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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT BEVIS, et al. *Plaintiffs*, v. CITY OF NAPERVILLE, ILLINOIS, and JASON ARRES, in his official capacity as Chief of Police, *Defendants*.	)	No. 22 C 4775 Judge Virginia M. Kendall

MEMORANDUM OPINION AND ORDER

After several mass shootings nationwide, the City of Naperville enacted an Ordinance prohibiting the sale of assault weapons. Illinois followed shortly after with the Protect Illinois Communities Act, which bans the sale of both assault weapons and high-capacity magazines. Robert Bevis, who owns a local gun store in Naperville, Law Weapons, and the National Association of Gun Rights sued the state and city, alleging their laws violate the Second Amendment. (Dkt. 48). They now move for a temporary restraining order and a preliminary injunction alleging that their constitutional rights are being violated by the bans. (Dkts. 10, 50). For the following reasons, the motions are denied. (*Id.*)

BACKGROUND

Mass shootings have become common in America. They have occurred in cities from San Bernadino, California to Newtown, Connecticut, and recently, Highland Park, Illinois. (Dkt. 12-1 at 1–3). In response, several states—California, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, and New York—along with many local municipalities have enacted

bans on the possession, sale, and manufacture of assault weapons and high-capacity magazines. (*Id.*) Illinois and the city of Naperville decided to put similar restrictions in place.

On August 17, 2022, Naperville's City Council passed its Ordinance banning the sale of "assault rifles" within the city.[1] (Dkt. 12 at 2). Section 3-19-2 declares "[t]he Commercial Sale of Assault Rifles within the City is unlawful and is hereby prohibited." (Dkt. 12-1 at 8). Violators are subject to fines ranging between $1,000 and $2,500. (*Id.* at 9). Section 3-19-1 provides both a general definition of an "assault rifle" as well as specific examples of prohibited guns. (*Id.* at 4). The general definition is as follows:

> (1) A semiautomatic rifle that has a magazine that is not a fixed magazine and has any of the following:
>
> > (A) A pistol grip.
> > (B) A forward grip.
> > (C) A folding, telescoping, or detachable stock, or is otherwise foldable or adjustable in a manner that operates to reduce the length, size, or any other dimension, or otherwise enhances the concealability, of the weapon.
> > (D) A grenade launcher.
> > (E) A barrel shroud.
> > (F) A threaded barrel.
>
> (2) A semiautomatic rifle that has a fixed magazine with the capacity to accept more than 10 rounds, except for an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition.
>
> (3) Any part, combination of parts, component, device, attachment, or accessory that is designed or functions to accelerate the rate of fire of a semiautomatic rifle but not convert the semiautomatic rifle into a machinegun.

[1] The parties dispute whether the terms "assault rifle," "assault pistol," and "assault weapon" are appropriate. Proponents of bans believe the language accurately links the class of weapons to military weaponry. Indeed, the gun industry itself used "the terms 'assault weapons' and 'assault rifles' [] in the early 1980s, before political efforts to regulate them emerged in the late 1980s. The use of military terminology, and the weapons' military character and appearance, were key to marketing the guns to the public." Robert J. Spitzer, *Gun Accessories and the Second Amendment: Assault Weapons, Magazines, and Silencers*, 83 Law & Contemp. Probs. 231, 234 (2020). Opponents now consider the label misleading because the often-included guns, the argument goes, share no similar set of characteristics beyond the fact that they look intimidating. The Court will use the terms, as they are widely accepted in modern parlance and effectively convey the substance of the bans.

(*Id.* at 5). Additionally, twenty-six categories of weapons are specifically banned, including AK-47 and AR-15 rifles. (*Id.* at 5–6). The Ordinance was set to go into effect on January 1, 2023. (*Id.* at 10).

On January 10, 2023, Illinois enacted the Protect Illinois Communities Act, HB 5471. (Dkt. 57 at 1). The statute renders it unlawful "for any person within this State to knowingly manufacture, deliver, sell, or purchase or cause to be manufactured, delivered, sold, or purchased or cause to be possessed by another, an assault weapon," defined by a list of enumerated guns, including the AR-15 and AK-47. 720 ILCS 5/24-1.9(b). Additionally, the law bans the sale of "large capacity ammunition feeding device[s]," which are "magazine[s], belt[s], drum[s], [and] feed strip[s] … that can be readily restored or converted to accept[] more than 10 rounds of ammunition for long guns and more than 15 rounds of ammunition for handguns." 720 ILCS 5/24-1.10(a). Both state prohibitions went into immediate effect upon the passage of the act (in contrast, the regulations banning assault-weapon and large-capacity magazine ownership and imposing registration requirements have a later effective date and are not being challenged). (Dkt. 57 at 2).

Robert Bevis owns Law Weapons, a firearm store in Naperville. (Dkt. 48 ¶¶ 7–8). He attests, "I and my customers desire to exercise our Second Amendment right to acquire the Banned Firearms … for lawful purposes, including, but not limited to, the defense of our homes." (Dkt. 10-2 ¶ 4). Furthermore, he claims that the prohibition means he and his business will go bankrupt, and "the citizens of Naperville will be left as sitting ducks for criminals who will still get guns." (*Id.* ¶ 5). National Association for Gun Rights ("NAGR") is a nonprofit organization dedicated to "defend[ing] the right of all law-abiding individuals to keep and bear arms" and seeks to represent "the interests of its members who reside in the City of Naperville." (Dkt. 10-1 ¶ 2; *see also* Dkt. 48 ¶ 6).

Before Illinois enacted the Protect Illinois Communities Act, the plaintiffs—Bevis, Law Weapons, and NAGR—sued Naperville alleging its Ordinance violates the Second Amendment. (Dkt. 1). They moved for a temporary restraining order and preliminary injunction preventing its enforcement. (Dkt. 10). The city agreed to stay the Ordinance pending the disposition of the motion. (Dkt. 29). Shortly thereafter, Illinois passed the Protect Illinois Communities Act, and this Court granted the plaintiffs leave to amend their complaint to add the state as a party. (Dkts. 41, 47). The plaintiffs promptly filed their Amended Complaint, adding Jason Arres, Naperville's Chief of Police, as a defendant and asserting that both Naperville's Ordinance and Illinois's Protect Illinois Communities Act violate the Second Amendment. (Dkt. 48). They then notified the Illinois Attorney General of their constitutional challenge and moved for a temporary restraining order and preliminary injunction against both laws.[2] (Dkts. 49, 50). The Court held oral argument on January 27, 2023. (Dkt. 55).

DISCUSSION

The standards for issuing a temporary restraining order and a preliminary injunction are identical. *Mays v. Dart*, 453 F. Supp. 3d 1074, 1087 (N.D. Ill. 2020). "A preliminary injunction is an extraordinary remedy never awarded as of right." *Doe v. Univ. of S. Ind.*, 43 F.4th 784, 791 (7th

[2] During this litigation, other plaintiffs have challenged the Illinois law in both state and federal court. On January 20, 2023, an Illinois circuit court entered a temporary restraining order enjoining the law based on a violation of the three-readings rule, and the Illinois Appellate Court for the Fifth District affirmed. *Accuracy Firearms, LLC v. Pritzker*, 2023 IL App (5th) 230035 (Jan. 31, 2023). Neither party has raised the possibility of abstention under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). *Pullman* abstention requires federal courts to stay cases while state courts adjudicate "unsettled state-law issues." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 76 (1997). While abstention doctrines can be raised sua sponte, *International College of Surgeons v. City of Chicago*, 153 F.3d 356, 360 (7th Cir. 1998), doing so here would be inappropriate. "Attractive in theory because it placed state-law questions in courts equipped to rule authoritatively on them, *Pullman* abstention proved protracted and expensive in practice, for it entailed a full round of litigation in the state court system before any resumption of proceedings in federal court." *Arizonans for Off. Eng.*, 520 U.S. at 76. The Protect Illinois Communities Act needs no clarification—it clearly prohibits the sale of assault weapons and high-capacity magazines. No unsettled state-law issue complicates this Court's review of the Act's constitutionality. Moreover, even without the state law, Naperville's Ordinance would still be in effect.

Cir. 2022) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Halczenko v. Ascension Health, Inc.*, 37 F.4th 1321, 1324 (7th Cir. 2022) (quoting *Winter*, 555 U.S. at 20).

I. Likelihood of Success on the Merits

A plaintiff must "demonstrate that [his] claim has some likelihood of success on the merits, not merely a better than negligible chance." *Doe*, 43 F.4th at 791 (quoting *Mays v. Dart*, 974 F.3d 810, 822 (7th Cir. 2020)). Analyzing the likelihood of success, the Seventh Circuit has stressed, is "often decisive"—as it is here. *Braam v. Carr*, 37 F.4th 1269, 1272 (7th Cir. 2022). As set forth below, although the plaintiffs have standing to bring this lawsuit, they are unlikely to succeed on the merits of their claim because Naperville's Ordinance and the Protect Illinois Communities Act are consistent with the Second Amendment's text, history, and tradition.

A. Jurisdiction

Before proceeding to the merits, the Court must be confident in its jurisdiction. *N.J. by Jacob v. Sonnabend*, 37 F.4th 412, 420 (7th Cir. 2022). Article III grants the federal courts jurisdiction only over "cases" and "controversies." U.S. Const. art. III § 2. As such, any person or party "invoking the power of a federal court must demonstrate standing to do so." *Hero v. Lake Cnty. Election Bd.*, 42 F.4th 768, 772 (7th Cir. 2022) (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013)). The three familiar elements for standing are (1) a concrete and particularized injury actually suffered by the plaintiff that (2) is traceable to the defendant's conduct and (3) can be remedied by judicial relief. *Pierre v. Midland Credit Mgmt., Inc.*, 29 F.4th 934, 937 (7th Cir. 2022). All three plaintiffs here have satisfied the standing requirements to bring their lawsuit.

1. Individual Standing

Direct monetary harm is a textbook "injury in fact," and Bevis alleges that, as a gun-store owner in the business of selling the banned weapons, he has lost money in sales, an allegation that clearly establishes harm at this stage. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021). Illinois's and Naperville's gun laws undeniably caused the harm.

The only wrinkle here relates to the third element: redressability. Before Illinois enacted the Protect Illinois Communities Act, the plaintiffs sued only Naperville. Municipalities do not enjoy sovereign immunity, so this Court could have redressed the plaintiffs' alleged injury by enjoining the enforcement of a law without issue; the standing inquiry would have been easy. *See Lincoln County v. Luning*, 133 U.S. 529 (1890). Then, Illinois enacted its own gun regulation that, like Naperville's ordinance, banned the sale of assault weapons. The plaintiffs—likely recognizing that, without the state as a party, this Court could not remedy their harm because the state law would still proscribe their conduct—amended their complaint to add Jason Arres, Naperville's Chief of Police. But as Naperville points out, several other parties, such as the state police or other county officials, also must enforce Illinois's gun laws, raising the possibility that relief would be ineffective.

Unlike local governments, state governments are generally immune from suit. *See, e.g.*, *Lukaszczyk v. Cook County*, 47 F.4th 587, 604 (7th Cir. 2022); *Hans v. Louisiana*, 134 U.S. 1, 20–21 (1890). The *Ex parte Young* doctrine is, however, one exception to this rule, and it "allows private parties to sue individual state officials for prospective relief to enjoin ongoing violations of federal law." *Council 31 of the Am. Fed'n of State, Cnty & Mun. Emps., AFL-CIO v. Quinn*, 680 F.3d 875, 882 (7th Cir. 2012) (quoting *MCI Telecomms. Corp. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 337 (7th Cir. 2000)). The doctrine represents a legal fiction: a plaintiff can for all intents and

purposes sue the state provided the complaint lists a state officer instead of the state itself. Little, then, is gained by imposing hyper-technical pleading requirements about which state official is named. A complaint must only be consistent with the legal framework laid out in *Ex parte Young*. In short, it must include a state official with a "connection" to the enforcement of the law instead of the state itself. *Fitts v. McGhee*, 172 U.S. 516, 529 (1899).[3] This inclusion avoids the sovereign-immunity issue that prevents a direct suit but still allows appropriate injunctive relief. Forcing parties to name *every* possible agent that could enforce a state law would be onerous if not impossible. *Cf. Duke Power Co. v. Carolina Env't Study Grp.*, 438 U.S. 59, 78 (1978) ("Nothing in our prior cases requires a party seeking to invoke federal jurisdiction to negate ... speculative and hypothetical possibilities ... in order to demonstrate the likely effectiveness of judicial relief.").

Arres, as Chief of Police, enforces both municipal and state laws, including the Ordinance and the Protect Illinois Communities Act. Naperville, IL., Mun. Code ch 8, art. A, §§ 2, 3 (2022). His duty to enforce both laws makes him a state official with the requisite "connection" for an official-capacity suit against Illinois. *See Fitts*, 172 U.S. at 529. If the plaintiffs succeed, this Court could enjoin the enforcement of the Protect Illinois Communities Act against any state actor who

[3] *See also Diamond v. Charles*, 476 U.S. 54, 64 (1986) (focusing on "the state officials who were charged with enforcing the [law]"); *Camreta v. Greene*, 563 U.S. 692, 727 (2011) (Kennedy, J., dissenting) ("[T]he proper defendant in a suit for prospective relief is the party prepared to enforce the relevant legal rule against the plaintiff."); *Am. C.L. Union v. The Fl. Bar*, 999 F.2d 1486, 1490 (11th Cir. 1993) ("[W]hen a plaintiff challenges the constitutionality of a rule of law, it is the state official designated to enforce that rule who is the proper defendant …."); *Weinstein v. Edgar*, 826 F. Supp. 1165, 1166 (N.D. Ill. 1993) ("The rule embodied by *Ex parte Young* and its progeny is informed by a familiar fiction. This fiction … is premised on the notion that a State cannot act unconstitutionally, so that any state official who violates anyone's constitutional rights is perforce stripped of his or her official character."); *Southerland v. Escapa*, No. 14-3094, 2015 WL 1329969 at *2 (C.D. Ill. Mar. 20, 2015) ("In *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007), the Supreme Court touched on the question of which parties are proper to a lawsuit when it reiterated that courts must determine whether 'there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'"); *Allied Artists Pictures Corp. v. Rhodes*, 473 F. Supp. 560, 566 (S.D. Ohio 1979) ("All that *Young* requires, as plaintiffs point out, is that the official have 'some connection with the enforcement of the act.'").

seeks to prevent Bevis from selling assault weapons or high-capacity magazines. Because Bevis and, by extension, Law Weapons have an effective remedy, they have standing to sue.

2. Organizational Standing

NAGR's standing presents a different question. Organizations can have standing to sue by either showing a direct harm or borrowing the standing of their members, known as associational or representational standing. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). NAGR chooses the latter method, as neither challenged law has directly harmed the group. "To sue on behalf of its members, an association must show that: (1) at least one of its members would 'have standing to sue in their own right'; (2) 'the interests it seeks to protect are germane to the organization's purpose'; and (3) 'neither the claim asserted nor the relief requested requires the participation of individual members.'" *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 2 F.4th 1002, 1008 (7th Cir. 2021) (quoting *Hunt*, 432 U.S. at 343).

NAGR asserts that several members live in Naperville, an Illinois city.[4] (Dkt. 48 ¶ 6). Unlike Bevis, who owns a business selling assault weapons and high-capacity magazines, NAGR's members are not identified as business owners and, therefore, have not lost money. (*Id.*) Instead, they claim the prohibitions deprive them of a constitutional right. (*Id.*) This harm suffices for standing. The alleged deprivation of a constitutional right is another "textbook harm." *See Doe v. Sch. Bd. of Ouachita Par.*, 274 F.3d 289, 292 (5th Cir. 2001) ("Impairments to constitutional rights are generally deemed adequate to support a finding of 'injury' for purposes of standing."). The Second Amendment differs from many other amendments in that it protects access to a tangible

[4] NAGR identifies its members only by their initials: B.S., D.B., G.S., G.K., L.J., and R.K. (Dkt. 48 ¶ 6). The Court assumes the complaint's accuracy, though the group may need to later establish these facts, likely by filing an addendum under seal.

item, as opposed to an intangible right. *Compare* U.S Const. amend. II. (protecting "the right of the people to keep and bear Arms"), *with id.* amend. I ("Congress shall make no law … abridging the freedom of speech …."), and *id.* amend. V ("No person … shall be compelled in any criminal case to be a witness against himself …."). But individuals deprived of an *in rem* right are not penalized because of this difference. The First Amendment furnishes a close analogue: individuals can sue when the government bans protected books or attempts to close a bookstore based on content censorship. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 349 (2010) ("If [the government is] correct, [it] could prohibit a corporation from expressing political views in media beyond those presented here, such as by printing books. … This troubling assertion of brooding governmental power cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure."); *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (emphasizing "the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom"). So too, residents can sue the government under a similar Second Amendment theory.

NAGR has also satisfied the remaining elements. The organization "seeks to defend the right of all law-abiding individuals to keep and bear arms." (Dkt. 10 ¶ 2). That interest is certainly furthered by joining a lawsuit to challenge gun regulations. The group, together with Bevis and Law Weapons, seeks equitable relief through a temporary restraining order and an injunction, neither of which "requires the participation of individual members." *Prairie Rivers*, 2 F.4th at 1008 (quoting *Hunt*, 432 U.S. at 333). Member participation is typically required only when the party seeks damages, and NAGR explicitly disclaimed compensatory or nominal damages. (Dkt. 48 ¶ 37).

B. Federal Rule of Civil Procedure 5.1

Turning from standing to civil procedure, a party challenging a statute must "file a notice of constitutional question stating the question and identifying the paper that raises it … if a state statute is questioned and the parties do not include the state … or one of its officers or employees in an official capacity" and "serve the notice and paper … on the state attorney general if a state statute is question—either by certified or registered mail or by sending it to [a designated] electronic address." Fed. R. Civ. P. 5.1(a). The court then certifies that the statute has been questioned to the "appropriate attorney general." *Id.* 5.1(b); *see also* 28 U.S.C. § 2403. The attorney general "may intervene within 60 days," and until the intervention deadline, a court "may not enter a final judgment holding the statute unconstitutional." Fed. R. Civ. P. 5.1(c).

The plaintiffs represent, and Naperville agrees, that they filed the appropriate notice with Illinois's attorney general that a constitutional challenge was being raised to the Protect Illinois Communities Act. (Dkts. 49; 50 at 2; *see also* Dkt. 57 at 5). This Court then promptly certified the question to the appropriate attorney general. (Dkt. 56). Illinois now *may* intervene—but is not required to. The statute is permissive. In the interim, this Court is free to consider the constitutionality of the law and any preliminary relief, such as a temporary restraining order or a preliminary injunction. *See* Fed. R. Civ. P. 5.1 advisory committee's note to 2006 adoption ("Pretrial activities may continue without interruption during the intervention period, and the court retains authority to grant interlocutory relief. The court may reject a constitutional challenge to a statute at any time.").

C. Second Amendment

1. Existing Jurisprudence

The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The Supreme Court first recognized that this provision enshrines an individual's right to keep and bear arms for the purpose of self-defense in *District of Columbia v. Heller*, 554 U.S. 570 (2008), a challenge to D.C.'s prohibition on handgun ownership. In interpreting the Amendment, the Court began with the text and its original meaning as "understood by the voters" at the time of ratification. *Id.* at 576 (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). The textual elements—including the unambiguous language stating a right to "keep and bear arms"—protects "the individual right to possess and carry weapons in case of confrontation," a meaning "strongly confirmed by the historical background." *Id.* at 592. Several states adopted similar measures in their respective state constitutions, *id.* at 600–01, and post-ratification commentary confirmed this understanding. *Id.* at 605–09.

