moreover, the State's argument is incompatible even with Seventh Circuit precedent. *See Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) (applying *Elrod v. Burns* principle in Second Amendment context). *See also Baird v. Bonta*, 81 F.4th 1036, 1040 (9th Cir. 2023) (same).

The State argues that following the *Elrod v. Burns* rule will impermissibly merge the likelihood of success on the merits factor with the irreparable harm factor. Resp. 16. This is an odd argument, because exactly that happens all of the time. *See* 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948.1 (3d ed. 1998) ("[w]hen an alleged deprivation of a constitutional right is involved, ... most courts hold that no further showing of irreparable injury is necessary.").

IV. The Record is Sufficiently Developed for Entry of a Preliminary Injunction

The State argues that denial of a preliminary injunction was appropriate because the record was not developed as much as it would be in later phases of the litigation. Resp. 15. The is wrong for two reasons. First, there is no further need to develop the record because the State concedes the dispositive facts on common use. As set forth in the Petition, the State's own expert, Dr. Louis Klarevas, estimated that there

are approximately 24.4 million so-called "assault weapons" in circulation in American society. Pet. 10. That is millions more than necessary to establish that the weapons are in common use. It is unclear why the State believes more evidence is needed to establish common use when its own expert has submitted all the evidence that is necessary. See *Miller v. Bonta*, 2023 WL 6929336, at *33 (S.D. Cal. Oct. 19, 2023) (stayed) (Citing Dr. Klarevas, the court noted that there are 24.4 million "assault weapons" in circulation).[3] On top of that, the State concedes that at least 6.4 million American citizens own the rifles it has banned. Resp. 33. The State's concession, standing alone, establishes common use. *See Friedman v. City of Highland Park, Illinois*, 784 F.3d 406, 415 and n.3 (7th Cir. 2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) (five million rifle owners sufficient to establish common use).

Secondly, the State's argument that a full-blown trial record must be developed before a preliminary injunction can be entered runs headlong into *Univ. of Texas v. Camenisch*, 451 U.S. 390 (1981), in which the Court wrote:

> Given [the limited purpose of a preliminary injunction], and given the haste that is often necessary if [the relative positions of the parties] are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal *and evidence that is less*

[3] The State suggests that the study that its expert relied on is not reliable. Resp. 33. It is odd, to say the least, that the State's argument relies on undermining its own expert's opinions.

> *complete* than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing.

Id. at 395 (emphasis added).

V. The Unanimity of the Lower Courts in Circumventing *Heller* and *Bruen* is a Reason to Grant Certiorari, Not Deny it

The State argues the Court should deny certiorari because there is no circuit split and lower courts have unanimously rejected challenges to arms bans. Resp. 12. This argument is ironic because an identical argument could have been made in opposition to a petition for a writ of certiorari in *Bruen* itself, where the Court noted that the lower courts had uniformly failed properly to apply *Heller's* text and history test. *See* 597 U.S. at 19 and n.4 (collecting many of the cases that had gotten *Heller* wrong). No circuit split developed prior to *Bruen* because one-by-one the circuit courts held that *Heller* mandated the application of intermediate scrutiny, when in fact, far from mandating such review, *Heller* specifically "ruled out . . . intermediate scrutiny." 597 U.S. at 23.

In summary, after *Heller*, the lower courts uniformly failed faithfully to apply this Court's Second Amendment precedents. That was the reason the Court stepped in and imposed a course correction. After *Bruen*, the lower courts have continued to fail to apply this Court's precedents. Far from being a reason to deny certiorari, that is perhaps the strongest reason to grant it.

