Nos. 23-877, 23-878, 23-879, 23-880, 23-944

In the Supreme Court of the United States

DANE HARREL, ET AL., *Petitioner*s,
v.
KWAME RAOUL, ATTORNEY GENERAL OF ILLINOIS, ET AL.,
Respondents.

JAVIER HERRERA, *Petitioner*,
v.
KWAME RAOUL, ATTORNEY GENERAL OF ILLINOIS, ET AL.,
Respondents.

CALEB BARNETT, ET AL., *Petitioners*,
v.
KWAME RAOUL, ATTORNEY GENERAL OF ILLINOIS, ET AL.,
Respondents.
(*Captions continued on inside cover*)

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

Amicus Curiae Brief of The Buckeye Institute in Support of Petitioners

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NATIONAL ASSOCIATION FOR GUN RIGHTS, ET AL.,
Petitioners,
v.
CITY OF NAPERVILLE, ILLINOIS, ET AL.,
Respondents.

JEREMY W. LANGLEY, ET AL.,
Petitioners,
v.
BRENDAN F. KELLY, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE ILLINOIS STATE POLICE, ET AL.,
Respondents.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae The Buckeye Institute respectfully submits its brief in support of the Petitioners. The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states. The Buckeye Institute performs timely and reliable research on key issues, compiles and synthesizes data, formulates free-market policy solutions, and presents them for implementation in Ohio and replication nationwide. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization as defined by I.R.C. § 501(c)(3). The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission, the exercise of citizens' constitutional rights, and the orderly functioning of the courts.

In this case, the Seventh Circuit, like other lower courts, appears to have misapplied the test set forth by this Court in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022) to reach a conclusion seemingly at odds with *Bruen's* logic. The Seventh Circuit's decision thus clouds and confuses the status of Second Amendment rights, leaving citizens and state and local governments in doubt as to the contours of the right. Granting the petition will allow

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[1] Pursuant to Supreme Court Rule 37.2, counsel has provided timely notice of the Buckeye Institute's intent to file this amicus brief. Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae* made any monetary contribution toward the preparation or submission of this brief.

the Court to clarify its holding in Bruen and bring greater consistency to its application in the federal court system.

SUMMARY OF ARGUMENT

The American people—including lawmakers, legal commentators, and federal jurists— have long held strong and conflicting views on the scope and meaning of the Second Amendment. The same is true for the First Amendment. As well as the Fifth and the Fourteenth. And this is exactly as it should be. In a pluralistic republic, the rights of individuals will often collide with the will of the majority, as expressed through statute, ordinance regulation or other government action.

It is therefore unsurprising—and in fact, welcome—that in *Bruen's* wake the lawmakers, litigants, and judges vigorously debate how *Bruen* should apply to existing statutes, newly minted legislation, and unanticipated factual scenarios. But as federal district courts and circuit courts of appeal consider the cases and controversies brought before them, they are still "bound to adhere to the controlling decisions" of this Court. *Hutto v. Davis,* 454 U.S. 370, 375 (1982).

In this case, the Seventh Circuit appears to have disregarded—or at least lost sight of this Court's fundamental holding in *Bruen*, and applied its own test based on whether history and tradition established governmental authority to ban "especially dangerous weapons" to "protect communities." Pet. App. 42. History shows that such deviation from and resistance to new precedents is not uncommon,

particularly when the new rule implicates public policy on issues where public opinion is split and deeply held. This resistance was the case in the civil rights era. And the tendency to stray from recent precedent cases has been manifest in Second Amendment jurisprudence since *Heller*.

Litigants and the public may take the cynical view that Justice O'Connor voiced when she noted that lower court judges "know how to mouth the correct legal rules with ironic solemnity while avoiding those rules' logical consequences," *TXO Prod. Corp. v. Alliance Resources Corp.,* 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting). Or they may see deviations from this Court's holding as attempts to properly apply precedent to new facts, or even to anticipate how this Court might rule. Regardless, it remains for this Court to serve as the final authority and promote uniformity throughout the federal court system, especially on issues that rouse public passions. The Court should therefore grant the petition to clarify, and if necessary, amplify its holding in *Bruen*.