The Court recognized, however, that the "right secured by the Second Amendment is not unlimited." *Id.* at 626. The Court gave two limiting examples: (1) as *United States v. Miller*, 307 U.S. 174 (1939), explained, "those weapons not typically possessed by law-abiding citizens for lawful purposes" are unprotected, *Heller*, 554 U.S. at 625; and (2) measures related to "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms" are presumptively lawful, *id.* at 626–27. So interpreted, a categorical ban on handgun possession in the home was unconstitutional "under any of the standards of scrutiny … applied to enumerated constitutional

rights." *Id.* at 628. Indeed, "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban." *Id.* at 629.

McDonald v. City of Chicago, 561 U.S. 742 (2010), decided two years later, incorporated the Second Amendment right against the states with a similar emphasis on text and history. Under the Due Process Clause, a right that is "fundamental to our scheme of ordered liberty," that is, "deeply rooted in this Nation's history and tradition," restrains the states just as it does for the federal government. *Id.* at 767 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). "Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and … is 'the *central component*' of the Second Amendment right." *Id.* (quoting *Heller*, 554 U.S. at 599). Thus, the Court had little trouble concluding the right recognized in *Heller* was "deeply rooted" in history and tradition. *Id.* at 791.

In handing down *Heller* and *McDonald*, the Supreme Court left the question of how to evaluate gun regulations unresolved. *See* Joseph Blocher & Darrell A. H. Miller, *The Positive Second Amendment: Rights, Regulation, and the Future of* Heller 102 (2018) ("*Heller* had opened a 'vast *terra incognita*,' and gave judges the job of mapping it." (internal citation omitted)). Eventually, the lower courts coalesced around a two-part test: the first question asked "whether the regulated activity falls within the scope of the Second Amendment" based on text and history. *Kanter v. Barr*, 919 F.3d 437, 441 (7th Cir. 2019) (quoting *Ezell v. City of Chicago*, 846 F.3d 888, 892 (7th Cir. 2017) (*Ezell II*)); *see also* Blocher & Miller, *supra*, at 110 ("In the decade since *Heller*, the federal courts of appeals have widely adopted the two-part approach."). If so, the second inquiry "looked into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights" and evaluated "the regulatory means the government has chosen and the public-benefits end it seeks to achieve." *Kanter*, 919 F.3d at 441

(quoting *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011)). In practice, step two did the heavy lifting. Courts regularly assumed without deciding the Second Amendment covered the regulated conduct and proceeded to analyze the regulation under the chosen means-end scrutiny (most often, intermediate scrutiny). *See* Blocher & Miller, *supra*, at 110–12.

Recently, the Supreme Court rejected the two-step approach in *New York State Rifle & Pistol Association, Inc. v. Bruen* and set forth a new standard for applying the Second Amendment. 142 S. Ct. 2111 (2022). In 1911, New York had enacted the so-called "Sullivan Law" that permitted public carry only if an applicant could prove "good moral character" and "proper cause." *Id.* at 2122 (quoting Act of May 21, 1913, ch. 608, § 1, 1913 N.Y. Laws 1627, 1629). The plaintiffs were denied the licenses sought, and they sued for declaratory and injunctive relief. *Id.* at 2124–25. "Despite the popularity of this two-step approach," the Court concluded, "it is one step too many." *Id.* at 2127. "*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context. Instead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127. The appropriate standard now is as follows:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.

Id. at 2129–30. Even accepting that standard, as Justice Kavanaugh emphasized in his concurrence (joined by Chief Justice Roberts), the Second Amendment still permits "a 'variety' of gun regulations," such as the examples already announced in *Heller*. *Id.* at 2162 (Kavanaugh, J., concurring). But the majority opinion—which six justices joined—found the New York licensing scheme to be unconstitutional: the text covered the right to carry a handgun outside of the home

for self-defense, and the state could not demonstrate a historical tradition of firearm regulation to support its law. *Id.* at 2156.

Before *Bruen*, every circuit court, including the Seventh Circuit, presented with a challenge to an assault-weapons or high-capacity magazine ban determined such bans were constitutional. *Worman v. Healey*, 922 F.3d 26, 38–39 (1st Cir. 2019); *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 261 (2d Cir. 2015); *Kolbe v. Hogan*, 849 F.3d 114, 124 (4th Cir. 2017) (en banc); *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015); *Heller v. District of Columbia*, 670 F.3d 1244, 1260 (D.C. Cir. 2011) (*Heller II*). The reasoning was similar. The inquiry asked, "whether a particular provision impinges upon a right protected by the Second Amendment; if it does, then we go on to determine whether the provision passes muster under the appropriate level of constitutional scrutiny." *Heller II*, 670 F.3d at 1252. Most courts assumed without deciding that the Second Amendment covered the regulations.[5] *See, e.g.*, *Worman*, 922 F.3d at 33–35; *Heller II*, 670 F.3d at 1260–61. Intermediate scrutiny, not strict scrutiny, was appropriate because the prohibitions left a person free to possess many lawful firearms. *Heller II*, 670 F.3d at 1262 (citing *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010)). The regulations survived intermediate scrutiny "because semiautomatic assault weapons have been understood to pose unusual risks. When used, these weapons tend to result in more numerous

[5] The Fourth Circuit was the only court to clearly hold, as one of two alternative holdings, that the scope of the Second Amendment did not extend to assault weapons. *Kolbe*, 849 F.3d at 135. In its view, *Heller* offered a "dispositive and relatively easy inquiry: Are the banned assault weapons … 'like' 'M-16 rifles,' i.e., 'weapons that are most useful in military service,' and thus outside the ambit of the Second Amendment?" *Id.* at 136. AR-15 rifles share similar rates of fire and are actually "more accurate and lethal." *Id.* The weapons can also have the "very features that qualify a firearm as a banned assault weapon—such as flash suppressors, barrel shrouds, folding and telescoping stocks, pistol grips, grenade launchers, night sights, and the ability to accept bayonets and large-capacity magazines." *Id.* at 137. The "net effect" is "a capability for lethality—more wounds, more serious, in more victims—far beyond that of other firearms in general, including other semiautomatic guns." *Id.* Because the weapons "are clearly most useful in military service," the Fourth Circuit felt "compelled by *Heller* to recognize that those weapons … are not constitutionally protected." *Id.*

wounds, more serious wounds, and more victims." *NYSRPA*, 804 F.3d at 262. The "same logic" applied to large-capacity magazines. *Id.* at 263. "Large-capacity magazines are disproportionately used in mass shootings," and they result in "more shots fired, persons wounded, and wounds per victim than do other gun attacks." *Id.* at 263–64 (quoting *Heller II*, 670 F.3d at 1263).

The Seventh Circuit was one of the circuits to uphold such a ban. In *Friedman v. City of Highland Park*, the city enacted an ordinance prohibiting the possession of assault weapons and large-capacity magazines. 784 F.3d at 407. Several plaintiffs sued seeking an injunction against the ordinance. *Id.* The district court denied them relief, and the Seventh Circuit affirmed. *See generally id.*

The question after *Bruen* is whether *Friedman* is still good law. *See United States v. Rahimi*, No. 21-11001, 2023 WL 1459240, at *2 (5th Cir. 2023) ("The Supreme Court need not expressly overrule [] precedent … where an intervening Supreme Court decision fundamentally changes the focus of the relevant analysis." (cleaned up)). As an initial observation, the opinion lacks some clarity. The two-part test was the law of the Seventh Circuit for at least five years, *see, e.g.*, *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc), *Ezell*, 651 F.3d 684, yet the Court did not engage with it. Instead, it explained,

> we think it better to ask whether a regulation bans weapons that were common at the time of ratification or those that have 'some reasonable relationship to the preservation or efficiency of a well regulated militia' and whether law-abiding citizens retain adequate means of self-defense.

Friedman, 784 F.3d at 410 (quoting *Heller*, 544 U.S. at 622–25) (internal citation omitted). This reframed test complicates the task of determining if the case was decided under the now-defunct step two—which Naperville concedes would render it bad law—or step one—which would make it binding precedent that dictates the outcome here. Without the benefit of a clear statement, this Court must examine the opinion's reasoning.

The Seventh Circuit observed first, "[t]he features prohibited by Highland Park's ordinance were not common in 1791. Most guns available then could not fire more than one shot without being reloaded; revolvers with rotating cylinders weren't widely available until the early 19th century." *Id.* at 410. The weapons banned, it continued, "are commonly used for military and police functions," and states enjoy leeway "to decide when civilians can possess military-grade firearms, so as to have them available when the militia is called to duty." *Id.* The main consideration, though, was whether the ordinance left residents with ample means to access weapons for self-defense. *Id.* at 411. The Court answered in the affirmative. The concern was principally allayed by the availability of handguns and other rifles. *Id.* "If criminals can find substitutes for banned assault weapons, then so can law-abiding homeowners." *Id.* Moreover, data showed that assault weapons are used in a greater share of gun crimes, and "some evidence" links their availability with gun-related homicides. *Id.* "The best way to evaluate the relation among assault weapons, crime, and self-defense is through the political process and scholarly debate," not a judicial decree. *Id.* at 412.

Friedman cannot be reconciled with *Bruen*.[6] The explanation that semiautomatic weapons were not common in 1791 is of no consequence. The Second Amendment "extends … to … arms … that were not in existence at the time of the founding." *Caetano v. Massachusetts*, 577 U.S.

[6] Recognizing *Friedman* was no longer good law, this Court ordered supplemental briefing on the application of *Bruen*. (Dkts. 15, 18, 30, 33). Naperville marshalled an admirable historical record. It protested, though, that "it [had] been unable to conduct primary source research or to retain and disclose an expert under FRCP 26(a)(2)." (Dkt. 34 at 19). On the first point, again, plaintiffs seek preliminary and emergency relief. Naperville may have agreed to stay its Ordinance, but Illinois has made no such guarantees. Supplemental briefing for a TRO is naturally rushed because plaintiffs allege a deprivation of a constitutional right. Naperville will, nevertheless, be able to continue assembling support for its positions as the case proceeds. On the second point, *Bruen* indicates that judges, not party-selected experts, will assess the Second Amendment's history; there was no summary-judgment record before the Court—the district court dismissed the complaint—and no mention of experts. The only two cases Naperville cites in support are the *dissenting* opinion in *State v. Philpotts*, 194 N.E.3d 371, 372 (Ohio 2022) (Brunner, J., dissenting), which contains rejected legal arguments, and the nonbinding district-court opinion in *United States v. Bullock*, 3:18-cr-165, 2022 WL 16649175 (S.D. Miss. Oct. 27, 2022), which the government itself rejected, *id.* Dkt. 71 ("If … this Court were to deem it necessary to delve into text and history …, it should look to the parties for argument and evidence on that point, directing the parties to supplement their prior filings as necessary.").

411, 412 (2016) (quoting *Heller*, 554 U.S. at 582). Relatedly, the Supreme Court has unequivocally dismissed the argument that "only those weapons useful in warfare are protected." *Id.* (quoting *Heller*, 554 U.S. at 624–25). To the extent that the Seventh Circuit classified the weapon as either "civilian" or "military," the classification has little relevance. And the arguments that other weapons are available and that fewer assault weapons lower the risk of violence are tied to means-end scrutiny—now impermissible and unconnected to text, history, and tradition. *See Bruen*, 142 S. Ct. at 2127. Accordingly, this Court must consider the challenged assault-weapon regulations on a *tabula rasa*.

2. Challenged Laws

Bruen is now the starting point. Courts must first determine whether "the Second Amendment's plain text covers an individual's conduct." *Bruen*, 142 S. Ct. at 2129–30. If not, the regulation is constitutional because the regulation falls outside the scope of protection. But if the text covers "an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2130. The analogue need not be "a historical twin" or "a dead ringer for historical precursors," so long it is sufficiently analogous "to pass constitutional muster." *Id.* at 2133. Relevant history includes English history from the late 1600s, American colonial views, Revolutionary- and Founding-era sources, and post-ratification practices, particularly from the late 18th and early 19th centuries. *Id.* at 2135–56; *see also Rahimi*, 2023 WL 1459240, at *8–10; *Frein v. Pa. State Police*, 47 F.4th 247, 254–56 (3d Cir. 2022).

"[T]he Second Amendment is neither a regulatory straightjacket nor a regulatory blank check." *Bruen*, 142 S. Ct. at 2133; *see also id.* at 2162 (Kavanaugh, J., concurring). *Bruen* does not displace the limiting examples provided in *Heller*. States remain free to enact (1) "prohibitions

on the possession of firearms by felons and the mentally ill"; (2) "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings"; (3) "laws imposing conditions and qualifications on the commercial sale of arms"; and (4) bans on weapons that are not "in common use." *Id.* at 2162 (Kavanaugh, J., concurring) (citation omitted). The Court in the majority opinion never specifies how these examples fit into the doctrine, but *Heller* and Justice Kavanaugh's concurrence reinforce their continued vitality.[7] And most importantly, the "list does not purport to be exhaustive." *Heller*, 554 U.S. at 626 n.26. Additional categories exist—provided they are consistent with the text, history, and tradition of the Second Amendment. *See Bruen*, 142 S. Ct. at 2129–30.

Under this framework, Naperville's Ordinance and the Protect Illinois Communities Act are constitutionally sound.[8] The text of the Second Amendment is limited to only certain arms, and history and tradition demonstrate that particularly "dangerous" weapons are unprotected.[9] *See* U.S. Const. amend. II; *Heller*, 554 U.S. at 627.

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[7] These categories may fit into the new doctrinal test in different ways. For instance, bans on weapons not in common use fall outside the Second Amendment's text only protecting certain "arms." In contrast, sensitive-place regulations are better justified by a robust history of keeping arms out of high-risk areas, such as government buildings or schools. The formulation for the standard resembles a rigid two-step test (text, then history), but it boils down to a basic idea: "Gun bans and gun regulations that are longstanding … are consistent with the Second Amendment individual right. Gun bans and gun regulations that are not longstanding or sufficiently rooted in text, history, and tradition are not consistent with the Second Amendment individual right." *Heller II*, 670 F.3d at 355 (Kavanaugh, J., dissenting).

[8] Today, the challenged laws ban only the sale of assault weapons and high-capacity magazines, not their possession. Nonetheless, the Court considers the state's general authority to regulate assault weapons because logically if a state can prohibit the weapons altogether, it can also control their sales. Inversely, a right to own a weapon that can never be purchased would be meaningless. *See Drummond v. Robinson Township*, 9 F.4th 217, 229 (3d Cir. 2021) ("[I]mmunizing the Township's atypical [gun-sales] rules would relegate the Second Amendment to a 'second-class right'—the precise outcome the Supreme Court has instructed us to avoid." (internal citation omitted)); *cf. Ezell*, 651 F.3d at 704 ("The right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective."). It may be that governments are afforded more leeway in regulating gun commerce than gun possession, but that argument is for another day.

[9] Weapons associated with criminality may also be unprotected, but given the strength of the historical evidence regarding "particularly dangerous" weapons, there is no need to consider this alternative ground.

i. History and Tradition

William Blackstone, whose writings the Court relied on in *Heller*, drew a clear line between traditional arms for self-defense and "dangerous" weapons. He proclaimed, "[t]he offense of riding or going armed, with *dangerous* or unusual weapons, is a crime against the public peace, by terrifying the good people of the land." 4 William Blackstone, *Commentaries on the Laws of England* 148–49 (emphasis added). And over two centuries of American law has built upon this fundamental distinction. (*See* Dkt. 57-10 ¶ 8 ("From the 1600s through the early twentieth century, the colonies, states, and localities enacted [] thousands of gun laws of every imaginable variety. … [I]t is a tradition that can be traced back throughout the Nation's history.")).

Gun ownership and gun regulation have evolved since the passage of the Second Amendment. In the 18th century, violent crime was at historic lows; the rate at which adult colonists were killed by violent crime was one per 100,000 in New England and, on the high end, five per 100,000 in Tidewater, Virginia.[10] The "pressing problem" for minimizing violence in the colonies was not guns. (Dkt. 34-7 ¶ 9). A musket took, at best, half a minute to load a single shot—the user had to pour powder down the barrel, compress the charge, and drop or ram the ball onto the charge—and the accuracy of the weapon was poor. (Dkt. 34-3 ¶ 27; Dkt. 34-7 ¶ 11). Nor did people keep guns loaded. The black powder used to fire a musket was corrosive and prone to attract moisture, which rendered it ineffective. (Dkt. 34-3 ¶ 27). That is also why guns hung over the fireplace mantle—it was the warmest and driest place in the home.[11] This combination of limitations meant that guns were seldom "the primary weapon of choice for those with evil intent."

[10] Randolph Roth, *American Homicide* 61–63 (2009).

[11] Randolph Roth, *Why Is the United States the Most Homicidal in the Affluent World*, National Institute for Justice (Dec. 1, 2023), https://nij.ojp.gov/media/video/24061#transcript--0.

(Dkt. 34-3 ¶ 28).[12] Citizens did not go to the town square armed with muskets for self-protection, and only a small group of wealthy, elite men owned pistols, primarily a dueling weapon (Alexander Hamilton being perhaps the most infamous example).[13] Other arms, though, were prevalent—as were laws governing the most dangerous of them.

An early example of these regulations concerned the "Bowie knife," originally defined as a single-edged, straight blade between nine and ten inches long and one-and-half inches wide.[14] In the early 19th century, the Bowie knife gained notoriety as a "fighting knife" after it was supposedly used in the Vidalia Sandbar Fight, a violent brawl that occurred in central Louisiana.[15] Shortly afterwards, many southerners began carrying the knife in public because it offered a better chance to stop an assailant than the more cumbersome guns of the era, which were unreliable and inaccurate.[16] They were also popular in fights and duels over the single-shot pistols.[17] Responding to the growing prevalence and danger posed by Bowie knives, states quickly enacted laws regulating them. Alabama was first, placing a prohibitively expensive tax of one hundred dollars on "selling, giving or disposing" the weapon, in an Act appropriately called "An Act to Suppress

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[12] *See also* Dkt. 34-7 ¶ 12 ("The infrequent use of guns in homicides in colonial America reflected these limitations. Family and household homicides—most of which were caused by abuse or fights between family members that got out of control—were committed almost exclusively with hands and feet or weapons that were close to hand: whips, sticks, hoes, shovels, axes, or knives. It did not matter whether the type of homicide was rare—like family and intimate homicides—or common, like murders of servants, slaves, or owners committed during the heyday of indentured servitude or the early years of racial slavery. Guns were not the weapons of choice in homicides that grew out of the tensions of daily life.").

[13] Joanne B. Freeman, *Affairs of Honor: National Politics in the New Republic* (2001).

[14] *See* David B. Kopel et al., *Knives and the Second Amendment*, 47 U. Mich. J.L. Reform 167, 179 (2013).

[15] *Id.*

[16] *Id.* at 185. The knife's inventor, Jim Bowie, died fighting at the Alamo, fueling the "Bowie legend." (Dkt. 34-4 ¶ 35).

[17] Norm Flayderman, *The Bowie Knife* 485 (2004).

the Use of Bowie Knives," followed two years later by a law banning the concealed carry of the knife and other deadly weapons.[18] Georgia followed suit the same year, making it unlawful "for any merchant … to sell, or offer to sell, or to keep … Bowie, or any other kinds of knives."[19] By 1839, Tennessee, Florida, and Virginia passed similar laws.[20] The trend continued. At the start of the twentieth century, every state except one regulated Bowie knives; thirty-eighty states did so by explicitly naming the weapon,[21] and twelve more states barred the category of knives encompassing them.[22] (Dkt. 34-4 ¶ 39).

State-court decisions uniformly upheld these laws. The Tennessee Supreme Court declared, "The Legislature, therefore, have a right to prohibit the wearing or keeping *weapons dangerous* to the peace and safety of the citizens, and which are not usual in civilized warfare, or would not contribute to the common defence [sic]." *Aymette v. State*, 21 Tenn. 154, 159 (1840)

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[18] Act of Jun 30, 1837, ch. 77, § 2, 1837 Ala. Laws 7, 7; An Act to Suppress the Evil Practice of Carrying Weapons Secretly, ch. 77, § 1, 1839 Ala. Laws 67, 67.