VI. The Court Has Never Hesitated to Grant Certiorari in Interlocutory Matters Involving Important Constitutional Rights

The State argues that the interlocutory nature of this matter forecloses granting certiorari. Resp. 2, 11, 15-16, 18, 35. But this Court has never hesitated to grant certiorari to review denial of a preliminary injunction when important constitutional rights are at stake. To cite a few of many examples, in the following cases the district court denied a motion to preliminarily enjoin a constitutional violation, the circuit court affirmed, and this Court granted certiorari and reversed: *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522 (2021); *Nat'l Inst. Of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755 (2018); *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015); and *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).[4]

VII. The State's Merits Arguments Are Unpersuasive

A. Firearms are Arms

In *Heller*, the Court wrote "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." 554 U.S. at 582. And "[a]t the time of the founding, as now, *to 'bear' meant to 'carry*.'" *Id*. at 584 (emphasis added). *Heller*

[4] In *Hobby Lobby*, the Court reversed the Third Circuit but affirmed the Tenth Circuit in consolidated cases. The point is that either way the Court granted certiorari in an interlocutory matter.

made it clear that any arm that can be carried is prima facie protected by the Second Amendment.

But the State cites the circuit court's contrary holding: "[A]s the Seventh Circuit noted, by using the phrase 'bearable arms,' this Court did not mean that the Second Amendment presumptively protects any weapons that a person can bear, like shoulder-fired rocket launchers." Resp. 29. Well, no, *Heller* said in so many words that any arm that can be carried is a bearable arm. It is difficult to understand why the State believes the phrases "bearable arm" and "weapon[] that a person can bear" can possibly have different meanings.

The State seems to be alarmed by the prospect that a shoulder-fired rocket launcher is presumptively protected by the Second Amendment. This too is difficult to understand, because in the very passage the State cites,[5] *Heller* stated that sophisticated military "arms that are highly unusual in society at large" (such as shoulder-fired rocket launchers) are not protected. 554 U.S. at 627. This does not mean that that sophisticated military "arms" are not "arms." *Heller* clearly refers to them as such. It means that even though they are arms under the plain text step, they are clearly not protected under the history and tradition step. In summary, in the case of a shoulder-fired rocket launcher, the presumption of protection is clearly rebutted under the historical tradition of banning dangerous and unusual arms. Thus, the State needn't have worried, because there is no risk that a

[5] See Resp. 29.

rocket launcher is actually (as opposed to presumptively) protected.

Of course, the State advances its strained argument regarding the meaning of "bearable arm" in service of its goal of "defining" its way around *Bruen's* plain text step. Under the State's view, if the government does not want its citizens to possess certain firearms in common use, all it has to do is define those firearms as "not arms," even if it has to do so in the teeth of the plain meaning of the word "arm." But the State's approach manifestly conflicts with *Heller* and must be rejected, because, as their name implies, firearms are obviously arms. *See* 554 U.S. at 581.

B. The State Embraces the Seventh Circuit's Interest-Balancing

The State argues that its arms ban should be upheld because it has balanced its citizens' interest in possessing these weapons against its interest in advancing public safety and determined that its public safety interest predominates. Resp. 22-24. This is pure interest-balancing. And if *Bruen* stands for anything, it stands for the proposition that the government may not justify a law simply by positing that it promotes an important interest. 597 U.S. at 17.

C. The State Embraces the Seventh Circuit's Empirical Judgments

The State says its experts believe that the banned long guns are not as suitable for self-defense as certain handguns that the State has not banned. Resp. 23-24. And it urges the Court to accept this empirical judgment as a basis for upholding its arms ban. But the State's experts' opinions about the suitability

of the banned weapons are simply irrelevant under *Bruen*. There, the Court stated that judges should not be making "difficult empirical judgments" about "the costs and benefits of firearms restrictions" given their lack of expertise in the field. 597 U.S. 25.

Ironically, the State is attempting to flip the script of the argument the District of Columbia made in *Heller*, where the government argued long guns are more suitable for self-defense and its handgun ban should be upheld. Here, the State argues handguns are more suitable for self-defense (Resp. 24) and its long gun ban should be upheld. But the Court's admonition to D.C. in *Heller* applies with equal force here:

> It is no answer to say ... that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed. It is enough to note, as we have observed, that the *American people have considered* the handgun to be the quintessential self-defense weapon. ... Whatever the reason, handguns are the *most popular weapon chosen by Americans* for self-defense in the home, and a complete prohibition of their use is invalid.