ARGUMENT

I. Academic Views of Resistance to Hierarchical Precedent

Commentators have observed that "[l]ower courts supposedly follow Supreme Court precedent—but they often don't. Instead of adhering to the most persuasive interpretations of the Court's opinions, lower courts often adopt narrower readings." Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 Geo. L.J. 921 (2016). Professor Re calls this practice

"narrowing from below," while Professor Ashutosh Bhagwat refers to it as "underruling." Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Fed. Courts, & The Nature of the "Judicial Power"*, 80 B.U.L. Rev. 967, 970 (2000). Regardless of the name applied though, the practice "challenges the authority of higher courts and can generate legal disuniformity." Re, *supra*, at 921.

Professor Bhagwat posits that underruling has become more prevalent in the modern age, arguing that "[t]he past three or four decades [of the 20th century] have witnessed a fundamental change in attitudes within the federal judiciary regarding the proper function and role of the United States Supreme Court in the judicial hierarchy." Bhagwat, *supra*, at 967. He suggests that counter-hierarchical tendencies in the lower courts are, in fact, a good thing, and that efficiency favors allowing lower courts to anticipate changes in direction at the Supreme Court and save the litigants the trouble of having "to go all the way to the Supreme Court to overturn a precedent which is widely acknowledged to be moribund." *Id.*

Professor Bhagwat's inclination that lower courts should save litigants the trip may carry some weight where a decision has long been held in disrepute, for example, *Lochner v. New York*, 198 U.S. 45 (1905) or *Korematsu v. United States*, 323 U.S. 214 (1944), which were discredited but not expressly overruled for decades. But that rationale does not apply here, a mere two years after *Bruen* where the Seventh Circuit seems to be side-stepping this Court's directives.

Professor Bhagwat also argues that avoiding the straight jacket of hierarchical precedent promotes "percolation" of issues through the courts of appeals. *Id.* at 979. Percolation and disagreement certainly serve a purpose in judicial decision making and a "temporary disuniformity of federal law can assist the Court in learning from experience." Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 Harv. L. Rev. 4, 65 (1998). But that percolation comes at a cost—particularly in cases like these (and other Second Amendment cases) where "concerns about equality and fair notice would tip the scales in favor of uniformity in the definition of criminal offenses." *Id.* at 66. Other costs include "legal uncertainty, unprotected reliance, inability to plan and excessive litigation." *Id*. In many cases, percolation might not be worth the cost. *Id*. Further, true "percolation" assumes the lower courts are faithfully applying a newly articulated rule to different factual situations, not the wholesale abandonment of that rule. Indeed, Professor Bhagwat's suggested avoidance approach echoes Judge Reinhardt's more blatant "open resistance, defiance even, toward [the] Supreme Court . . . ." Linda Greenhouse, *Dissenting Against the Supreme Court's Rightward Shift,* N.Y. Times (April 12, 2018).[2] When asked about his record number of reversals, he "took it with a smile. 'They can't catch 'em all,' he said." *Id.*

[2] https://www.nytimes.com/2018/04/12/opinion/supreme-court-right-shift.html.

Fortunately, approval, whether tacit or express, of lower courts sidestepping binding Supreme Court precedent is the minority position in the academy. More importantly, this Court has soundly rejected it. See *Hutto*, 454 U.S. at 375 ("Federal district courts and circuit courts are bound to adhere to the controlling decisions of the Supreme Court."). This Court has been abundantly clear that it has sole authority to overturn its own precedent: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). Justice Rehnquist explained the danger of allowing inconsistent appellate decisions to stand, warning that "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto*, 454 U.S. at 375.

Allowing the circuit courts decisions that appear to ignore governing precedent presents another problem for the federal judiciary as an institution. Scholars, judges, and citizens have seen shadows of result-oriented jurisprudence underlying the underruling of politically charged cases. Regardless of the merits of these suspicions, when the Court allows a decision that seems plainly at odds with precedent—particularly a politically charged issue, its legitimacy can suffer. As Professor Evan Carminker writes:

> If federal law means one thing to one court but something else to another, the public might think either or both courts unprincipled or incompetent, or that the process of interpretation necessarily is indeterminate. Each of these alternatives subverts the courts' efforts to make their legal rulings appear objective and principled.