[19] Act of December 25, 1837, § 1, 1837 Ga. Laws 90, 91.

[20] Act of January 27, 1837, ch. 137, § 4,1837–1838 Tenn. Pub. Acts 200, 200–01; Act of February 10, 1838, Pub. L. No. 24 §1,1838 Fla. Laws 36, 36; Act of February 2, 1838, ch. 101, § 1, 1838 Va. Acts 76, 76.

[21] *See, e.g.*, Act of June 30, 1837, No. 11, § 1, 2, 1837 Ala. Acts 7, 7 ("[I]f any person carrying any knife or weapon, known as Bowie Knives or Arkansaw [sic] Tooth-picks, or either or any knife or weapon that shall in form, shape or size, resemble a Bowie-Knife or Arkansaw [sic] Tooth-pick, on a sudden rencounter, shall cut or stab another with such knife, by reason of which he dies, it shall be adjudged murder, and the offender shall suffer the same as if the killing had been by malice aforethought. … for every such weapon, sold or given, or otherwise disposed of in this State, the person selling, giving or disposing of the same, shall pay a tax of one hundred dollars, to be paid into the county Treasury …."); Act of Aug. 14, 1862, § 1, 1862 Colo. Sess. Laws 56, 56 ("If any person or persons shall … carry concealed upon his or her person any pistol, bowie knife, dagger, or other deadly weapon, shall, on conviction thereof … be fined in a sum not less than five, nor more than thirty-five dollars."); Act of Feb. 26, 1872, ch. 42, § 246, 1872 Md. Laws 56, 57 ("It shall not be lawful for any person to carry concealed … any pistol, dirk-knife, bowie-knife, sling-shot, billy, razor, brass, iron or other metal knuckles, or any other deadly weapon, under a penalty of a fine of not less than three, nor more than ten dollars in each case ….").

[22] *See, e.g.*, Act of May 25, 1911, ch. 195, § 1, 1911 N.Y. Laws 442, 442 ("A person who … carries or possesses a dagger, dirk, dangerous knife, razor, stiletto, or any other dangerous or deadly instrument or weapon, is guilty of a felony."); Act of Apr. 18, 1905, ch. 172, § 1, 1905 N.J. Laws 324, 324 ("Any person who shall carry … any stiletto, dagger or razor or any knife with a blade of five inches in length or over concealed in or about his clothes or person, shall be guilty of a misdemeanor …."); Act of March 8, 1915, ch. 83, § 1, 1915 N.D. Laws 96, 96 ("Any person other than a public officer, who carries concealed in his clothes … any sharp or dangerous weapon usually employed in attack or defense of the person … shall be guilty of a felony ….").

(emphasis added).[23] "To hold that the Legislature could pass no law upon this subject by which to preserve the public peace, and protect our citizens from the terror which a wanton and unusual exhibition of arms might produce," it continued, "would be to pervert a great political right to the worst of purposes." *Id.* The Texas Supreme Court expressed similar concern, noting that a Bowie knife "is an exceeding[ly] *destructive weapon*," "difficult to defend against," more dangerous than a pistol or sword, and an "instrument of almost certain death." *Cockrum v. State*, 24 Tex. 394, 402 (1859) (emphasis added).

Laws regulating melee weapons also targeted more than just the Bowie knife. As early guns proved unreliable, many citizens resorted to clubs and other blunt weapons. (Dkt. 34-4 ¶ 40). Popular instruments included the billy (or billie) club, a heavy, hand-held club usually made of wood, plastic, or metal, and a slungshot, a striking weapon that had a piece of metal or stone attached to a flexible strip or handle. (*Id.* at ¶¶ 41–44). States responded to the proliferation of these weapons. The colony of New York enacted the first "anti-club" law in 1664,[24] with sixteen states following suit, the latest being Indiana in 1905, which proscribed the use of clubs in sensitive places of transportation.[25] The city of Leavenworth, Kansas passed the first law regulating the billy club in 1862.[26] By the early 1900s, almost half of states and some municipalities had laws relating to billy clubs.[27] (Dkt. 34-4 ¶ 42). Many, such as North Dakota and the city of Johnstown,

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[23] *Heller* distinguished its holding from *Aymette*'s "middle position" that "citizens were permitted to carry arms openly, unconnected with any service in a formal militia, but were given the right to use them only for the military purpose of banding together to oppose tyranny." 554 U.S. at 613. It did not, however, cast any doubt on the conclusion reached by the *Aymette* court that the legislature could prohibit "weapons dangerous to the peace." 21 Tenn. at 159.

[24] The Colonial Laws of New York from the Year 1664 to the Revolution (1894).

[25] Act of March 10, 1905, ch. 169, § 410, 1905 Ind. Acts 584, 677.

[26] C.B. Pierce, Charter and Ordinances of the City of Leavenworth, An Ordinance Relating to Misdemeanors, § 23 (1862).

[27] *See, e.g.*, Act of May 4, 1917, ch. 145, §§ 1, 2, 5, 1917 Cal. Sess. Laws 221, 221–22 (making the manufacture, possession, or use of a "billy" a felony); Act of Feb. 26, 1872, ch. 42, § 1, 1872 Md. Laws 56, 57

Pennsylvania,[28] banned their concealed carry, while others outlawed them entirely.[29] "Anti-slungshot" carry laws proved the most ubiquitous though.[30] Forty-three states limited slungshots,[31] which "were widely used by criminals and street gang members in the 19th Century" because "[t]hey had the advantage of being easy to make silent, and very effective, particularly against an unsuspecting opponent." (Dkt. 34-4 ¶ 44). (Then-lawyer Abraham Lincoln defended a man accused of killing another with a slungshot in the 1858 William "Duff" Armstrong case.) (*Id.* ¶ 45).

States continued to regulate particularly dangerous weapons from the 18th century through the late 19th and early 20th centuries. Five years before the Revolution and three decades before the ratification of the Second Amendment, New Jersey banned "any loaded Gun … intended to go off or discharge itself, or be discharged by any String, Rope, or other Contrivance."[32] After the Civil War, Minnesota, Michigan, Vermont, and North Dakota passed nearly identical laws.[33] Eight states—South Carolina, Maine, Vermont, Minnesota, New York, Massachusetts, Michigan, and

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(prohibiting the concealed carrying of a "billy"); Act of May 31, 1887, No. 129, § 1, 1887 Mich. Pub. Acts 144, 144 (making unlawful the concealed carrying of a "pocket-billie").

[28] *See, e.g.*, Penal Code, Crimes Against the Public Health and Safety, ch. 40, §§ 7311–13, 1895 N.D. Rev. Codes 1292, 1292–93; Act of May 23, 1889, Laws of the City of Johnstown, Pa.

[29] *See, e.g.*, Act of February 21, 1917, ch. 377, §§ 7-8 1917 Or. Laws 804, 804–808; Act of June 13, 1923, ch. 339, § 1, 1923 Cal. Stat. 695, 695–96 ("[E]very person who within the State of California manufactures or causes to be manufactures, or who imports into the state, or who keeps for sale … any instrument or weapon … commonly known as a … billy … shall be guilty of a felony ….").

[30] *See, e.g.*, Act of May 25, 1852, §§ 1–3, 1845–70 Haw. Sess. Laws 19, 19; Act of January 12, 1860, § 23, 1859 Ky. Acts 245, 245–46; Act of March 5, 1883, sec. 1, §1224, 1883 Mo. Laws 76, 76.

[31] *See, e.g.*, Act of March 18, 1889, No. 13, § 1, 1889 Ariz. Sess. Laws 16, 16 (prohibiting the carrying of a "slung shot"); Act of March 5, 1883, ch. 105, § 1, 1883 Kan. Sess. Laws 159, 159 (prohibiting the sale and possession of a "slung shot"); Act of Feb. 28, 1878, ch. 46, § 1, 1878 Miss. Laws 175, 175 (prohibiting the concealed carrying of a "slung shot").

[32] Act of December 21, 1771, ch. 539, § 10, 1763-1775 N.J. Laws 343, 346.

[33] Act of February 27, 1869, ch. 39, §§ 1–3, 1869 Minn. Laws 50, 50–51; Act of April 22, 1875, Pub. L. No. 97 § 1, 1875 Mich. Pub. Acts 136, 136; Act of November 25, 1884, Pub. Law No. 76 §§ 1–2, 1884 Vt. Acts & Resolves 74, 74–75; Penal Code, Crimes Against the Public Health and Safety, ch. 40, § 7094, 1895 N.D. Rev. Codes 1259, 1259.

Rhode Island—banned gun silencers in the 1900s.[34] Notably, semiautomatic weapons themselves, which assault weapons fall under, were directly controlled in the early 20th century. Rhode Island prohibited the manufacture, sale, purchase, and possession of "any weapon which shoots more than twelve shots semi-automatically without reloading."[35] Michigan regulated guns that could fire "more than sixteen times without reloading."[36] In total, nine states passed semiautomatic-weapon regulations,[37] along with Congress, which criminalized the possession of a "machine gun" in D.C., defined as "any firearm which shoots … semiautomatically more than twelve shots without reloading."[38] Twenty-three states imposed some limitation on ammunition magazine capacity, restricting the number of rounds from anywhere between one (Massachusetts and Minnesota) and eighteen (Ohio).[39]

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[34] 1869 Minn. Laws 50-51, ch. 39 § 1; 1875 Mich. Pub. Acts 136, No. 97 § 1; 1884 Vt. Acts & Resolves 74-75, No. 76, § 1; The Revised Codes of North Dakota 1259, § 7094 (1895); 1903 S.C. Acts 127-23, No. 86 § 1; 1909 Me. Laws 141, ch. 129; 1912 Vt. Acts & Resolves 310, No. 237; 1916 N.Y. Laws 338-39, ch. 137, § 1; 1926 Mass. Acts 256, ch. 261; 1927 Mich. Pub. Acts 888-89, ch. 372 § 3; 1927 R.I. Pub. Laws 259, ch. 1052 § 8.

[35] 1927 R.I. Pub. Laws 256-57, ch. 1052 §§ 1, 4.

[36] 1927 Mich. Pub. Acts 888-89, An Act to Regulate and License the Selling, Purchasing, Possessing and Carrying of Certain Firearms, § 3.

[37] 1933 Minn. Laws 231-32, ch. 190; 1933 Ohio Laws 189-90; 1933 S.D. Sess. Laws 245-47, ch. 206, §§ 1-8; 1934 Va. Acts 137-40, ch. 96.

[38] 47 Stat. 650, H.R. 8754, 72d Cong. §§ 1, 14 (1932).

[39] Act of May 20, 1933, ch. 450, § 2, 1933 Cal. Stat. 1169, 1170 ("ten cartridges"); Act of July 8, 1932, ch. 465, § 1, 47 Stat. 650, 650 ("more than twelve shots without reloading"); Act of July 7, 1932, No. 80, § 1, 1932 La. Acts 336, 337 ("more than eight cartridges successively without reloading"); Act of Apr. 27, 1927, ch. 326, § 1, 1927 Mass. Acts 413, 413 ("a pistol, revolver or other weapon of any description, loaded or unloaded, from which a shot or bullet can be discharged"); Act of June 2, 1927, No. 372, § 3, 1927 Mich. Pub. Acts 887, 888–89 ("more than sixteen times without reloading"); Act of Apr. 10, 1933, ch. 190, § 1, 1933 Minn. Laws 231, 232 ("Any firearm capable of automatically reloading after each shot is fired"); Act of March 22, 1920, ch. 31, § 9, 1920 N.J. Laws 62, 67 ("any kind any shotgun or rifle holding more than two cartridges at one time, or that may be fired more than twice without reloading"); Act of Jan. 9, 1917, ch. 209, § 1, 1917 N.C. Sess. Laws 309, 309 ("any gun or guns that shoot over two times before reloading"); Act of March 30, 1933, No. 64, § 1, 1933 Ohio Laws 189, 189 ("more than eighteen shots"); Act of Apr. 22, 1927, ch. 1052, § 1, 1927 R.I. Pub. Laws 256, 256 ("more than twelve shots"); Act of March 2, 1934, No. 731, § 1, 1934 S.C. Acts 1288, 1288 ("more than eight cartridges"); Act of Feb. 28, 1933, ch. 206, § 1, 1933 S.D. Sess. Laws 245, 245 ("more than five shots or bullets"); Act of March 7, 1934, ch. 96, § 1, 1934 Va. Acts 137, 137 ("more than seven shots or bullets … discharged from a magazine"); Act of July 2, 1931, No. 18, § 1, 1931 Ill. Laws 452, 452 ("more than eight cartridges"); Act of March 9, 1931, ch. 178, § 1, 1931 N.D. Laws 305, 305–06 (firearms "not requiring the trigger be pressed for each shot and having a reservoir, belt or other means of storing and

Concealed-carry laws were also replete with references to "dangerous" weapons. For two early examples, in 1859, Ohio outlawed the carry of "any other dangerous weapon,"[40] and five years later, California prohibited carrying any concealed "dangerous or deadly weapon," followed by a similar law in 1917 with the same "dangerous or deadly" language.[41] By the 1930s, most states had similar regulations on "dangerous weapons."[42] At the federal level, the District of

carrying ammunition"); Act of March 10, 1933, ch. 315, § 2, 1933 Or. Laws 488, 488 ("a weapon of any description by whatever name known, loaded or unloaded, from which two or more shots may be fired by a single pressure upon the trigger device"); Act of Apr. 25, 1929, No. 329, § 1, 1929 Pa. Laws 777, 777 ("any firearm that fires two or more shots consecutively at a single function of the trigger or firing device"); Act of Oct. 25, 1933, ch. 82, § 1, 1933 Tex. Gen. Laws 219, 219 ("more than five (5) shots or bullets … from a magazine by a single functioning of the firing device"); Act of March 22, 1923, No. 130, § 1, 1923 Vt. Acts and Resolves 127, 127 ("a magazine capacity of over six cartridges"); Act of Apr. 13, 1933, ch. 76, § 1, 1931–1933 Wis. Sess. Laws 245, 245–46 ("a weapon of any description by whatever name known from which more than two shots or bullets may be discharged by a single function of the firing device"); Act of Apr. 27, 1933, No. 120, § 2, 1933 Haw. Sess. Laws 117, 118 ("capable of automatically and continuously discharging loaded ammunition of any caliber in which the ammunition is fed to such guns from or by means of clips, disks, drums, belts or other separable mechanical device"); Act of June 1, 1929, § 2, 1929 Mo. Laws 170, 170 (guns "capable of discharging automatically and continuously loaded ammunition of any caliber in which the ammunition is fed to such gun from or by means of clips, disks, drums, belts or other separable mechanical device"); Act of March 6, 1933, ch. 64, § 2, 1933 Wash. Sess. Laws 335, 335 (any firearm "not requiring that the trigger be pressed for each shot and having a reservoir clip, disc, drum belt, or other separable mechanical device for storing, carrying, or supplying ammunition which can be loaded into such weapon, mechanism, or instrument, and fired therefrom at the rate of five or more shots per second").

[40] 1859 Ohio Laws 56, An Act to Prohibit the Carrying or Wearing of Concealed Weapons, § 1.

[41] An Act to Prohibit the Carrying of Concealed Weapons, § 1; 1917 Cal. Sess. 221-225, An act relating to and regulating the carrying, possession, sale or other disposition of firearms capable of being concealed upon the person; prohibiting the possession, carrying, manufacturing and sale of certain other dangerous weapons and the giving, transferring and disposition thereof to other persons within this state; providing for the registering of the sales of firearms; prohibiting the carrying or possession of concealed weapons in municipal corporations; providing for the destruction of certain dangerous weapons as nuisances and making it a felony to use or attempt to use certain dangerous weapons against another, § 5.

[42] Act to Prevent the Carrying of Deadly Weapons, § 1, 1852 Haw. Sess. Laws 19; Act of Feb. 17, 1909, No. 62, § 1 1909 Id. Sess. Laws 6; Laws and Ordinances Governing the Village of Hyde Park Together with Its Charter and General Laws Affecting Municipal Corporations; Special Ordinances and Charters under Which Corporations Have Vested Rights in the Village, at 61, §§ 6, 8, (1876); Act of Feb. 23, 1859, ch. 79, § 1, 1859 Ind. Acts 129; S.J. Quincy, Revised Ordinances of the City of Sioux City, Iowa 62 (1882); ch. 169, § 16, 1841 Me. Laws 709; John Prentiss Poe, Maryland Code. Public General Laws 468-69, § 30 (1888); Revised Statutes of the Commonwealth of Massachusetts Passed November 4, 1835 to which are Subjoined, as Act in Amendment Thereof, and an Act Expressly to Repeal the Acts Which are Consolidated Therein, both Passed in February 1836, at 750, §16 (1836); Act of May 31, 1887, No. 129, § 1, 1887 Mich. Pub. Acts 144; The Municipal Code of Saint Paul: Comprising the Laws of the State of Minnesota Relating to the City of Saint Paul, and the Ordinances of the Common Council; Revised to December 1, 1884, at 289, §§ 1-3 (1884); Act of Jan. 3, 1888, sec. 1, § 1274, Mo. Rev. Stat., 1883 Mo. Laws 76; Ordinance No. 20, Compiled Ordinances of the City of Fairfield, Clay County, Nebraska, at 34 (1899); Act of Feb. 18, 1887, §§ 1-5, 8-10, 1887 N.M. Laws 55, 58; George R. Donnan, Annotated Code of Criminal Procedure and Penal Code of the State of New York as Amended 1882-5, at 172, § 410 (1885); N.D. Pen. Code §§ 7312-13 (1895); Act of Dec. 25, 1890, art. 47, § 8, 1890 Okla. Sess. Laws 495; Act of Feb. 21, 1917, § 7, 1917 Or. Sess. Laws

Columbia also made it unlawful "for any person or persons to carry or have concealed about their persons any deadly or dangerous weapons."[43]

The history of firearm regulation, then, establishes that governments enjoy the ability to regulate highly dangerous arms (and related dangerous accessories). The final question is whether assault weapons and large-capacity magazines fall under this category. They do.

ii. Application

Assaults weapons pose an exceptional danger, more so than standard self-defense weapons such as handguns.[44] *See NYSRPA*, 804 F.3d at 262 ("When used, these weapons tend to result in more numerous wounds, more serious wounds, and more victims."). They fire quickly: a shooter using a semiautomatic weapon can launch thirty rounds in as little as six seconds, with an effective rate of about a bullet per second for each minute of firing,[45] meeting the U.S. Army definition for "rapid fire."[46] The bullets hit fast and penetrate deep into the body. The muzzle velocity of an assault weapon is four times higher than a high-powered semiautomatic firearm.[47] A bullet striking

807; S.D. Terr. Pen. Code § 457 (1877), as codified in S.D. Rev. Code, Penal Code § 471 (1903); William H. Bridges, Digest of the Charters and Ordinances of the City of Memphis, from 1826 to 1867, Inclusive, Together with the Acts of the Legislature Relating to the City, with an Appendix, at 44, § 4753 (1867); Tex. Act of Apr. 12, 1871, as codified in Tex. Penal Code (1879); Dangerous and Concealed Weapons, Feb. 14, 1888, reprinted in The Revised Ordinances of Salt Lake City, Utah, at 283, § 14 (1893); Act of Mar. 29, 1882, ch. 135, § 7, 1882 W. Va. Acts 421–22; Act of Feb. 14, 1883, ch. 183, § 3, pt. 56 1883 Wis. Sess. Laws 713.

[43] An Act to Prevent the Carrying of Concealed Weapons, Aug. 10, 1871, reprinted in Laws of the District of Columbia: 1871-1872, Part II, 33 (1872).

[44] Again, this case is at a preliminary posture: plaintiffs remain free to present evidence discounting the body of literature relied on by the Court.

[45] E. Gregory Wallace, *Assault Weapon Myth*, 43 S. Ill. U. L. J. 193, 218 (2018).