Id., 554 U.S. at 629 (emphasis added).

The State insists that it has the power to decide which weapons it will deign to allow the people to use for self-defense. But *Heller* says the State has it exactly backwards. The government does not tell the people which arms they can have for self-defense. That matter is definitively determined by the collective choices of the American people.

D. The Relative Dangerousness of a Weapon in Common Use is Irrelevant

The State breathlessly asserts that the common use test "would render the government powerless to ban any commonly owned weapons that a single person could carry, no matter how dangerous or inappropriate for self-defense." Resp. 30. The State seems to be startled by this conclusion. It needn't be, because "[i]f *Heller* tells us anything, it is that firearms cannot be categorically prohibited just because they are dangerous." *Caetano v. Massachusetts*, 577 U.S. 411, 418 (2016) (Alito, J., concurring). And this is why "the relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes." *Id*.

E. The State's Own Expert Establishes that the Banned Weapons are not Predominantly used by Criminals

The State asserts that it may ban these rifles because they are predominantly used by criminals. Resp. 34 (comparing the banned rifles to Tommy guns used by criminals in the 1920s). This is an odd argument for the State to make, because, as discussed in the Petition, the State's own expert provided data that indicated that over 99.999% of the weapons were not used in mass shootings in 2022. Moreover, as then-Judge Kavanaugh pointed out in *Heller v. D.C.*, 670 F.3d 1244 (D.C. Cir. 2011), it makes absolutely no sense to argue that these rifles should be banned because they are sometimes used by criminals when the handguns protected in *Heller* are used by criminals to a far greater extent. *Id*. at 1269-70 (Kavanaugh, J.,

dissenting). As the Court noted in *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 783 (2010), constitutional rights are not discarded merely because they sometimes have "controversial public safety implications."

F. The Seventh Circuit's Historical Inquiry Was Perfunctory

The State insists that there is no need for review because the lower court implemented *Bruen* in good faith. That is a dubious assertion. *Bruen* noted that since everything is similar in infinite ways to everything else, one must be cautious to engage in the analogical inquiry at the appropriate level of generality to ensure that the proposed analogues are "relevantly similar" to the challenged law. 597 U.S. at 29. To achieve this goal, there are at least two important metrics: "*how* and *why* the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* (emphasis added).

Regarding the "how" metric, the circuit court noted that there were historical laws regulating weapons and their use, but the details of those regulations (such as whether they regulated use outside the home or imposed an absolute ban on possession even in the home) are irrelevant. App. 42-43. In other words, according to the Seventh Circuit, practically all historical firearm regulations satisfy the "how" metric because the details regarding whether the burdens they imposed were light or heavy do not matter.

Regarding the "why" metric, the circuit court noted that if the purpose of a challenged ordinance is to "protect public health, safety, and welfare," its purpose is sufficiently analogous to historical regulations

which served the same purpose. App. 44-45. In other words, according to the Seventh Circuit, practically all historical laws satisfy the "why" metric.

It strains credulity to suggest that the circuit court engaged in a good-faith analogical inquiry. This is especially true given that the lower court hardly bothered to conceal its contempt for *Bruen's* historical test. See App. 42, 43.

VIII. A Point of Agreement

The State distinguishes *Teter v. Lopez*, 76 F.4th 938 (9th Cir. 2023), on the ground that the knives that were at issue in that case are nothing like the firearms and magazines banned by the State. Resp. 13. Perhaps the State will now concede that all of the Bowie knife regulations it pointed to as part of its historical analysis (See, e.g., Resp. 11, 26, 34) are not relevant to the resolution of this matter.

CONCLUSION

The petition for writ of certiorari should be granted.

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