Evan Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 Stan. L. Rev. 817, 853–54 (1994).

This suspicion of judicial motives is hardly the exclusive province of the tin-foil hat crowd. Professor Carminker remarks that "[c]onsiderable anecdotal evidence suggests that when judges care deeply about a particular legal issue but disagree with existing precedent, they often attempt to subvert the doctrine and free themselves from its fetters by stretching to distinguish the holdings of the higher court." *Id*. at 819. Professor Bhagwat agrees, writing that "both evidence and observation suggest that more subtle, subterranean defiance, [than direct noncompliance] through means such as reading Supreme Court holdings narrowly, denying the logical implications of a holding, or treating significant parts of opinions as dicta, is far from unusual." Bhagwat, *supra*, at 986.

Indeed, Justice O'Connor has voiced the concern that lower court judges intentionally avoid applying rules they dislike, noting that some "know how to mouth the correct legal rules with ironic solemnity while avoiding those rules' logical consequences." *TXO Prod. Corp.*, 509 U.S. at 500 (O'Connor, J., dissenting).

The Seventh Circuit's decision in these cases seems to do just that, avoiding *Bruen's* logical conclusion.

II. Historical Judicial Resistance to Hierarchical Precedent

Lamentably some of our jurisprudential history demonstrates how, without this Court's enforcement of its decisions, obdurate lower court judges can frustrate those constitutional rights that are unfashionable. Some of the grossest—and most shameful—examples of lower courts "underruling" this Court's clear holdings occurred immediately following this Court's in *Brown v. Board of Education*, 347 U.S. 483 (1954). Despite the Court's plain holding that "separate but equal" facilities were "inherently unequal," numerous courts, deploying language that would make modern readers cringe, clung to *Plessy's* discredited rule, taking great pains to avoid *Brown's* logical conclusion. They just could not accept the concept that all men really are "created equal." The Declaration of Independence ¶ 2 (U.S. 1776).

In *Flemming v. S.C. Elec. & Gas. Co.*, 128 F. Supp. 469, 470 (E.D.S.C. 1955), *rev'd*, 224 F.2d 752 (4th Cir. 1955), the District Court for the Eastern District of South Carolina held that *Brown* applied only to "the field of public education," and relied on *Plessy* to support the to hold that that segregation in the field of public transportation is a valid exercise of State police power." And worse, while undermining the plain meaning of *Brown's* holding, the *Flemming* court indulged in the sophism that it was actually following precedent, mouthing support for *Brown* but noting that "[a]lthough the *Brown* case discredited some of

the language used in *Plessy v. Ferguson*, the Court's holding in that case has not been overruled." *Id.* On appeal, the Fourth Circuit applied *Brown's* express language and obvious intent to correct the deviation. This Court should do the same here.

The plaintiff in *Lonesome v. Maxwell*, a Black man who sought to play on a "whites only" public golf course met the same fate. 123 F.Supp. 193, 196–97 (D.Md.1954) ("This court has consistently held, following [*Plessy*], that segregation of races with respect to recreational facilities afforded by the State for its citizens is within the constitutional exercise of the police power of the State, provided the separate facilities afforded different races are substantially equal."), *sub nom*. *Dawson v. Mayor & City Council of Baltimore City*, 220 F.2d 386 (4th Cir.), *aff'd*, 350 U.S. 877 (1955). Again, the court of appeals eventually corrected the error. But it was not until the passage of the Civil Rights Act a decade later that the pernicious idea that "separate but equal" was somehow consistent with our Constitution was finally buried.

This is not to suggest that the Court, in deciding the cases and controversies before it in the years immediately following *Brown*, could have—or should have—enacted all of the Civil Rights Act's protections by judicial fiat. But the early post-*Brown* cases, which gave lip-service to precedent while declining to apply it, show that judges, whether consciously or unconsciously, can bring their own motives or prejudices to the bench and fundamentally misread

this Court's direction. When they do, quick correction is warranted.

III. Judicial Resistance to This Court's Second Amendment Decisions

The constitutional rights preserved by the Second Amendment are "not [] second-class right[s], subject to an entirely different body of rules than the other Bill of Rights guarantees." *Bruen*, 597 U.S. at 70 (citing *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion)). But some lower courts still have not accepted that clear directive.