[46] Sections 8-17 through 8-22 (Rates of Fire), Sections 8-23 and 8-24 (Follow Through), and Sections B-16 through B22 (Soft Tissue Penetration), in TC 3-22.9 Rifle and Carbine Manual, Headquarters, Department of the Army (May 2016). Available at the Army Publishing Directorate Site (https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN19927_TC_3-22x9_C3_FINAL_WEB.pdf), accessed October 4, 2022.

[47] Peter M. Rhee et al., *Gunshot Wounds: A Review of Ballistics, Bullets, Weapons, and Myths*, 80 J. Trauma & Acute Care Surgery 853, 855 (2016).

a body causes cavitation, meaning, in the words of a trauma surgeon, "that as the projectile passes through tissue, it creates a large cavity."[48] "It does not have to actually hit an artery to damage it and cause catastrophic bleeding. Exit wounds can be the size of an orange."[49] Children are even more vulnerable because "the surface area of their organs and arteries are smaller."[50] Additionally, "[t]he injury along the path of the bullet from an AR-15 is vastly different from a low-velocity handgun injury …."[51] Measured by injury per shooting, there is an average of about 30 injuries for assault weapons compared to 7.7 injuries for semiautomatic handguns.[52] In a mass shooting involving a non-semiautomatic firearm, 5.4 people are killed and 3.9 people are wounded on average; in a mass shooting with a semiautomatic handgun, the numbers climb to 6.5 people killed and 5.8 people wounded on average; and in a mass shooting with a semiautomatic rifle, the average number of people rises to 9.2 killed and 11 wounded on average. (Dkt. 57-8 ¶ 54).

Assault rifles can also be easily converted to increase their lethality and mimic military-grade machine guns. Some of these "fixes" are as simple as "stretching a rubber band from the trigger to the trigger guard of an AR-15." (*Id.* ¶ 53). Two conversion devices stick out though: bump stocks and trigger cranks, both of which allow an assault weapon to fire at a rate several times higher than it could otherwise. As the Fourth Circuit summarized, "[t]he very features that

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[48] Emma Bowman, *This Is How Handguns and Assault Weapons Affect the Human Body*, NPR (June 6, 2022, 5:58 AM), https://www.npr.org/2022/06/06/1103177032/gun-violence-mass-shootings-assault-weapons-victims.

[49] Heather Sher, *What I Saw Treating the Victims from Parkland Should Change the Debate on Guns*, The Atlantic (Feb. 22, 2018), https://www.theatlantic.com/politics/archive/2018/02/what-i-saw-treating-the-victims-from-parkland-should-change-the-debate-on-guns/553937.

[50] Bowman, *supra*.

[51] Sher, *supra*.

[52] Joshua D. Brown & Amie J. Goodin, *Mass Casualty Shooting Venues, Types of Firearms, and Age of Perpetrators in the United States, 1982–2018*, 108 Am. J. of Pub. Health 1385, 1386 (2018).

qualify a firearm as a banned assault weapon—such as flash suppressors, barrel shrouds, folding and telescoping stocks, pistol grips, grenade launchers, night sights, and the ability to accept bayonets and large-capacity magazines—'serve specific, combat-functional ends.'" *Kolbe*, 849 F.3d at 137.

Moreover, assault weapons are used disproportionately in mass shootings, police killings, and gang activity. Of the sixty-two mass shootings from 1982 to 2012, a thirty-year period, one-third involved an assault weapon.[53] Between 1999 and 2013, the number was 27 percent,[54] and the most recent review placed the figure at 25 percent in active-shooter incidents between 2000 and 2017.[55] While 25 percent may be about half that of semiautomatic handguns, it is greatly overrepresented "compared with all gun crime and the percentage of assault weapons in society."[56] The statistics also reveal a grim picture for police killings and gang activity. About 20 percent of officers were killed with assault weapons from 1998 to 2001 and again from 2016 to 2017.[57] Even conservative estimates calculate that assault weapons are involved in 13 to 16 percent of police murders.[58] Additionally, just under 45 percent of all gang members own an assault rifle (compared

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[53] Spitzer, *supra*, at 240.

[54] William J. Krouse & Daniel J. Richardson, Cong. Rsch. Serv., R44126, *Mass Murder with Firearms: Incidents and Victims, 1999-2013* 29 (2015), https://sgp.fas.org/crs/misc/R44126.pdf.

[55] Elzerie de Jager et al., *Lethality of Civilian Active Shooter Incidents With and Without Semiautomatic Rifles in the United States*, 320 J. Am. Med. Ass'n 1034, 1034–35 (2018).

[56] Spitzer, *supra*, at 241.

[57] Violence Pol'y Ctr., *"Officer Down" Assault Weapons and the War on Law Enforcement* 5 (2003), https://www.vpc.org/studies/officer%20down.pdf; *New Data Shows One in Five Law Enforcement Officers Slain in the Line of Duty in 2016 and 2017 Were Felled by an Assault Weapon*, Violence Pol'y Ctr. (Sept. 25, 2019), https://vpc.org/press/new-data-shows-one-in-five-law-enforcement-officers-slain-in-the-line-of-duty-in-2016-and-2017-were-felled-by-an-assault-weapon/.

[58] George W. Knox et al., Nat'l Gang Crime Rsch. Ctr., *Gangs and Guns: A Task Force Report From the National Gang Crime Research Center* 35–36 (2001), https://www.ojp.gov/ncjrs/virtual-library/abstracts/gangs-and-guns-task-force-report-national-gang-crime-research.

to, at most, 15 percent of non-gang members), and gang members are seven times more likely to use the weapons in the commission of a crime.[59]

High-capacity magazines share similar dangers. The numbers tell a familiar grim story. An eight-year study of mass shootings from 2009 to 2018 found that high-capacity magazines led to five times the number of people shot and more than twice as many deaths.[60] More recently, researchers examining almost thirty years of mass-shooting data determined that high-capacity magazines resulted in a 62 percent higher death toll.[61] It is little wonder why mass murderers and criminals favor these magazines. Thirty-one of sixty-two mass shootings studied involved the gun accessory.[62] Also, extended magazines, one expert estimates, allow semiautomatic weapons to become more lethal: by themselves, semiautomatic weapons cause "an average of 40 percent more deaths and injuries in mass shooting than regular firearms, and 26 percent more than semiautomatic handguns." (Dkt. 57-8 ¶ 56). Add in extended magazines and "semiautomatic rifles cause an

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[59] George W. Knox et al., *Gangs and Guns: A Task Force Report*, National Gang Crime Research Center 36 (2001), https://www.ojp.gov/ncjrs/virtual-library/abstracts/gangs-and-guns-task-force-report-national-gang-crime-research.

[60] Everytown For Gun Safety, *Twelve Years of Mass Shootings in the United States* (June 4, 2021), https://everytownresearch.org/maps/mass-shootings-in-america/.

[61] Louis Klarevas et al., *The Effect of Large-Capacity Magazine Bans on High-Fatality Mass Shootings*, 1990–2017, 109 Am. J. Pub. Health 1754, 1755 (2019); *see also Worman*, 922 F.3d at 39 ("It is, therefore, not surprising that AR-15s equipped with LCMs have been the weapons of choice in many of the deadliest mass shootings in recent history, including horrific events in Pittsburgh (2018), Parkland (2018), Las Vegas (2017), Sutherland Springs (2017), Orlando (2016), Newtown (2012), and Aurora (2012)."); *NYSRPA*, 804 F.3d at 263 ("Large-capacity magazines are disproportionately used in mass shootings, like the one in Newtown, in which the shooter used multiple large-capacity magazines to fire 154 rounds in less than five minutes.").

[62] Spitzer, *supra*, at 242.

average of 299 percent more deaths and injuries than regular firearms, and 41 percent more than semiautomatic handguns." (*Id.*)

Assault-weapons and high-capacity magazines regulations are not "unusual," *Bruen*, 142 S. Ct. at 2129 (Kavanaugh, concurring), or "severe," *Heller*, 554 U.S. at 629. The federal government banned assault weapons for ten years. Today, eight states, the District of Columbia, and numerous municipalities, maintain assault-weapons and high-capacity magazine bans—as more jurisdictions weigh similar measures. Because assault weapons are particularly dangerous weapons and high-capacity magazines are particularly dangerous weapon accessories, their regulation accords with history and tradition. Naperville and Illinois lawfully exercised their authority to control their possession, transfer, sale, and manufacture by enacting a ban on commercial sales. That decision comports with the Second Amendment, and as a result, the plaintiffs have not shown the "likelihood of success on the merits" necessary for relief. *See Braam*, 37 F.4th at 1272 ("The district court may issue a preliminary injunction *only if* the plaintiff demonstrates 'some' likelihood of success on the merits." (emphasis added)); *Camelot Bonquet Rooms, Inc. v. United States Small Business Administration*, 24 F.4th 640, 644 (7th Cir. 2022) ("Plaintiffs who seek a preliminary injunction must show that … they have some likelihood of success on the merits.").

II. Remaining Preliminary-Injunction Factors

A. Irreparable Harm

For thoroughness, the Court addresses the remaining preliminary-injunction factors. The party seeking a preliminary injunction must show, in addition to a likelihood of success on the merits, that absent an injunction, irreparable harm will ensue. *Int'l Ass'n of Fire Fighters, Local 365 v. City of East Chicago*, 56 F.4th 437, 450 (7th Cir. 2022). "Harm is irreparable if legal

remedies are inadequate to cure it," meaning "the remedy must be seriously deficient as compared to the harm suffered." *Life Spine, Inc. v. Aegis Spine, Inc.*, 8 F.4th 531, 545 (7th Cir. 2021) (quoting *Foodcomm Int'l v. Barry*, 328 F.3d 300, 304 (7th Cir. 2003)). Deprivations of constitutional rights often—but do not always—amount to "irreparable harm." *See* 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948.1 (3d ed. 1998) ("When an alleged deprivation of a constitutional right is involved … most courts hold that no further showing of irreparable harm is necessary."). This principle certainly applies for the First Amendment. The Supreme Court has held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable harm." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *see also Int'l Ass'n of Fire Fighters*, 56 F.4th at 450–51 ("Under Seventh Circuit law, irreparable harm is presumed in First Amendment cases.").

No binding precedent, however, establishes that a deprivation of *any* constitutional right is presumed to cause irreparable harm. *Cf. Wheeler v. Wexford Health Sources, Inc.*, 689 F.3d 680, 682 (7th Cir. 2012) ("The judge was right to say that equitable relief depends on irreparable harm, even when constitutional rights are at stake."). *Ezell* does draw upon First Amendment principles. *See* 651 F.3d at 697. For example, the argument that a Second Amendment harm is mitigated "by the extent to which it can be exercised in another jurisdiction" cannot pass muster because a city could never ban "the exercise of a free-speech or religious-liberty right within its borders on the rationale that those rights may be freely enjoyed in the suburbs." *Id.* The opinion also acknowledges that "[t]he loss of a First Amendment right is frequently presumed to cause irreparable harms" and that "[t]he Second Amendment protects similarly intangible and unquantifiable interests." *Id.* at 699. But the Seventh Circuit stopped short of holding that injury

in the Second Amendment context "unquestionably constitutes irreparable harm." *Elrod*, 427 U.S. at 373.

Absent this presumption, the plaintiffs have not demonstrated that they will suffer irreparable harm. Bevis has not furnished any evidence that he will lose substantial sales, and he can still sell almost any other type of gun. While a high number of assault weapons are in circulation, only 5 percent of firearms are assault weapons, 24 million out of an estimated 462 million firearms. (Dkt. 57-4 ¶ 36; Dkt. 57-7 ¶ 27.) As a percentage of the total population, less than 2 percent of all Americans own assault weapons. (Dkt. 57-7 ¶ 27). NAGR's members also retain other effective weapons for self-defense. Most law enforcement agencies design their firearm training qualification courses around close-quarter shootings, those shooting that occur between the range of three to ten yards, where handguns are most useful. (Dkt. 57-4 ¶ 59). Firearms are certainly effective, necessary tools for protecting law enforcement and civilians alike. But, as one Federal Bureau of Investigation agent describes, "the best insights indicate that shotguns and 9mm pistols are generally recognized as the most suitable and effective choices for armed defense." (*Id.* ¶ 61).

Assuming, though, the deprivation of any constitutional right rises to *per se* irreparable harm, the plaintiffs have still not shown that they are likely to succeed on the merits. *See Winter*, 555 U.S. at 20. A plaintiff need not demonstrate "absolute success," but the chances of success must be "better than negligible." *Valencia v. City of Springfield*, 883 F.3d 959, 966 (7th Cir. 2018) (quoting *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046 (7th Cir. 2017)) (cleaned up). "If it is plain that the party seeking the preliminary injunction has no case on the merits, the injunction should be refused …." *Id.* (quoting *Green River Bottling Co. v. Green River Corp.*, 997 F.2d 359, 361 (7th Cir. 1993)); *see also Braam*, 37 F.4th at 1272.

It is plain here—the plaintiffs have "no case on the merits." *Valencia*, 883 F.3d at 966 (quoting *Green River Bottling*, 997 F.2d at 361). The analysis could end there because that failure is dispositive. *See Higher Soc'y of Ind. v. Tippecanoe County*, 858 F.3d 1113, 1116 (7th Cir. 2017).

B. The Balance of Equities and the Public Interest

Neither the balance of equities nor the public interest decisively favors the plaintiffs. On the one hand, they suffer an alleged deprivation of a constitutional right. Again though, the financial burden and loss of access to effective firearms would be minimal. On the other side, Illinois and Naperville compellingly argue their laws protect public safety by removing particularly dangerous weapons from circulation. The protection of public safety is also unmistakably a "public interest," one both laws further. *Cf. Metalcraft of Mayville, Inc. v. The Toro Company*, 848 F.3d 1358, 1369 (Fed. Cir. 2017) ("[T]he district court should focus on whether a *critical* public interest would be injured by the grant of injunctive relief." (emphasis added)). Therefore, the plaintiffs have not made a "clear showing" that they are entitled to the "extraordinary and drastic" remedy of an injunction. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (quoting 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2948 (2d ed.1995)).

CONCLUSION

For these reasons, the motions for a temporary restraining order and a preliminary injunction are denied. (Dkt. 10, 50).

Virginia M. Kendall
United States District Judge

Date: February 17, 2023

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen
United States Courthouse
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ORDER

April 18, 2023

By the Court:

No. 23-1353	ROBERT BEVIS, et al., Plaintiffs - Appellants v. CITY OF NAPERVILLE, a municipal corporation and JASON ARRES, Defendants - Appellees and STATE OF ILLINOIS, Intervening Appellee
Originating Case Information:	
District Court No: 1:22-cv-04775 Northern District of Illinois, Eastern Division District Judge Virginia M. Kendall,	

The following are before the court:

1. **MOTION FOR INJUNCTION PENDING APPEAL**, filed on March 7, 2023, by counsel the appellants.

2. **APPENDIX TO MOTION FOR INJUNCTION PENDING APPEAL**, filed on March 7, 2023, by counsel for the appellants.

3. **INTERVENING STATE APPELEE'S OPPOSITION TO PLAINTIFFS' MOTION FOR INJUNCTION PENDING APPEAL**, filed on March 21, 2023, by counsel for the appellee State of Illinois.

4. **INTERVENING STATE APPELLEE'S SEPARATE APPENDIX TO OPPOSITION TO PLAINTIFFS' MOTION FOR INJUNCTION PENDING APPEAL, VOLUME 1 OF 2**, filed on March 21, 2023, by counsel for the appellee State of Illinois.

5. **INTERVENING STATE APPELLEE'S SEPARATE APPENDIX TO OPPOSITION TO PLAINTIFFS' MOTION FOR INJUNCTION PENDING APPEAL, VOLUME 2 OF 2**, filed on March 21, 2023, by counsel for the appellee State of Illinois.

6. **CITY OF NAPERVILLE AND JASON ARRES' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR INJUNCTION PENDING APPEAL**, filed on March 21, 2023, by counsel for the appellees City of Naperville and Jason Arres.

7. **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR INJUNCTION PENDING APPEAL**, filed on March 24, 2023, by counsel for the appellants.

IT IS ORDERED that the motion for an injunction pending appeal is **DENIED**.

form name: **c7_Order_BTC** (form ID: **178**)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL ASSOCIATION FOR GUN RIGHTS, ROBERT C. BEVIS, and LAW WEAPONS, INC., d/b/a LAW WEAPONS & SUPPLY, an Illinois corporation;	)	Case No. 22-cv-04775
Plaintiffs,	)	
v.	)	
CITY OF NAPERVILLE, ILLINOIS,	)	
Defendant.	)	

PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiffs submit the following Motion for Temporary Restraining Order and Preliminary Injunction against the City of Naperville, Illinois (the "City").

Certificate: Plaintiffs have conferred with counsel for Defendant. Defendant opposes this motion.

INTRODUCTION

This action challenges the constitutionality of Chapter 19 of Title 3 of the Naperville Municipal Code (the "Ordinance"). The Ordinance bans the commercial sale of certain semi-automatic firearms of a type that are held by millions of law-abiding American citizens for lawful purposes. The Second Amendment protects the right of law-abiding citizens to own weapons in common use by law-abiding citizens for lawful purposes. *D.C. v. Heller*, 554 U.S. 570, 627 (2008). "The right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use . . ." *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011). Thus, this provision of the Ordinance is unconstitutional. Accordingly, Plaintiffs hereby move

the Court to enter a temporary restraining order and a preliminary injunction enjoining the City from enforcing this unconstitutional provision of the Ordinance.

NOTE REGARDING TIMING OF MOTION

The Ordinance goes into effect on January 1, 2023. Because the Ordinance was not currently in effect and thereby depriving them of their constitutional rights, Plaintiffs have not sought a TRO earlier. Since, however, the Ordinance will be effective in a few weeks, Plaintiffs are seeking a TRO at this time to prevent the Ordinance from going into effect.

FACTS

1. Section 3-19-1 of the Ordinance defines the term "assault rifle." The term "assault rifle" as used in the Code is not a technical term used in the firearms industry or community for firearms commonly available to civilians. Brown Dec. ¶ 5. Instead, the term is a rhetorically charged political term[1] meant to stir the emotions of the public against those persons who choose to exercise their constitutional right to possess certain semi-automatic firearms that are commonly owned by millions of law-abiding American citizens for lawful purposes. *Id*. Plaintiffs refuse to adopt the City's politically charged rhetoric in this Motion. Therefore, for purposes of this Motion, the term "Banned Firearm" shall have the same meaning as the term "assault rifle" in Section 3-19-1 of the Code.

2. Section 3-19-2 of the Ordinance states: "The Commercial Sale of Assault Rifles within the City is unlawful and is hereby prohibited." Section 3-19-3 of the Ordinance provides for substantial penalties for any violation of its provisions.

3. Plaintiff National Association for Gun Rights ("NAGR") is a nonprofit membership and donor-supported organization qualified as tax-exempt under 26 U.S.C. § 501(c)(4).

[1] *See Stenberg v. Carhart*, 530 U.S. 914, 1001 n.16 (2000) (Thomas, J., dissenting).

Brown Dec. ¶2. NAGR seeks to defend the right of all law-abiding individuals to keep and bear arms. NAGR has members who reside within the City. *Id*. NAGR represents the interests of its members who reside in the City. *Id*.

4. Plaintiff Robert C. Bevis is a business owner in the City and a law-abiding citizen of the United States. Bevis Dec. ¶¶ 1, 2.

5. Plaintiff Law Weapons, Inc. d/b/a Law Weapons & Supply ("LWI")is a duly registered Illinois corporation which operates in the City engaged in the commercial sale of firearms. Bevis Dec. ¶ 2. A substantial part of LWI's business consists of the commercial sale of firearms that will be Banned Weapons when the Ordinance goes into effect. Bevis Dec. ¶3.

6. Plaintiffs and/or their members and/or customers desire to exercise their Second Amendment right to acquire the Banned Firearms within the City for lawful purposes, including, but not limited to, the defense of their homes. Bevis Dec. ¶ 4; Brown Dec. ¶ 6. When the Ordinance becomes effective on January 1, 2023, Plaintiffs and/or their members and/or customers will be prohibited from exercising their Second Amendment rights in this fashion. Bevis Dec. ¶ 5; Brown Dec. ¶ 7.

7. The ban applies to licensed gun sellers, but not private sales by unlicensed parties. Bevis Dec. ¶ 6.

7. At least 20 million semi-automatic firearms such as those defined as "assault rifles" are owned by millions of American citizens who use those firearms for lawful purposes. Declaration of James Curcuruto ¶6. Mr. Curcuruto's declaration was originally submitted in *Rocky Mountain Gun Owners, et al. v. Town of Superior*, 22-CV-1685-RM. It is used with permission in this action.

STANDARD FOR GRANTING TRO AND PRELIMINARY INJUNCTION

The standard for issuing a temporary restraining order is identical to that governing the issuance of a preliminary injunction. *Mays v. Dart*, 453 F. Supp. 3d 1074, 1087 (N.D. Ill. 2020). To be entitled to preliminary relief, Plaintiffs must establish as a threshold matter: (1) they are likely to suffer irreparable harm in the absence of preliminary relief; (2) inadequate remedies at law exist; and (3) they have a reasonable likelihood of success on the merits. (3) the balance of the equities tips in their favor. *Whitaker v. Kenosha Unified School District*, 858 F. 3d 1034, 1044 (7th Cir. 2017). If the movant successfully makes this showing, the court must engage in a balancing analysis, to determine whether the balance of harm favors the moving party or whether the harm to other parties or the public sufficiently outweighs the movant's interests. *Id.*, *Higher Soc'y of Indiana v. Tippecanoe Cnty., Indiana*, 858 F.3d 1113, 1116 (7th Cir. 2017), *citing Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

In a case involving an alleged violation of a constitutional right, the likelihood of success on the merits will often be the determinative factor. *Id.*, *citing Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012).[2] That is because even short deprivations of constitutional rights constitute irreparable harm, and the balance of harms normally favors granting preliminary injunctive relief because the public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitutional. *Id*. So "the analysis begins and ends with the likelihood of success on the merits" of the constitutional claim. *Id.*, *citing Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013).

[2] *Higher Soc'y of Indiana* was a First Amendment case, but that difference does not matter, because in *Bruen*, *infra*, the Supreme Court held that Second Amendment rights should be protected in the same way First Amendment rights are protected. *Id.*, 142 S. Ct. at 2130.

In *Ezell v. City of Chicago*, 651 F.3d 684, 997 (7th Cir. 2011), the Court equated the standard for obtaining a preliminary injunction in the Second Amendment context with the standard for obtaining that relief in a First Amendment case. Also in *Ezell*, the Court granted preliminary relief against a Chicago ordinance which *inter alia* prohibited commercial activity found to be protected by the Second Amendment. Namely, the ordinance prohibited all shooting galleries, firearm ranges, or any other places where firearms are discharged.

THE GOVERNMENT BEARS THE BURDEN OF DEMONSTRATION

In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court unambiguously placed on the government a substantial burden of demonstrating that any law seeking to regulate firearms is consistent with this Nation's historical tradition of firearm regulation.[3] Specifically, the Court stated:

> "To support that [its claim that its regulation is permitted by the Second Amendment], the burden falls on [the government] to show that New York's proper-cause requirement is consistent with this Nation's historical tradition of firearm regulation. Only if respondents carry that burden can they show that the pre-existing right codified in the Second Amendment, and made applicable to the States through the Fourteenth, does not protect petitioners' proposed course of conduct."

Bruen, 142 S. Ct. at 2135.

In this case, the Second Amendment's plain text covers Plaintiffs' conduct in seeking to acquire and/or sell bearable arms. *Bruen*, 142 S. Ct. at 2132 ("the Second Amendment extends, prima facie, to all instruments that constitute bearable arms"). *Ezell* also makes clear commercial activity related to the right to keep and bear arms is as much protected by the Second Amendment as is the right to possess and carry firearms. Accordingly, Plaintiffs' conduct is **presumptively**

[3] "Significantly, the plaintiff need not demonstrate the absence of regulation in order to prevail; the burden rests squarely on the government to establish that the activity has been subject to some measure of regulation." *Friedman v. City of Highland Park, Illinois*, 784 F.3d 406, 415 (7th Cir. 2015) (Manion, J., dissenting).

protected by the Second Amendment. *Bruen*, 142 S. Ct. at 2126 ("when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct"). The government may attempt to rebut that presumption by demonstrating that its law is consistent with this Nation's historical tradition of firearm regulation. If the government attempts to meet that burden in its response, Plaintiffs will have an opportunity to submit rebuttal evidence in their reply.

ARGUMENT

I. The Supreme Court has Reaffirmed the *Heller* Standard

A. A Regulation Burdening the Right to Keep and Bear Arms is Unconstitutional Unless it is Consistent with the Text of the Second Amendment and the Nation's History and Traditions

In *Bruen*, the Court rejected the two-part balancing test for Second Amendment challenges that several courts of appeal adopted in the wake of *Heller* and *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010). Instead, it reiterated the *Heller* standard, which it summarized as follows:

> "Today, we decline to adopt that two-part approach. In keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command."

Bruen, 142 S. Ct. at 2126 (internal quotation marks omitted).

The *Bruen* court spent significant time describing how lower courts are to proceed in Second Amendment cases. As particularly relevant here, *Bruen* described the proper analysis of the term "arms." That word, *Bruen* affirmed, has a "historically fixed meaning" but one that

"applies to new circumstances." *Id*. at 2132. It thus "covers modern instruments that facilitate armed self-defense." *Id*., *citing Caetano v. Massachusetts*, 577 U.S. 411, 411—412 (2016) *(per curiam*) (stun guns). Accordingly, the text of 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." *Id*.

The Court then explained that "[m]uch like we use history to determine which modern 'arms' are protected by the Second Amendment, so too does history guide our consideration of modern regulations that were unimaginable at the founding." *Id*. In considering history, courts are to engage in "reasoning by analogy." *Id*. This analogical reasoning requires the government to identify a well-established and representative historical analogue to the challenged regulation. *Id*. at 2133. But to be a genuine "analogue," the historical tradition of regulation identified by the government must be "relevantly similar" to the restriction before the Court today. *Id*. at 2132. Two metrics are particularly salient in determining if a historical regulation is relevantly similar: [1] how and [2] why the regulations burden a law-abiding citizen's right to armed self-defense. *Id*. at 2133. By considering these two metrics, a court can determine if the government has demonstrated that a modern-day regulation is analogous enough to historical precursors that the regulation may be upheld as consistent with the Second Amendment's text and history. *Id*.

As noted above, the Court held that the judicial balancing of means and ends pursuant to intermediate scrutiny review plays no part in Second Amendment analysis. "*Heller* does not support applying means-end scrutiny." *Id*., 142 S. Ct. at 2127; *see also Id*., 142 S. Ct. at 2129 (inquiry into the statute's alleged "salutary effects" upon "important governmental interests" is not part of the test).

B. Only the Sale of "Dangerous and Unusual Arms" Can be Banned Consistent with Our History and Tradition

This case involves a blanket prohibition on the commercial sale of a class of arms. Both *Bruen* and *Heller* identified only one aspect of the nation's history and tradition that is sufficiently analogous to – and therefore capable of justifying – such a ban: the tradition, dating back to the Founding, of restricting "dangerous and unusual weapons" that are not "in common use at the time." *Bruen*, 142 S. Ct. at 2128. By contrast, where a type of arm is in common use, there is, by definition, no historical tradition of banning its sale. Thus, for the type of restriction at issue in this case, the Court has already analyzed the relevant historical tradition and established its scope: the sale of "dangerous and unusual" weapons may be subject to a blanket ban, but the sale of arms "in common use at the time" may not be. *Id*.

The *Heller* test is based on historical practice and "the historical understanding of the scope of the right," but with reference to modern realities of firearm ownership. *Heller*, 554 U.S. at 625; *see also Bruen*, 142 S. Ct. at 2131 ("The test that we set forth in *Heller* and apply today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding. "). In summary, in the context of blanket bans on the sale of bearable arms, the Supreme Court has already done the historical spadework, and the only restrictions of this kind that it has deemed consistent with the historical understanding of the right to keep and bear arms are restrictions limited to dangerous and unusual arms that are not in common use.

This Court's task is therefore a simple one: it merely must determine whether the arms the sale of which is banned are "dangerous and unusual." Importantly, this is a "conjunctive test: A weapon may not be banned unless it is both dangerous and unusual." *Caetano*, 577 U.S. at 417 (Alito, J., *concurring*). An arm that is in common use for lawful purposes is, by definition, not

unusual. Such an arm therefore cannot be both dangerous and unusual and therefore cannot be subjected to a blanket ban. *Bruen*, 142 S. Ct. at 2143*; Heller*, 554 U.S. at 629.

To determine whether an arm is "unusual" the Supreme Court has likewise made clear that the Second Amendment focuses on the practices of the American people nationwide, not just, say, in this State. *See id*. at 2131 ("It is this balance – struck by the traditions of the American people – that demands our unqualified deference."); *Heller*, 554 U.S. at 628 (handguns are "overwhelmingly chosen by American society" for self-defense); *Caetano*, 577 U.S. at 420 (Alito, J., *concurring*) ("stun guns are widely owned and accepted as a legitimate means of self-defense across the country"). Therefore, the Second Amendment protects those who live in states or localities with a less robust practice of protecting the right to keep and bear firearms from outlier legislation (like the City's ban here) just as much as it protects those who live in jurisdictions that have hewed more closely to America's traditions.

Furthermore, courts and legislatures do not have the authority to second-guess the choices made by law-abiding citizens by questioning whether they really "need" the arms that ordinary citizens have chosen to possess. While *Heller* noted several reasons that a citizen may prefer a handgun for home defense, the Court held that "[w]hatever 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. The Court reaffirmed that the traditions of the American people, which includes their choice of preferred firearms, demand the courts' "unqualified deference." *Id*., 142 S. Ct. at 2131.

As set forth below, the Banned Firearms are "typically possessed by law-abiding citizens for lawful purposes." Under *Heller* and *Bruen*, that is the end of the analysis. The Second

Amendment does not countenance a complete prohibition on the commercial sale of one of the most popular weapons chosen by Americans for self-defense in the home. *Id*., 142 S. Ct. at 2128.

Finally, the Second Amendment inquiry focuses on the choices commonly made by contemporary law-abiding citizens. *Heller* rejected as "bordering on the frivolous" "the argument . . . that only those arms in existence in the 18th century are protected," *Id*. at 582. And in *Caetano*, the Supreme Court reiterated this point, holding that arms protected by the Second Amendment need not have been in existence at the time of the Founding. 577 U.S. 411-12, *quoting Heller*, 554 U.S. at 582. The *Caetano* Court flatly denied that a particular type of firearm's being "a thoroughly modern invention" is relevant to determining whether the Second Amendment protects it. *Id*. And *Bruen* cements the point. Responding to laws that allegedly restricted the carrying of handguns during the colonial period, the Court reasoned that "even if these colonial laws prohibited the carrying of handguns because they were considered 'dangerous and unusual weapons' in the 1690s, they provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today." *Bruen*, 142 S. Ct. at 2143.

II. The City's Prohibition on the Sale of Banned Firearms is Unconstitutional

A. Introduction

Under *Bruen*, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. *Bruen*, 142 S. Ct. at 2126. To justify its regulation, the government . . . must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id*. Here, the Second Amendment's plain text covers the Banned Firearms, so it falls to the City to attempt to justify its law as consistent with historical tradition rooted in the Founding. It cannot possibly do so, because the Banned Firearms

are commonly possessed by law abiding citizens, and *Bruen* has already established that, by definition, there cannot be a tradition of banning the sale of an arm if it is commonly possessed.

B. The Banned Firearms are in Common Use

This case thus reduces to the following, straightforward inquiry: are the arms the commercial sale of which is banned by the City in "common use," according to the lawful choices by contemporary Americans? They unquestionably are. There is no class of firearms known as "assault rifle." "Prior to 1989, the term 'assault weapon' did not exist in the lexicon of firearms. It is a political term, developed by anti-gun publicists . . ." *Stenberg v. Carhart*, 530 U.S. 914, 1001 (2000) at n. 16 (Thomas, J., dissenting). But while "assault rifle" is not a recognized category of firearms, "semiautomatic rifle" is. And it is semiautomatic rifles that the City's "assault rifle" ban targets. The "automatic" part of "semiautomatic" refers to the fact that the user need not manually load another round in the chamber after each round is fired. But unlike an automatic rifle, a semiautomatic rifle will not fire continuously on one pull of its trigger; rather, a semiautomatic rifle requires the user to pull the trigger each time he or she wants to discharge a round. *See Staples v. United States*, 511 U.S. 600, 602 (1994) at n. 1.

There is therefore a significant practical difference between a truly automatic and a merely semiautomatic rifle. According to the United States Army, for example, the maximum effective rates of fire for various M4- and M16-series firearms is between forty-five and sixty-five rounds per minute in semiautomatic mode, versus 150-200 rounds per minute in automatic mode. Dept. of the Army, RIFLE MARKSMANSHIP: ML6-/M4-SERIES WEAPONS, 2-1 tbl. 2-1 (2008), available at https://bit.ly/3pvS3SW.

There is a venerable tradition in this country of lawful private ownership of semiautomatic rifles. The Supreme Court has held as much. In *Staples,* it concluded that semiautomatics, unlike

machine guns, "traditionally have been widely accepted as lawful possessions." *Staples*, 511 U.S. at 612. Semiautomatic rifles have been commercially available for over a century. *See Heller v. District of Columbia* ("*Heller II*"), 670 F.3d 1244, 1287 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); David B. Kopel, *Rational Basis Analysis of "Assault Weapon" Prohibition*, 20 J. CONTMP. L. 381, 413 (1994).

In contrast to this long history of legal ownership of semi-automatic rifles, the first "assault weapon" ban was not enacted until California did so in 1989, a full 200 years after the Constitution became effective. Obviously, that is far too late to demonstrate anything about the original meaning of the Second or Fourteenth Amendment, no matter which is the relevant historical reference point. *Bruen*, 142 S.Ct. at 2126 (cautioning against giving post enactment history more weight than it can rightly bear). Even today, the vast majority of states (42 out of 50)[4], do not ban semiautomatic weapons that would be deemed "assault rifles" under the law at issue in this action.[5]

Thus, there is no historical tradition of banning semi-automatic firearms. This is borne out by the fact that millions of law-abiding citizens choose to possess firearms in that category. *Duncan v. Becerra ("Duncan IV")*, 970 F.3d 1133, 1147 (9th Cir. 2020) ("Commonality is determined largely by statistics."); *Ass'n of N.J Rifle & Pistol Clubs, Inc. v. Att'y Gen.*, 910 F.3d 106, 116 (3d Cir. 2018) (finding an arm is commonly owned because the record shows that "millions" are owned); *New York State Rifle & Pistol Ass 'n, Inc. v. Cuomo*, 804 F.3d 242, 255

[4] The federal government banned semi-automatic rifles from 1994 to 2004 when Congress allowed that law after the Justice Department concluded that it produced "no discernible reduction" in gun violence. Christopher S. Koper, Assessing the Potential to Reduce Deaths and Injuries from Mass Shootings Through Restrictions on Assault Weapons and Other High-Capacity Semiautomatic Firearms, 19 Crim'y & Pub. Pol'y 96 (2020).

[5] The bans and the year each was enacted are: CAL. PENAL CODE §§ 30600, 30605 (**1989**); N.J. STAT. §§ 2C:39-5(f), 2C:39-9(g) (**1990**); HAW. REV. STAT. § 134-8(a) (**1992**); CONN. GEN. STAT. § 53-202c (**1993**); MD. CODE ANN., CRIM. LAW §§ 4-301, 4-303 (**1994**); MASS. GEN. LAWS ch. 140, § 131M (**1994**); N.Y. PENAL LAW §§ 265.02(7), 265.10(1)-(3) (**2000**); 11 DEL. CODE § 1466 (**2022**).

(2d Cir. 2015) ("Even accepting the most conservative estimates cited by the parties and by *amici*, the assault weapons at issue are 'in common use' as that term was used in *Heller*."); *Heller II*, 670 F.3d at 1261 ("We think it clear enough in the record that semi-automatic rifles . . . are indeed in 'common use.'").

The AR-15 is America's "most popular semi-automatic rifle," *Heller II*, 670 F.3d at 1287 (Kavanaugh, J., dissenting), and in recent years it has been "the best-selling rifle type in the United States," Nicholas J. Johnson, *Supply Restrictions at the Margins of Heller and the Abortion Analogue*, 60 HASTINGS L.J. 1285, 1296 (2009); *see also Duncan v. Becerra* ("*Duncan III*"), 366 F. Supp. 3d 1131, 1145 (S.D. Cal. 2019).

This issue was addressed in *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017), abrogated by *Bruen*, *supra*. In his dissent (which, after *Bruen*, likely represents the correct interpretation of the law), Judge Traxler stated:

> "It is beyond any reasonable dispute from the record before us that a statistically significant number of American citizens possess semiautomatic rifles (and magazines holding more than 10 rounds) for lawful purposes. Between 1990 and 2012, more than 8 million AR- and AK- platform semiautomatic rifles alone were manufactured in or imported into the United States. In 2012, semiautomatic sporting rifles accounted for twenty percent of all retail firearms sales. In fact, in 2012, the number of AR- and AK- style weapons manufactured and imported into the United States was more than double the number of the most commonly sold vehicle in the U.S., the Ford F-150. In terms of absolute numbers, these statistics lead to the unavoidable conclusion that popular semiautomatic rifles such as the AR-15 are commonly possessed by American citizens for lawful purposes within the meaning of *Heller*."

Id., 849 F.3d at 153, Traxler, J. dissenting (internal citations and quotation marks omitted).

Today, the number of AR-rifles and other modern sporting rifles in circulation in the United States exceeds twenty-four million. The Firearms Industry Trade Ass'n, *Commonly*

Owned: NSSF Announces Over 24 Million MSRS in Circulation, (July 20, 2022), available at https://bit.ly/3pUj8So.[6]

According to industry sources, as of 2018, roughly thirty-five percent of all newly manufactured guns sold in America are modern semiautomatic rifles, Bloomberg, *Why Gunmakers Would Rather Sell AR-15s Than Handguns*, FORTUNE (June 20, 2018), available at https://bit.ly/3R2kZ3s, and an estimated 5.4 million Americans purchased firearms for the first time in 2021. The Firearms Industry Trade Ass'n, *NSSF Retailer Surveys Indicate 5.4 million First-Time Gun Buyers in 2021,* (Jan. 25, 2022), available at https://bit.ly/3dV6RKI. In fact, a recent survey of gun owners estimated that 24.6 million Americans have owned AR-15 or similar rifles. *See* William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* at 1 (May 13, 2022), available at https://bit.ly/3yPfoHw .

AR-style rifles are commonly and overwhelmingly possessed by law-abiding citizens for lawful purposes. In a 2021 survey of 16,708 gun owners, recreational target shooting was the most common reason (cited by 66% of owners) for possessing an AR-style firearm, followed closely by home defense (61.9% of owners) and hunting (50.5% of owners). English, *supra*, at 33-34. This is consistent with the findings of an earlier 2013 survey of 21,942 confirmed owners of such firearms, in which home-defense again followed (closely) only recreational target shooting as the most important reason for owning these firearms. *See also Friedman v. City of Highland Park*, 68 F. Supp. 3d 895, 904 (N.D. Ill. 2014), *aff'd* 784 F.3d 406 (7th Cir. 2015). "An additional survey estimated that approximately 11,977,000 people participated in target shooting with a modern sporting rifle." *Id.* Indeed the "AR-15 type rifle . . . is the leading type of firearm used in national matches and in other matches sponsored by the congressionally established

[6] *See also* Declaration of James Curcuruto ¶ 6 ("At least 20 million semi-automatic firearms such as those defined as "assault rifles" are owned by millions of American citizens who use those firearms for lawful purposes."