This Court's holding in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment conferred an individual right to keep and bear arms and that statutes banning possessing operable handguns in the home violated that right was understandably controversial. Any decision so wound-up with the government's police power to protect public safety and the deep cultural divide surrounding the individual right to gun ownership inevitably would generate criticism. Again, this is as it should be. But whether out of an earnest attempt to apply a new rule to new facts, or the "subterranean defiance" recognized by Professor Bhagwat, courts, some courts at both the state and federal levels declined to enforce it. For example, in *People v. Abdullah*, a New York court "underruled" *Heller* on the basis that its ban on home firearm possession was not a complete ban, and *Heller* had not been expressly incorporated into the Fourteenth Amendment and did not apply to the states:

> Because New York does not have a complete ban on the possession of handguns in the home and because the District of Columbia is a federal enclave and not a State, *Heller* is distinguishable and its holding does not invalidate New York's gun possession laws or regulations

People v. Abdullah, 23 Misc.3d 232, 234, 870 N.Y.S.2d 886, 887 (2008). The *Abdullah* court premised its non-incorporation holding on a pre-*Heller* Second Circuit case, *Bach v. Pataki*, 408 F.3d 75 (2d Cir. 2005), which was subsequently overruled in *McDonald*, 561 U.S. 742. But this help came too late for Mr. Abdullah, whose conviction was affirmed. Likewise, in *National Rifle Ass'n of America, Inc v. Chicago, IL*, 567 F.3d 856 (2009), also overruled by *McDonald*, the NRA challenged two municipal ordinances that—like the D.C. ordinance in *Heller*—banned the possession of most handguns. The Court of Appeals, like the *Abdullah* court, held that absent express incorporation into the Fourteenth Amendment, the Second Amendment did not apply to the municipal bans. In these cases, the Court saw that the remedy was granting certiorari.

Yet even after this Court decided *McDonald*, lower courts continued to find ways to distinguish *Heller* and frustrate its holding. In *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014), *on reh'g en banc*, 824 F.3d 919 (9th Cir. 2016), the District Court for the Southern District of California upheld an ordinance allowing the carrying of weapons outside of the home only with "good cause." The Ninth Circuit initially

reversed and remanded, but sitting en banc, held that the general public had no Second Amendment right to carry concealed weapons. This holding was narrower than the district's court decision, but still qualified the individual right.

Bruen itself, of course, arose from cramped readings of *Heller* and a challenge to a New York licensing scheme that essentially prohibited the carrying of firearms outside of the home absent a showing of a particular need, even when an applicant had acquired a license for hunting and target practice. The Second Circuit held that the statute, which effectively banned individuals from bearing arms in contravention of *Heller*, passed constitutional muster under the intermediate scrutiny test. See *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d. Cir. 2012).

And state and federal courts, like the Seventh Circuit's decisions on appeal here, have applied Bruen so narrowly as to give it no meaning. See, *e.g.*, *People v. Rodriguez*, 76 Misc.3d 494, 498–99, 171 N.Y.S.3d 802, 806 (2022). Indeed, some courts have even expressed Reinhardt-like defiance. See *State v. Wilson*, No. SCAP-22-0000561, 2024 WL 466105, at *19 (Haw. Feb. 7, 2024) ("The spirit of Aloha clashes with a federally mandated-lifestyle that lets citizens walk around with deadly weapons during day-to-day activities"); *Frey v. Nigrelli*, No. 21 CV 05334, 2023 WL 2929389, *5 (S.D.N.Y Apr. 13, 2023) (denying injunction to prevent enforcement of licensing regime on the basis that "while *Bruen* did away with means-end scrutiny when considering whether a law violates the Second Amendment, the Court must still consider

the parties' hardships and the public interest when deciding on whether to issue an injunction") (internal citations omitted).

As this Court has repeatedly stated, "[t]he government of the United States has been emphatically termed a government of laws, and not of men." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). Regardless of whether lower court judges go astray in a good faith effort to apply new law or whether they cynically underrule this Court while ironically mouthing the correct legal rules, the remedy is the same. This Court should grant the petition to clarify and if necessary, amplify its decision in *Bruen*.

CONCLUSION

For all the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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