Civilian Marksmanship program." *Shew v. Malloy*, 994 F. Supp. 2d 234, 245 n.40 (D. Conn. 2014).

The fact that "assault" rifles are used extremely rarely in crime underscores that AR-15s and other Banned Firearms are commonly possessed by law-abiding citizens for lawful purposes. Evidence indicates that "well under 1% [of crime guns] are 'assault rifles.'" Gary Kleck, TARGETING GUNS: FIREARMS AND THEIR CONTROL 112 (1997). This conclusion is borne out by FBI statistics. In the five years from 2015 to 2019 (inclusive), there were an average of 14,556 murders per year in the United States. On average, rifles of all types (of which so-called "assault rifles" are a subset) were identified as the murder weapon in 315 murders per year. U.S. Dept. of Just., *Expanded Homicide Data Table 8: Murder Victims by Weapon, 2015-2019, Crime in the United States*, 2019, FBI, available at https://bit.ly/31WmQ1V. By way of comparison, on average 669 people are murdered by "personal weapons" such as hands, fists and feet. *Id*. According to the FBI, a murder victim is more than twice as likely to have been killed by hands and feet than by a rifle of any type.

Even in the counterfactual event that a modern semiautomatic rifle had been involved in each rifle-related murder from 2015 to 2019, an infinitesimal percentage of the approximately 24 million modern sporting rifles in circulation in the United States during that time period –around .001 percent – would have been used for that unlawful purpose. More broadly, as of 2016, only 0.8 percent of state and federal prisoners reported using any kind of rifle during the offense for which they were serving time. Mariel Alper & Lauren Glaze, *Source and Uses of Firearms Involved in Crimes: Survey of Prison Inmates*, 2016, U.S. DEPT OF JUST., OFF. OF JUST. PROGS., BUREAU OF JUST. STATS. 5 tbl. 3 (Jan. 2019), available at https://bit.ly/31VjRa9

Finally, the Supreme Court's decision in *Caetano* further confirms that the arms the sale of which is banned by the City are in common use. That case concerned Massachusetts's ban on the possession of stun guns, which that state's highest court had upheld on the ground that such weapons are not protected by the Second Amendment. *Id*., 577 U.S. at 411. In a brief *per curiam* opinion, the Supreme Court vacated that decision. *Id*. at 411-12. Though the Court remanded the case back to the state court without deciding whether stun guns are constitutionally protected, Justice Alito filed a concurring opinion expressly concluding that those arms "are widely owned and accepted as a legitimate means of self-defense across the country," based on evidence that "hundreds of thousands of Tasers and stun guns have been sold to private citizens." *Id*. at 420 (Alito, J., concurring) (cleaned up) (citation omitted). If hundreds of thousands" of arms constitute wide ownership, *a fortiori* so does the tens of millions of semiautomatic rifles sold to private citizens nationwide.

The Massachusetts court got the message. In a subsequent case, that court, relying on *Caetano*, held that because "stun guns are 'arms' within the protection of the Second Amendment," the state's law barring "civilians from possessing or carrying stun guns, even in their home, is inconsistent with the Second Amendment and therefore unconstitutional." *Ramirez v. Commonwealth*, 94 N.E.3d 809, 815 (Mass. 2018). The Illinois Supreme Court followed suit with a similar ruling in 2019, relying on *Caetano* and *Ramirez* to conclude that "[a]ny attempt by the State to rebut the prima facie presumption of Second Amendment protection afforded stun guns and tasers on the grounds that the weapons are uncommon or not typically possessed by law-abiding citizens for lawful purposes would be futile." *People v. Webb*, 131 N.E. 3d 93, 96 (Ill. 2019). This reasoning is sound, and it necessarily entails the invalidity of the City's blanket ban, which restricts arms that are many times more common than stun guns.

III. *Illinois Ass'n of Firearms Retailers* Controls

In *Bruen*, the Court held that when the Second Amendment covers an individual's conduct, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation in order for it to be valid. *Bruen*, 142 S. Ct. at 2126. In this regard, this Court has already held that flat prohibitions on the sale of firearms are not supported by this nation' history and traditions. In *Illinois Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928 (N.D. Ill. 2014), this Court invalidated an ordinance banning the commercial sale of firearms. It stated:

> Although the City argues that 'state bans of the sale of even popular and common arms stretch back nearly 200 years,' [] the only historical support that it musters are three statutes from Georgia, Tennessee, and South Carolina banning the sale, manufacture, and transfer of firearms within their borders. *See* [] Georgia Act of Dec. 25, 1837, ch. 367, § I; [] Tennessee Act of Mar. 17, 1879, ch. 96, § 1 [], South Carolina Act of Feb. 20, 1901, ch. 435, § 1. But these isolated statutes were enacted 50 to 110 years after 1791, which is 'the critical year for determining the amendment's historical meaning.' *Moore*, 702 F.3d at 935. These statutes are thus not very compelling historical evidence for how the Second Amendment was historically understood. And citation to a few isolated statutes – even to those from the appropriate time period – 'fall[ ] far short' of establishing that gun sales and transfers were historically unprotected by the Second Amendment. *Ezell*, 651 F.3d at 706. **The City's proffered historical evidence fails to establish that governments banned gun sales and transfers at the time of the Second Amendment's enactment**, so the Court must move on to the second step of the inquiry.

Id., 961 F. Supp. 2d at 937 (emphasis added). Accordingly, the Court entered an injunction against enforcement of the prohibition on commercial sales.

It does no good for the City to argue that its residents could acquire the Banned Firearms in other cities. This Court rejected this argument in *Illinois Ass'n of Firearms Retailers*. It stated:

> The City argues in response that these ordinances do not ban acquisition, but merely regulate where acquisition may occur. [] It is true that some living on the outskirts of the City might very well currently live closer to gun stores now than they would absent these ordinances. But *Ezell* makes clear that this type of argument 'assumes that the harm to a constitutional right is measured by the extent to which it can be

> exercised in another jurisdiction. That's a profoundly mistaken assumption.' 651 F.3d at 697. It was no answer there that plenty of gun ranges were located in the neighboring suburbs, or even right on the border of Chicago and the suburbs. Instead, the Seventh Circuit drew on First Amendment jurisprudence to reason that Second Amendment rights must be guaranteed within a specified geographic unit – be it a city or a State. *See id*. ('In the First Amendment context, the Supreme Court long ago made it clear that 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'' (*quoting Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76–77, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981)).

Id., 961 F. Supp. 2d 928, 938–39.

This Court's holding in *Illinois Ass'n of Firearms Retailers* is consistent with the Supreme Court's analysis in *Bruen*. In *Bruen* the Court cited with approval the case of *Drummond v. Robinson*, 9 F.4th 217, 226 (3rd Cir. 2021). *Id*. 142 S. Ct. at 2133. In *Drummond*, the Third Circuit held that a city's ordinance prohibiting the operation of a commercial gun club was an "outlier" and thus not supported by the nation's history or tradition of firearms regulation. 9 F.4th at 232.

In summary, millions of law-abiding citizens own and use for lawful purposes semi-automatic firearms such as the Banned Firearms the sale of which will be banned by the Ordiannce. The Ordinance's prohibition on the sale of the Banned Firearms is an historical outlier. Therefore, by definition, the Ordinance is not consistent with the nation's history and tradition of firearm regulation. Accordingly, the Ordinance violates the Second Amendment. As such, Plaintiffs are likely to succeed on the merits of their claims. "A party moving for preliminary injunctive relief need not demonstrate a likelihood of absolute success on the merits. Instead, he must only show that his chances to succeed on his claims are "better than negligible." *Cooper v. Salazar*, 196 F.3d 809, 813 (7th Cir. 1999). This is a low threshold." *Whitaker*, at 1046.

Banning the sale of the Banned Firearms will cause irreparable harm to LWI and the citizens of Naperville who will be unable to purchase Banned Firearms in Naperville. Harm is considered irreparable if it "cannot be prevented or fully rectified by the final judgment after trial." *Girl Scouts of Manitou Council, Inc.*, 549 F.3d at 1089, *quoting Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984. And it is no remedy to say businesses selling Banned Firearms can simply relocate outside of Naperville. See *Ezell*, *supra* at 697.

Moreover, since the harm is prospective in nature, Plaintiffs and others similarly situated have no adequate remedy at law, as any such award "would be 'seriously deficient as compared to the harm suffered.'" *Whitaker*, at 1046 (citations omitted).

Accordingly, the balance of harms favors Plaintiffs. "Once a moving party has met its burden of establishing the threshold requirements for a preliminary injunction, the court must balance the harms faced by both parties and the public as a whole. *See Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1100 (7th Cir. 2008); *see also Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015). This is done on a "sliding scale" measuring the balance of harms against the moving party's likelihood of success. *Turnell*, 796 F.3d at 662. The more likely he is to succeed on the merits, the less the scale must tip in his favor. *Id.*" *Whitaker*, at 1054. As established above, Plaintiffs are eminently likely to succeed on the merits, especially in light of *Bruen*. As such the balance of harms favors granting injunctive relief to Plaintiffs.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court to enter a preliminary injunction enjoining the City from enforcing the Ordinance.

Respectfully submitted this 18th day of November 2022.

/s/ Barry K. Arrington

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CERTIFICATE OF SERVICE

The undersigned certifies that on November 18, 2022, he filed the foregoing via the Court's CM/ECF system which caused service to be effected on the following counsel of record:

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ORDINANCE NO. 22 – 099

AN ORDINANCE
ADDING CHAPTER 19
(REGULATION OF THE COMMERCIAL SALE OF ASSAULT RIFLES) OF TITLE 3
(BUSINESS AND LICENSE REGULATIONS) OF
THE NAPERVILLE MUNICIPAL CODE

RECITALS

1. **WHEREAS,** on July 4, 2022, 7 people were murdered, and 46 others were injured during a mass shooting that took place during an Independence Day parade in Highland Park, Illinois. The shooter used an AR-15-style semi-automatic rifle with three 30-round magazines to fire 83 shots into the parade crowd from the rooftop of a local store. A 22-year-old suspect has been arrested and charged.

2. **WHEREAS**, on May 24, 2022, 21 people were murdered (19 children and 2 staff members), and 18 others were injured during a mass shooting that took place at Robb Elementary School in Uvalde, Texas. The 18-year-old shooter used an AR-15-style semi-automatic rifle.

3. **WHEREAS**, on May 14, 2022, 10 people were murdered, and 3 others were injured during a mass shooting that took place in a grocery store in Buffalo, New York. The shooter used an AR-15-style semi-automatic rifle. An 18-year-old suspect has been arrested and charged.

4. **WHEREAS**, on August 3, 2019, 23 people were murdered, and 23 others were injured during a mass shooting at a Walmart store in El Paso, Texas. The shooter used an AK-47–style semi-automatic rifle. A 21-year-old suspect has been arrested and charged.

5. **WHEREAS,** on October 27, 2018, 11 people were murdered, and 6 others were injured during a mass shooting that took place at the Tree of Life synagogue in Pittsburgh, Pennsylvania. The shooter used an AR-15-style semi-automatic rifle. A 46-year-old suspect has been arrested and charged.

6. **WHEREAS**, on February 14, 2018, 17 people were murdered (14 students and 3 staff members), and 17 others were injured during a mass shooting that took place at Stoneman Douglas High School in Parkland, Florida. The 19-year-old shooter used an AR-15-style semi-automatic rifle.

7. **WHEREAS,** on November 5, 2017, 26 people were murdered, and 22 others were injured during a mass shooting that took place at the Sutherland Springs church in Sutherland Springs, Texas. The 26-year-old shooter used an AR-15-style semi-automatic rifle.

8. **WHEREAS**, on October 1, 2017, 60 people were murdered, and approximately 867 were injured during a mass shooting that took place at a music festival in Las Vegas, Nevada. The 64-year-old shooter used 24 firearms, including AR-15-style and AR-10-style semi-automatic rifles to fire more than 1,000 bullets.

9. **WHEREAS**, on June 12, 2016, 49 people were murdered, and 58 others were injured during a mass shooting that took place at the Pulse Nightclub in Orlando, Florida. The 29-year-old shooter used an MCX-style semi-automatic rifle.

10. **WHEREAS,** on December 2, 2015, 14 people were murdered, and 24 others were injured during a mass shooting that took place at the Inland Regional Center in San Bernardino, California. The 28-year-old and 29-year-old shooters used AR-15-style semi-automatic rifles.

11. **WHEREAS**, on December 14, 2012, 27 people were murdered (20 children and 6 staff members), and 2 others were injured during a mass shooting that took place at the Sandy Hook Elementary School in Newtown, Connecticut. The 20-year-old shooter used an AR-15-style semi-automatic rifle.

12. **WHEREAS**, there have been many other mass shootings during the last decade, and it has become an unacceptable fact of life that no municipality is exempt from the reality that its citizens are at risk.

13. **WHEREAS**, commonplace in mass shootings are the use of lawfully purchased assault rifles. The U.S. Department of Justice describes assault weapons as "semiautomatic firearms with a large magazine of ammunition that were designed and configured for rapid fire and combat use." Assault rifles are exceptionally deadly firearms and have immense killing power.

14. **WHEREAS,** like many of the municipalities that have encountered mass shootings involving assault rifles, Naperville has a vibrant commercial area, public parks, restaurants, movie theaters, music venues, parades, elementary, middle and high schools both public and private, colleges and universities, houses of worship of many denominations, and other places where members of the public gather with an expectation of safety.

15. **WHEREAS,** the Second Amendment to the United States Constitution provides that: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed". However, no fundamental right is set forth in the United States Constitution for persons or entities to engage in the commercial sale of assault rifles.

16. **WHEREAS**, in 1994, the U.S. Congress passed the Federal Assault Weapons Ban ("AWB"), a United States federal law which prohibited the possession and sale of assault weapons and large-capacity magazines (limiting magazines to ten rounds). Several constitutional challenges were filed against provisions of the ban, but all

were rejected by the courts. The AWB expired in 2004, in accordance with its sunset provision, and attempts to renew or replace the AWB have been unsuccessful.

17. **WHEREAS**, currently, seven states and Washington, D.C. prohibit assault weapons. Federal appellate courts have decided four cases concerning the Second Amendment and assault weapons, each time reaching the same conclusion that assault weapon bans are constitutional (the D.C. Circuit upheld the District of Columbia's ban in 2011, the Second Circuit upheld New York and Connecticut laws in 2015, the Seventh Circuit upheld Highland Park's local ordinance in 2015, and the Fourth Circuit upheld Maryland's ban in 2017).

18. **WHEREAS**, assault rifles did not exist when the United States Congress ratified the Second Amendment in 1791. Civilian-owned assault refiles were rare prior to 2004. The proliferation of civilian-owned assault rifles began within only the last 18 of the 231 years since the ratification of the Second Amendment. That recency of assault rifles combined with the recent proliferation of mass shootings and the common use of assault rifles in said mass shootings indicates that assault rifles are uncommon and unacceptably dangerous.

19. **WHEREAS,** the Illinois legislature has limited the ability of public bodies to enact laws to protect the public from assault weapons that are used in mass shootings that have devastated many communities and countless individuals.

20. WHEREAS, in 2013, the Illinois General Assembly enacted legislation amending the Firearm Owners Identification Card Act ("FOID Act"). As part of the 2013 amendment of the FOID Act, the state legislature granted municipalities only ten (10) calendar days to enact local ordinances regulating the possession or ownership of assault weapons.

21. WHEREAS, if a municipality could not, or did not, pass a local ordinance within the ten-day window, the legislature provided that a municipality could not thereafter pass an ordinance pertaining to the possession or ownership of assault weapons:

> Any ordinance or regulation, or portion of that ordinance or regulation, that purports to regulate the possession or ownership of assault weapons in a manner that is inconsistent with this Act, shall be invalid unless the ordinance or regulation is enacted on, before, or within 10 days after the effective date of this amendatory Act of the 98th General Assembly. [430 ILCS 65/13.1(c)]

23. WHEREAS, the City of Naperville did not pass an assault weapon ordinance regulating the possession or ownership of assault weapons within the ten days allotted by the state legislature.

24. WHEREAS, the City of Naperville is a home rule unit of local government under the laws and Constitution of the State of Illinois.

25. WHEREAS, under the Constitution of the State of Illinois, home rule units of government have broad authority to pass ordinances and promulgate rules and regulations that protect the public health, safety, and welfare of their residents unless the state legislature specifically states that state legislation preempts home rule authority.

26. WHEREAS, the 2013 FOID Act preempts home rule municipalities relative to ***regulation of the possession or ownership*** of assault weapons in a manner that is inconsistent with that Act. However, the FOID Act does not preempt home rule municipalities from regulating the Commercial Sale of Assault Rifles within their jurisdiction. Therefore, the City retains its broad home rule authority to legislate with respect to commercial sales.

27. WHEREAS, in an effort to protect the public health, safety, and welfare, the City of Naperville has a clear and compelling interest in exercising its home rule authority as set forth herein.

NOW THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF NAPERVILLE, DUPAGE AND WILL COUNTIES, ILLINOIS, in exercise of its home rule authority that:

SECTION 1: **Recitals incorporated.** The foregoing Recitals are hereby incorporated in this Section 1 as though fully set forth herein.

SECTION 2: **Amendment adding Title 3, Chapter 19 to the Naperville Municipal Code.** Title 3 (Business and License Regulations) of the Naperville Municipal Code is hereby amended by adding the Chapter and language as follows:

TITLE 3 -BUSINESS AND LICENSE REGULATIONS

CHAPTER 19 – REGULATION OF THE COMMERCIAL SALE OF ASSAULT RIFLES

SECTION:

3-19-1: - DEFINITIONS

The following words and phrases shall, for the purposes of this Chapter, have the meaning ascribed to them by this Section, as follows:

ASSAULT RIFLE:	Means any of the following, regardless of country of manufacture or caliber of ammunition accepted: (1) A semiautomatic rifle that has a magazine that is not a fixed magazine and has any of the following: (A) A pistol grip. (B) A forward grip. (C) A folding, telescoping, or detachable stock, or is otherwise foldable or adjustable in a manner that operates to reduce the length, size, or any other dimension, or otherwise enhances the concealability, of the weapon. (D) A grenade launcher. (E) A barrel shroud. (F) A threaded barrel. (2) A semiautomatic rifle that has a fixed magazine with the capacity to accept more than 10 rounds, except for an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition. (3) Any part, combination of parts, component, device, attachment, or accessory that is designed or functions to accelerate the rate of fire of a semiautomatic rifle but not convert the semiautomatic rifle into a machinegun. (4) All of the following rifles, copies, duplicates, variants, or altered facsimiles with the capability of any such weapon thereof: (A) All AK types, including, but not limited to, the following: (i) AK, AK47, AK47S, AK–74, AKM, AKS, ARM, MAK90, MISR, NHM90, NHM91, Rock River Arms LAR–47, SA85, SA93, Vector Arms AK–47, VEPR, WASR–10, and WUM. (ii) IZHMASH Saiga AK. (iii) MAADI AK47 and ARM. (iv) Norinco 56S, 56S2, 84S, and 86S. (v) Poly Technologies AK47 and AKS. (vi) SKS with a detachable magazine. (B) All AR types, including, but not limited to, the following: (i) AR–10. (ii) AR–15. (iii) Alexander Arms Overmatch Plus 16. (iv) Armalite M15 22LR Carbine. (v) Armalite M15–T. (vi) Barrett REC7. (vii) Beretta AR–70. (viii) Black Rain Ordnance Recon Scout. (ix) Bushmaster ACR.

	(x) Bushmaster Carbon 15. (xi) Bushmaster MOE series. (xii) Bushmaster XM15. (xiii) Chiappa Firearms MFour rifles. (xiv) Colt Match Target rifles. (xv) CORE Rifle Systems CORE15 rifles. (xvi) Daniel Defense M4A1 rifles. (xvii) Devil Dog Arms 15 Series rifles. (xviii) Diamondback DB15 rifles. (xix) DoubleStar AR rifles. (xx) DPMS Tactical rifles. (xxi) DSA Inc. ZM–4 Carbine. (xxii) Heckler & Koch MR556. (xxiii) High Standard HSA–15 rifles. (xxiv) Jesse James Nomad AR–15 rifle. (xxv) Knight's Armament SR–15. (xxvi) Lancer L15 rifles. (xxvii) MGI Hydra Series rifles. (xxviii) Mossberg MMR Tactical rifles. (xxix) Noreen Firearms BN 36 rifle. (xxx) Olympic Arms. (xxxi) POF USA P415. (xxxii) Precision Firearms AR rifles. (xxxiii) Remington R–15 rifles. (xxxiv) Rhino Arms AR rifles. (xxxv) Rock River Arms LAR–15. (xxxvi) Sig Sauer SIG516 rifles and MCX rifles. (xxxvii) Smith & Wesson M&P15 rifles. (xxxviii) Stag Arms AR rifles. (xxxix) Sturm, Ruger & Co. SR556 and AR–556 rifles. (xl) Uselton Arms Air-Lite M–4 rifles. (xli) Windham Weaponry AR rifles. (xlii) WMD Guns Big Beast. (xliii) Yankee Hill Machine Company, Inc. YHM–15 rifles. (C) Barrett M107A1. (D) Barrett M82A1. (E) Beretta CX4 Storm. (F) Calico Liberty Series. (G) CETME Sporter. (H) Daewoo K–1, K–2, Max 1, Max 2, AR 100, and AR 110C. (I) Fabrique Nationale/FN Herstal FAL, LAR, 22 FNC, 308 Match, L1A1 Sporter, PS90, SCAR, and FS2000. (J) Feather Industries AT–9. (K) Galil Model AR and Model ARM. (L) Hi-Point Carbine. (M) HK–91, HK–93, HK–94, HK–PSG–1, and HK USC.

	(N) IWI TAVOR, Galil ACE rifle. (O) Kel-Tec Sub-2000, SU–16, and RFB. (P) SIG AMT, SIG PE–57, Sig Sauer SG 550, Sig Sauer SG 551, and SIG MCX. (Q) Springfield Armory SAR–48. (R) Steyr AUG. (S) Sturm, Ruger & Co. Mini-14 Tactical Rifle M–14/20CF. (T) All Thompson rifles, including, but not limited to, the following: (i) Thompson M1SB. (ii) Thompson T1100D. (iii) Thompson T150D. (iv) Thompson T1B. (v) Thompson T1B100D. (vi) Thompson T1B50D. (vii) Thompson T1BSB. (viii) Thompson T1–C. (ix) Thompson T1D. (x) Thompson T1SB. (xi) Thompson T5. (xii) Thompson T5100D. (xiii) Thompson TM1. (xiv) Thompson TM1C. (U) UMAREX UZI rifle. (V) UZI Mini Carbine, UZI Model A Carbine, and UZI Model B Carbine. (W) Valmet M62S, M71S, and M78. (X) Vector Arms UZI Type. (Y) Weaver Arms Nighthawk. (Z) Wilkinson Arms Linda Carbine. (8) All belt-fed semiautomatic firearms, including TNW M2HB and FN M2495. (9) Any combination of parts from which a firearm described in subparagraphs (1) through (8) can be assembled. (10) The frame or receiver of a rifle described in subparagraphs (1) through (9). Assault Rifles as defined herein do not include firearms that: (i) are manually operated by a bolt, pump, lever or slide action; or (ii) have been rendered permanently inoperable.
BARREL SHROUD:	A shroud that is attached to, or partially or completely encircles, the barrel of a firearm so that the shroud protects the user of the firearm from heat generated by the barrel but excluding a slide that encloses the barrel.

COMMERCIAL SALE OF ASSAULT RIFLES:	The sale or offer for sale of an Assault Rifle when the sale requires the seller to have a valid certificate of license issued pursuant to the Illinois Firearm Dealer License Certification Act (430 ILCS 68/5-1 et seq.).
DETACHABLE MAGAZINE:	An ammunition feeding device that can be removed from a firearm without disassembly of the firearm.
FIXED MAGAZINE:	An ammunition feeding device that is contained in and not removable from or permanently fixed to the firearm.
FOLDING, TELESCOPING, OR DETACHABLE STOCK:	A stock that folds, telescopes, detaches or otherwise operates to reduce the length, size, or any other dimension, or otherwise enhances the concealability, of a firearm.
FORWARD GRIP:	A grip located forward of the trigger that functions as a pistol grip.
LAW ENFORCEMENT OFFICER:	A person who can provide verification that they are currently employed by a local government agency, state government agency, or federal government agency as a sworn police officer or as a sworn federal law enforcement officer or agent.
PISTOL GRIP:	A grip, a thumbhole stock or Thordsen-type grip or stock, or any other characteristic that can function as a grip.
THREADED BARREL:	A feature or characteristic that is designed in such a manner to allow for the attachment of a device such as a firearm silencer or a flash suppressor.

3-19-2: - PROHIBITION OF THE COMMERCIAL SALE OF ASSAULT RIFLES

1. The Commercial Sale of Assault Rifles within the City is unlawful and is hereby prohibited.

2. The provisions of this Chapter shall not apply to the Commercial Sale of Assault Rifles to:

   2.1. Any federal, state, local law enforcement agency;

2.2. The United States Armed Forces or department or agency of the United States;

2.3. Illinois National Guard, or a department, agency, or political subdivision of a state; or

2.4. A Law Enforcement Officer.

3-19-3: - ENFORCEMENT

Any person or entity who violates any of the provisions set forth or referenced in this Chapter shall be subject to the following:

1. A fine of one thousand dollars ($1,000.00) for a first offense within a 12-month period, and a fine of two thousand five hundred dollars ($2,500.00) for a second or subsequent offense within a 12-month period.

    1.1. Each day that a violation of this Chapter continues shall be considered a separate and distinct offense and a fine shall be assessed for each day a provision of this Chapter is found to have been violated. Notwithstanding the forgoing, the escalation of fines as set forth above shall not occur until a prior adjudication of a violation against the same person or entity has been entered.

2. Any violation of the provisions of this Chapter may be deemed a public nuisance and abated pursuant to all available remedies, including but not limited to injunctive relief. In addition to the penalties provided for in Section 3-19-3:1 above, the City shall be entitled to reimbursement for the cost of the City's reasonable attorney's fees and all costs and expenses incurred by the City to abate any entity operating as a public nuisance. Said attorney's fees and said costs and expenses shall be paid to the City within sixty (60) days of issuance of a bill therefor unless an alternate timeframe is agreed to in writing by the City Manager.

SECTION 3: **Savings clause**. If any provisions of this Ordinance or their application to any person or circumstance are held invalid or unenforceable by any court of competent jurisdiction, the invalidity or unenforceability thereof shall not affect any of the remaining provisions or application of this Ordinance which can be given effect without the invalid or unenforceable provisions or application. To achieve this purpose, the provisions of the Ordinance are declared to be severable.

SECTION 4: **Effective date and Pre-existing purchasers.** This Ordinance shall take effect on January 1, 2023, (the "Effective Date"), except as follows:

Any person that can demonstrate to the satisfaction of the City Attorney that the Commercial Sale of an Assault Rifle was completed prior to the Effective Date of January 1, 2023, which means that prior to January 1, 2023, the purchaser completed an application, passed a background check, and has a receipt or purchase order for said purchase, without regard to whether the purchaser has actual physical possession of the Assault Rifle, shall be considered a pre-existing purchaser. For said pre-existing purchaser, the delivery of physical possession of the Assault Rifle may be completed, even if such activity would otherwise be in violation of the new provisions of Chapter 19 (Regulation of the Commercial Sale of Assault Rifles) of Title 3 (Business and License Regulations). Notwithstanding the foregoing, if physical possession of the Assault Rifle will not occur until more than sixty (60) days following the Effective Date of this Ordinance, that person is not a pre-existing purchaser and said purchase shall constitute a violation of the provisions of this Chapter.

PASSED this 16th day of August 2022.

AYES: CHIRICO, GUSTIN, HOLZHAUER, KELLY, LEONG, SULLIVAN, TAYLOR, WHITE

NAYS: HINTERLONG

APPROVAL this 17th day of August 2022.

_____
Steve Chirico
Mayor

ATTEST:

_____
Grace Michalak
Records Clerk

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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CIVIL DIVISION

JAMES MILLER et al., Plaintiffs, **v.** **CALIFORNIA ATTORNEY GENERAL ROB BONTA et al.,** Defendants.	3:19-cv-01537-BEN-JLB **DECLARATION OF ROBERT SPITZER** Dept: 5A Judge: Hon. Roger T. Benitez Action Filed: 8/15/2019

state, New Hampshire, may not have enacted such a law during this time but did at some point.[124]

C. Historical Restrictions on Pistol Carrying

49. Carry restriction laws were widely enacted from the 1600s through the start of the twentieth century, spanning over three centuries. As early as 1686, New Jersey enacted a law against wearing weapons because they induced "great fear and quarrels."[125] Massachusetts followed in 1750. In the late 1700s, North Carolina and Virginia passed similar laws. In the 1800s, as interpersonal violence and gun carrying spread, 43 states joined the list; 3 more did so in the early 1900s (see Exhibit B). The eighteenth century laws generally restricted more general carrying of firearms, usually if done in crowded places, or in groups of armed people. The laws of the nineteenth century forward generally restricted concealed weapons carrying. Among the earliest laws criminalizing the carrying of concealed weapons was that of Louisiana in 1813. Concealed carry laws normally targeted pistols as well as the types of knives and various types of clubs discussed here (see Exhibit E for text of most such laws).

D. Historical Restrictions on Trap Guns

50. Not to be confused with firearms used in trapshooting, trap guns were devices or contraptions rigged in such a way as to fire when the owner need not be

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[124] Up to 2010, New Hampshire had this law on the books: "159:16 Carrying or Selling Weapons. Whoever, except as provided by the laws of this state, sells, has in his possession with intent to sell, or carries on his person any stiletto, switch knife, blackjack, dagger, dirk-knife, slung shot, or metallic knuckles shall be guilty of a misdemeanor; and such weapon or articles so carried by him shall be confiscated to the use of the state." In 2010, the law was amended when it enacted HB 1665 to exclude stilettos, switch knives, daggers, and dirk-knives. Compare N.H. Rev. Stat. § 159:16 with 2010 New Hampshire Laws Ch. 67 (H.B. 1665)...

[125] The Grants, Concessions, And Original Constitutions of The Province of New Jersey 290 (1881).

present. Typically, trap guns could be set to fire remotely (without the user being present to operate the firearm) by rigging the firearm to be fired with a string or wire when tripped.[126] This early law from New Jersey in 1771 both defines and summarizes the problem addressed by this law:

> Whereas a most dangerous Method of setting Guns has too much prevailed in this Province, Be it Enacted by the Authority aforesaid, That if any Person or Persons within this Colony shall presume to set any loaded Gun in such Manner as that the same shall be intended to go off or discharge itself, or be discharged by any String, Rope, or other Contrivance, such Person or Persons shall forfeit and pay the Sum of Six Pounds; and on Non-payment thereof shall be committed to the common Gaol of the County for Six Months.[127]

51. Also sometimes referred to as "infernal machines,"[128] the term trap gun came to encompass other kinds of traps designed to harm or kill those who might encounter them, including for purposes of defending property from intruders. Unlike the other weapons restrictions examined here, opinion was more divided on the relative merits or wisdom of setting such devices, with some arguing that thieves or criminals hurt or killed by the devices had it coming,[129] though the

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[126] See Spitzer, "Gun Law History in the United States and Second Amendment Rights," 67.

[127] 1763-1775 N.J. Laws 346, An Act for the Preservation of Deer and Other Game, and to Prevent Trespassing with Guns, ch. 539, § 10.

[128] E.g. 1901 Utah Laws 97-98, An Act Defining an Infernal Machine, and Prescribing Penalties for the Construction or Contrivance of the Same, or Having Such Machine in Possession, or Delivering Such Machine to Any Person . . . , ch. 96, §§ 1-3.

[129] For example, this small item appeared in the Bangor (Maine) Daily Whig on October 27, 1870: "A burglar while attempting to break into a shop in New York, Monday night, had the top of his head blown off by a trap-gun so placed that it would be discharged by any one tampering with the window. A few such 'accidents' are needed to teach the thieves who have lately been operating in this city, a lesson."

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL ASSOCIATION FOR GUN RIGHTS, ROBERT C. BEVIS, and LAW WEAPONS, INC., d/b/a LAW WEAPONS & SUPPLY, an Illinois corporation, Plaintiffs, v. CITY OF NAPERVILLE, ILLINOIS, and JASON ARRES, Defendants.	)	Case No. 22-cv-04775

FIRST AMENDED AND SUPPLEMENTED COMPLAINT

Plaintiffs submit the following First Amended and Supplemented Complaint ("Complaint") against Defendant City of Naperville, Illinois (the "City") and Jason Arres ("Arres").

I. TERMS

1. For purposes of this Complaint, the term "Ordinance" means Chapter 19 of Title 3 of the Naperville Municipal Code.

2. For purposes of this Complaint, the term "State Law" means HB5471, which became effective on January 10, 2023, available at IL LEGIS 102-1116 (2022), 2022 Ill. Legis. Serv. P.A. 102-1116 (H.B. 5471).

3. For purposes of this Complaint, the term "City Banned Firearm" shall have the same meaning as the term "assault rifle" in Section 3-19-1 of the Ordinance.

4. For purposes of this Complaint, the term "State Banned Firearm" shall have the same meaning as "assault weapon" as defined in in 720 ILCS 5/24-1.9.

5. For purposes of this Complaint, the term "Banned Magazine" shall have the same meaning as "large capacity ammunition feeding device" as defined in 720 ILCS 5/24-1.10.

II. PARTIES

6. Plaintiff National Association for Gun Rights ("NAGR") is a nonprofit membership and donor-supported organization qualified as tax-exempt under 26 U.S.C. § 501(c)(4). NAGR seeks to defend the right of all law-abiding individuals to keep and bear arms. NAGR has over 240,000 members nationwide. Over 8,000 NAGR members reside in the State of Illinois, several of whom reside in Naperville. NAGR is not required to provide identifying information regarding its members. Nevertheless, the following are the initials of a sample of NAGR's members who reside in the City: B.S., D.B., G.S., G.K., L.J., and R.K. NAGR represents the interests of its members who reside in the City. Specifically, NAGR represents the interests of its members whose Second Amendment right to acquire arms is burdened by the Ordinance and the State Law. For purposes of this Complaint, the term "Plaintiffs" is meant to include NAGR in its capacity as a representative of its members.

7. Plaintiff Robert C. Bevis is a business owner in the City and a law-abiding citizen of the United States. Mr. Bevis is a member of NAGR.

8. Plaintiff Law Weapons, Inc. d/b/a Law Weapons & Supply ("LWI") is an Illinois corporation which operates in the City. LWI is engaged in the commercial sale of firearms. A substantial part of LWI's business consists of the commercial sale of City Banned Firearms, State Banned Firearms and Banned Magazines.

9. The City is a municipal corporation with an address of 400 S. Eagle Street, Naperville, Illinois 60540.

10. Arres is the City's Chief of Police. He is responsible for the performance of the City's Police Department. Naperville Municipal Code 1-8A-2. Arres has the duty to see to the enforcement of all applicable laws, including the Ordinance and the State Law. Naperville Municipal Code 1-8A-3. Arres is or will perform his duty to enforce the Ordinance and State Law. Thus, Arres is or will deprive Plaintiffs' of their constitutional rights by enforcing these unconstitutional laws against them.

11. Defendants are or will enforce the unconstitutional provisions of the Ordinance and the State Law against Plaintiffs under color of state law within the meaning of 42 U.S.C. § 1983.

III. JURISDICTION AND VENUE

12. The Court has original jurisdiction of this civil action under 28 U.S.C. § 1331, because the action arises under the Constitution and laws of the United States. The Court also has jurisdiction under 28 U.S.C. § 1343(a)(3) and 42 U.S.C. § 1983 since this action seeks to redress the deprivation, under color of the laws, ordinances, regulations, customs and usages of the City, of rights, privileges or immunities secured by the United States.

13. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202, respectively, and their claim for attorneys' fees is authorized by 42 U.S.C. § 1988.

14. Venue in this judicial district is proper under 28 U.S.C. § 1391(b)(2), because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this district.

IV. LEGAL BACKGROUND

15. The Second Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment, declares that "the right of the people to keep and bear

arms shall not be infringed." U.S. CONST. Amend. II; *see also D.C. v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); and *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

16. The legal principles governing this case have already been briefed in Plaintiffs' Motion for Preliminary Injunction [Doc. 10] ("PI Motion") and their Reply in Support of their Motion for Preliminary Injunction [Doc. 35] ("Reply").

17. When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. PI Motion, 5-6. The government bears the burden of showing that any regulation of that conduct is consistent with this Nation's historical tradition of firearm regulation. *Id*.

18. The Second Amendment's plain text covers Plaintiffs' conduct. Motion, 5; Reply, 1-4. Therefore, Defendants must show that the burdens on Plaintiffs' rights in the Ordinance and the State Law are consistent with this Nation's historical tradition of firearm regulation. It is impossible for Defendants to meet this burden because there is no such tradition.

19. The City Banned Firearms, the State Banned Firearms, and the Banned Magazines are commonly possessed by law-abiding citizens for lawful purposes. Motion, 11-16; Declaration of James Curcuruto attached to PI Motion ¶¶ 6-7.

20. The City's ban on the commercial sale of City Banned Firearms burdens the right to acquire arms protected by the Second Amendment. Reply, 1-4. Defendant Bevis asserts this right on his own behalf. NAGR asserts this right on behalf of its members who reside in the City. LWI asserts this right on behalf of third parties who seek access to its services. Reply, 5.

V. GENERAL ALLEGATIONS

21. Section 3-19-2 of the Ordinance states: "The Commercial Sale of [City Banned Firearms] within the City is unlawful and is hereby prohibited." Section 3-19-3 of the Ordinance provides for substantial penalties for any violation of its provisions.

22. Plaintiffs and/or their members and/or customers desire to exercise their Second Amendment right to acquire City Banned Firearms within the City for lawful purposes, including, but not limited to, the defense of their homes. LWI asserts this right on behalf of its customers. The Ordinance prohibits Plaintiffs from exercising their Second Amendment rights in this fashion and provides for substantial penalties for violations of its provisions.

23. The State Law States that a person commits the offense of unlawful use of weapons when he knowingly carries, possesses, sells, delivers, imports, or purchases any State Banned Firearm in violation of 720 ILCS 5/24-1.9. Section 1.9 in turn states that with certain exceptions not applicable to Plaintiffs it is "unlawful for any person within this State to knowingly manufacture, deliver, sell, import, or purchase . . . [a State Banned Firearm]. In addition, Section 1.9 states that with certain exceptions, "beginning January 1, 2024, it is unlawful for any person within this State to knowingly possess [a State Banned Firearm]."

24. 720 ILCS 5/24-1.10(b) states that with certain exceptions not applicable to Plaintiffs "it is unlawful for any person within this State to knowingly manufacture, deliver, sell, purchase, or cause to be manufactured, delivered, sold, or purchased a [Banned Magazine].

720 ILCS 5/24-1.10(c) states that with certain exceptions after April 9, 2023, it will be "unlawful to knowingly possess a [Banned Magazine].

25. The State Law provides for substantial criminal penalties for violation of its provisions.

26. Plaintiffs and/or their members and/or customers desire to exercise Second Amendment right to acquire, possess, carry, sell, purchase and transfer State Banned Firearms and Banned Magazines for lawful purposes, including, but not limited to, the defense of their homes. The State Law prohibits or soon will prohibit Plaintiffs from exercising their Second Amendment rights in this fashion.

27. There is an actual and present controversy between Plaintiffs and Defendants. The Ordinance and the State Law infringe on Plaintiffs' right to keep and bear arms under the Second Amendment. Defendants deny these contentions. Plaintiffs desire a judicial declaration that the Ordinance and State Law, facially and/or as applied to them, violate their constitutional rights. Plaintiffs should not be forced to choose between risking criminal prosecution and exercising their constitutional rights. The risk of criminal prosecution on account of exercising a constitutionally protected right unlawfully chills the exercise of that right and thus violates the Constitution even if the criminal defendant ultimately prevails.

28. Plaintiffs are or will be injured by Defendants' enforcement of the Ordinance and State Law insofar as those laws violate Plaintiffs' rights under the Second Amendment. If not enjoined by this Court, Defendants will enforce the Ordinance and State Law in derogation of Plaintiffs' constitutional rights. Plaintiffs have no plain, speedy, and adequate remedy at law. Damages are indeterminate or unascertainable and, in any event, would not fully redress any harm suffered by Plaintiffs because they are unable to engage in constitutionally protected activity due to Defendants' present or contemplated enforcement of these provisions.

VI. FIRST CLAIM FOR RELIEF
Right to Keep and Bear Arms
U.S. Const., amends. II and XIV

29. Paragraphs 1-28 are realleged and incorporated by reference.

30. The Ordinance and the State Law burden Plaintiff's Second Amendment rights by limiting or prohibiting their right to acquire, possess, carry, sell, purchase and transfer City Banned Firearms, State Banned Firearms and Banned Magazines. These laws are not consistent with the nation's history and tradition of firearm regulation. There are significant penalties for violations of the Ordinance and the State Law.

31. These restrictions infringe on Plaintiffs' right to keep and bear arms as guaranteed by the Second Amendment and made applicable to the State of Illinois and its political subdivisions by the Fourteenth Amendment.

32. The Ordinance's and the State Law's prohibitions extend into Plaintiff homes, where Second Amendment protections are at their zenith, as they burden their right to acquire and possess arms for the defense of their homes.

33. Defendants cannot satisfy their burden of justifying these restrictions on the Second Amendment right of the People.

VII. PRAYER FOR RELIEF

Plaintiffs pray that the Court:

34. Enter a declaratory judgment pursuant to 28 U.S.C. § 2201 that the Ordinance and the State Law are unconstitutional on their face or as applied;

35. Enter preliminary and permanent injunctive relief enjoining Defendants and their officers, agents, and employees from enforcing the Ordinance and the State Law;

36. Award remedies available under 42 U.S.C. § 1983 and all reasonable attorneys' fees, costs, and expenses under 42 U.S.C. § 1988, or any other applicable law;

37. Award actual compensatory and/or nominal damages (NAGR does not seek damages on behalf of its members); and

38. Grant any such other and further relief as the Court may deem proper.

/s/ Barry K. Arrington

_____

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Pro Hac Vice

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CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2023, I electronically filed a true and correct copy of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing via email counsel of record:

/s/ Barry K. Arrington

_____

Barry K. Arrington

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL ASSOCIATION FOR GUN RIGHTS, ROBERT C. BEVIS, and LAW WEAPONS, INC., d/b/a LAW WEAPONS & SUPPLY, an Illinois corporation,	)	Case No. 22-cv-04775
Plaintiffs,	)	
v.	)	
CITY OF NAPERVILLE, ILLINOIS, and JASON ARRES,	)	
Defendants.	)	

DECLARATION OF ROBERT C. BEVIS

1. My name is Robert C. Bevis. I am over the age of 18 and have personal knowledge of the matters set forth in this Declaration.

2. I am a business owner in the City of Naperville and a law-abiding citizen of the United States. I am a member of NAGR.

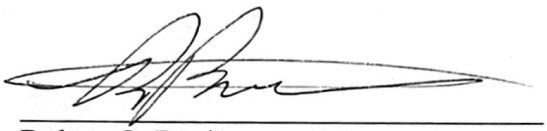
3. Plaintiff Law Weapons, Inc. d/b/a Law Weapons & Supply ("LWI") is an Illinois corporation which operates in the City. LWI is engaged in the commercial sale of firearms. A substantial part of LWI's business consists of the commercial sale of State Banned Firearms and Banned Magazines.

4. I and LWI and LWI's customers desire to exercise our Second Amendment right to acquire, possess, carry, sell, purchase and transfer State Banned Firearms and Banned Magazines for lawful purposes, including, but not limited to, the defense of our homes. The State Law prohibits or soon will prohibit us from exercising their Second Amendment rights in

RB

this fashion. LWI asserts the claims set forth in this action on its own behalf and on behalf of its customers who are prohibited by the State Law from acquiring arms protected by the Second Amendment.

I, Robert C. Bevis, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury that I have reviewed the foregoing, that I am competent to testify in this matter, and that the facts contained therein are true and correct.



Robert C. Bevis

January 24, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL ASSOCIATION FOR GUN RIGHTS, ROBERT C. BEVIS, and LAW WEAPONS, INC., d/b/a LAW WEAPONS & SUPPLY, an Illinois corporation, Plaintiffs, v. CITY OF NAPERVILLE, ILLINOIS, and JASON ARRES, Defendants.	)	Case No. 22-cv-04775

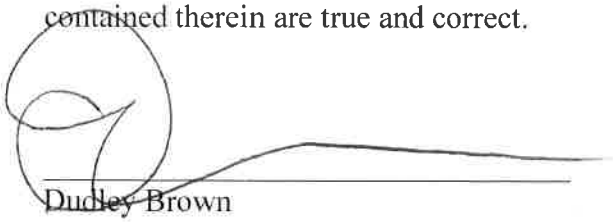
DECLARATION OF DUDLEY BROWN

1. My name is Dudley Brown. I am over the age of 18 and have personal knowledge of the matters set forth in this Declaration.

2. Plaintiff National Association for Gun Rights ("NAGR") is a nonprofit membership and donor-supported organization qualified as tax-exempt under 26 U.S.C. § 501(c)(4). NAGR seeks to defend the right of all law-abiding individuals to keep and bear arms. NAGR has over 240,000 members nationwide. Over 8,000 NAGR members reside in the State of Illinois, several of whom reside in Naperville. NAGR is not required to provide identifying information regarding its members; nevertheless, the following are the initials of a sample of NAGR's members who reside in the City of Naperville (the "City"): B.S., D.B., G.S., G.K., L.J., and R.K. NAGR represents the interests of its members whose Second Amendment rights are infringed by the State Law.

3. NAGR's members desire to exercise Second Amendment right to acquire, possess, carry, sell, purchase and transfer State Banned Firearms and Banned Magazines for lawful purposes, including, but not limited to, the defense of their homes. The State Law prohibits or soon will prohibit NAGR's members from exercising their Second Amendment rights in this fashion.

I, Dudley Brown, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury that I have reviewed the foregoing, that I am competent to testify in this matter, and that the facts contained therein are true and correct.



Dudley Brown

January 24, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL ASSOCIATION FOR GUN RIGHTS, ROBERT C. BEVIS, and LAW WEAPONS, INC., d/b/a LAW WEAPONS & SUPPLY, an Illinois corporation;	)	Case No. 22-cv-04775
Plaintiffs,	)	
v.	)	
CITY OF NAPERVILLE, ILLINOIS,	)	
Defendant.	)	

NOTICE OF APPEAL

Pursuant to 28 U.S.C. § 1292(a)(1), PLAINTIFFS appeal the Order denying Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, entered on February 17, 2023 (Dkt. 63).

Respectfully submitted this 21st day of February, 2023.

/s/ Jason R. Craddock
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Pro Hac Vice

Attorneys for Plaintiffs

Certificate of Service

The foregoing was filed and served on February 21, 2023, via this Court's CM/ECF system of electronic filing which will cause service to be had upon all parties of record who have appeared in this matter:

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Attorneys for City of Naperville

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF NextGen 1.6.3
Eastern Division

Robert Bevis, et al.

Plaintiff,

v.

Case No.: 1:22−cv−04775
Honorable Virginia M. Kendall

City of Naperville, Illinois, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Friday, February 24, 2023:

MINUTE entry before the Honorable Virginia M. Kendall. Illinois Attorney General Kwame Raoul moves to intervene. Federal Rule of Civil Procedure 5.1 provides that whenever "a state statute is questioned," like here, the state attorney general has a right to intervene. Illinois seeks to exercise that right. Plaintiffs have appealed this Court's decision denying a temporary restraining order and preliminary injunction. (Dkt. [64]). But the filing of an appeal divests the district court of jurisdiction only over aspects of the case involved in the appeal. See Kusay v. United States, 62 F.3d 192, 19394 (7th Cir. 1995); see also Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 5960 (1982). And the district court retains jurisdiction "to take additional action in aid of the appeal despite the pendency of an appeal." Brown v. Pierson, 12 F. App'x 398, 402 (7th Cir. 2001) (citing Chicago Downs Ass'n v. Chase, 944 F.2d 366, 370 (7th Cir.1991) and Textile Banking Co. v. Rentschler, 657 F.2d 844, 84950 (7th Cir.1981)). Therefore, the Illinois Attorney General's motion to intervene [68] is granted insofar as it seeks to intervene in district−court proceedings. The motion for leave to file a written response to Plaintiffs' argument in their Motions for Temporary Restraining Order and Preliminary Injunction is denied because the Court has already ruled on both motions. The Attorney General can file responses to any "subsequent challenges to the Act's constitutionality" in this Court. Mailed notice(lk,)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL ASSOCIATION FOR GUN RIGHTS, ROBERT C. BEVIS, and LAW WEAPONS, INC., d/b/a LAW WEAPONS & SUPPLY, an Illinois corporation, Plaintiffs, v. CITY OF NAPERVILLE, ILLINOIS, and JASON ARRES, Chief of Police of Naperville, Illinois; Defendants.	)	Case No. 22-cv-04775

MOTION FOR INJUNCTION PENDING APPEAL

Plaintiffs submit the following Motion for Injunction Pending Appeal.

I. Procedural Background

Plaintiffs filed motions for preliminary injunction with respect to the City of Naperville Ordinance on November 18, 2022 [Doc. 10] and with respect to the State of Illinois Statute on January 24, 2023 [Doc. 50 (hereinafter, "Mot.")]. The Court denied Plaintiffs' motions for preliminary injunction in an order dated February 17, 2023 [Doc. 63 (hereinafter, the "Order")]. On February 21, 2023, Plaintiffs appealed the Order to the United States Court of Appeals for the Seventh Circuit [Doc. 64]. *See* 28 U.S.C. § 1292(a)(1) (order denying request for preliminary injunction appealable).

II. Standard of Review

Fed.R.App.P. 8(a)(1)(C) states that a party must move first in the district court for an injunction pending appeal. Fed.R.Civ.P. 62(d) provides that a district court may grant an

injunction while an interlocutory appeal is pending. In evaluating a motion for entry of an injunction pending appeal, the court must consider: (1) whether the movants have made a strong showing that they are likely to prevail on the merits of their appeal; (2) whether the movants will be irreparably injured if the injunction is not granted; (3) whether granting the injunction will substantially harm the opposing parties; and (4) where the public interest lies. *Denver Bible Church v. Becerra*, 2021 WL 1220758, at *1 (D. Colo. 2021). Thus, the standard for an injunction pending appeal is similar to the standard for a preliminary injunction. In a constitutional case like this one, "the [preliminary injunction] analysis begins and ends with the likelihood of success on the merits of [that] claim." *Higher Soc'y of Indiana v. Tippecanoe Cnty., Indiana*, 858 F.3d 1113, 1116 (7th Cir. 2017) (internal quotation omitted). *See also Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013) (same). Accordingly, Sections III to X will focus on that issue. Section XI will focus on the remaining three prongs.

III. Justice Thomas: Laws Like the Illinois Statute and the City's Ordinance are Clearly Unconstitutional

This is not a close case. Justice Thomas, the author of *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), has provided a roadmap to the resolution of this case in his dissent from denial of certiorari in *Friedman v. City of Highland Park, Ill.*, 577 U.S. 1039 (2015) (Thomas, J., dissenting). Justice Thomas examined an arms ban that was for practical purposes identical to the Illinois' statute.[1] He noted that under *Heller*, only those "weapons not typically possessed by law-abiding citizens for lawful purposes" are excluded from Second Amendment protection. *Id.* Millions of Americans own AR-style semiautomatic rifles for lawful purposes, including self-defense and target shooting. *Id.* "**Under our precedents, that is**

[1] His analysis applies equally to the City's absolute ban on commercial sales. Like the Court in its Order (18 n. 8), Plaintiffs will treat the two laws the same in this brief.

all that is needed for citizens to have a right under the Second Amendment to keep such weapons." *Id*. (emphasis added). Thus, this case turns on *Heller's* simple rule to which Justice Thomas alluded. Is the firearm hardware commonly owned by law-abiding citizens for lawful purposes? "**If the answer[is] 'yes,' the test is over**." *Duncan v. Becerra ("Duncan III")*, 366 F. Supp. 3d 1131, 1142 (S.D. Cal. 2019)[2]. In this case, the answer is "yes." The test is, therefore, over. The challenged laws are unconstitutional. It is just that simple.

IV. "The Relative Dangerousness of a Weapon is Irrelevant"

In *Heller* the Supreme Court held that the Nation's **historical tradition** of firearms regulation supports banning weapons that are both "dangerous and unusual." *Heller*, 554 U.S. at 627 (emphasis added). Here, apparently relying on this passage from *Heller*, the Court held that "[b]ecause assault weapons are particularly dangerous weapons and high-capacity magazines are particularly dangerous weapon accessories, their regulation accords with **history and tradition**." Order 30 (emphasis added). With all due respect, the Court has misinterpreted *Heller* in two respects. Importantly, "[the *Heller* test] is a conjunctive test: A weapon may not be banned unless it is **both** dangerous **and** unusual." *Caetano v. Massachusetts*, 577 U.S. 411, 417 (2016) (Alito, J. concurring) (emphasis in the original). An arm that is commonly possessed by law-abiding citizens for lawful purposes is, by definition, not unusual. Thus, such an arm cannot be both dangerous and unusual and therefore it cannot be subjected to a categorical ban. *Heller*, 554 U.S. at 629. It follows, that "the relative dangerousness of a

[2] *aff'd*, 970 F.3d 1133 (9th Cir. 2020), *reh'g en banc granted, opinion vacated*, 988 F.3d 1209 (9th Cir. 2021), *and on reh'g en banc sub nom. Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021), *cert. granted, judgment vacated*, 213 L. Ed. 2d 1109, 142 S. Ct. 2895 (2022), *and vacated and remanded*, 49 F.4th 1228 (9th Cir. 2022), *and rev'd and remanded sub nom. Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021), and *cert. granted, judgment vacated*, 142 S. Ct. 2895 (2022).

weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes." *Caetano*, 577 U.S. at 418.

In summary, under *Heller*, the nation's history of firearms regulation supports a law banning a "dangerous and unusual" weapon. Conversely, nothing in *Heller* suggests that the nation's history of firearms regulation supports a law banning a weapon commonly used for lawful purposes because it is "particularly dangerous." This Court did not recognize this critical distinction in its Order, and it erred when it upheld the challenged laws merely because the banned arms are in its view particularly dangerous.

This Court cited *Heller's* reliance on a passage from 4 William Blackstone, *Commentaries on the Laws of England* as authority for upholding the arms ban. Order 18. This Court misapprehended *Heller* in this regard. That Blackstone passage states: "The offense of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land." *Id*., at 148-49. But even though *Heller* cited this passage, it used the conjunctive (and not the disjunctive) when it described the type of arms that may be banned. And as Justice Alito noted, its use of the conjunctive is important. *Bruen* goes even further and explicitly links the "dangerous and unusual" test with the "common use" test:

> [In *Heller*], we found it 'fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons' 'that the Second Amendment protects the possession and use of weapons that are 'in common use at the time.' *Id*., at 627, 128 S.Ct. 2783 (first **citing 4 W. Blackstone**, Commentaries on the Laws of England 148–149 (1769).

Id., 142 S. Ct. at 2128 (emphasis added).

In a second passage, the Court repeated this theme:

> At most, respondents can show that colonial legislatures sometimes prohibited the carrying of 'dangerous **and** unusual weapons' – a fact we already acknowledged in *Heller*. … Drawing from this historical tradition, we explained there that the Second Amendment protects only the carrying of weapons that are those 'in common use at the

> time,' as opposed to those that 'are highly unusual in society at large.' … Whatever the likelihood that handguns were considered 'dangerous **and** unusual' during the colonial period, they are indisputably in 'common use' for self-defense today. They are, in fact, 'the quintessential self-defense weapon.' … **Thus, even if these colonial laws prohibited the carrying of handguns because they were considered 'dangerous and unusual weapons' in the 1690s, they provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today.**

Id., 142 S. Ct. at 2143 (emphasis added).

This passage from *Bruen* cannot be reconciled with this Court's Order. In *Bruen*, the Court held that even if founding era laws prohibited arms because they were considered dangerous and unusual, those laws "provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today." *Id*.

V. The Court Failed to Distinguish Between "Ban" and "Regulation"

The Court held that because, in its view, the banned weapons are particularly dangerous, "their **regulation** accords with history and tradition." Order 30 (emphasis added). The word "regulation" is misplaced. This is a ban, not a regulation, and *Heller* distinguishes between laws that ban arms and laws that regulate arms. The flaw in the Court's historical analysis is that it has failed to distinguish between the two types of laws. *Heller* held that "dangerous and unusual" arms may be banned. *Id*., 554 U.S. at 627. Conversely, arms typically possessed by law-abiding citizens may not be banned. *Id*., 554 U.S. at 628. In the same passage, the Court held that various regulations – short of bans – such as prohibitions on concealed carry, possession of firearms by felons, possession of firearms in sensitive places, and conditions on the commercial sales of weapons, are legitimate. *Id*., 554 U.S. at 627-28. The reason for this dichotomy is that nothing in the Nation's history and tradition of firearm laws, "remotely burden[s] the right of self-defense as much as an absolute ban." *Id*., 554 U.S. at 632. Whereas

regulations that do not burden the right anywhere near as much as a ban may be "fairly supported by [] historical tradition." *Id*., 554 U.S. at 628.

VI. This Court's Means-End Scrutiny was Not Proper

This Court properly recognized that *Bruen* rejected means-end scrutiny as a mode of analysis in the context of the Second Amendment. Order 13. The Supreme Court also warned courts to be careful not to allow means-end analysis to impact their analysis in other, less obvious ways. In particular, *Bruen* stated that "courts may [not] engage in independent means-end scrutiny under the guise of an analogical inquiry." *Id*., 142 S. Ct. at 2133 n. 7. Unfortunately, the Court erred when it did just that. Pages 26 to 30 of the Order recite the Court's public safety concerns implicated by the semi-automatic rifles and magazines banned by the challenged laws. The Court followed that discussion by stating that Naperville and Illinois addressed these public safety concerns with their laws, and for that reason the laws are constitutional. Order 30. But it is this sort of means-end scrutiny that may not be used to justify a firearms regulation. "To justify its regulation, the government **may not simply posit that the regulation promotes an important interest**. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126 (emphasis added). The Court may not identify an important governmental interest (such as public safety) and uphold the challenged laws on the ground that the means the State and the City chose further that governmental end. But that is what the Court did.

The arms banned by the challenged laws are typically possessed by law abiding-citizens for lawful purposes. The whole point of *Heller* is that a categorical ban of such commonly

possessed arms is not supported by the Nation's historical tradition of firearms regulation. As in *Heller*, none of the historical regulations identified by the Court "remotely burden[s] the right of self-defense as much as an absolute ban on" commonly possessed arms in the challenged laws. *See Heller*, 554 U.S. at 632. This is *Heller's* simple rule. This Court's means-end analysis cannot be reconciled with that rule.

VII. The City's Central Premise is False

A. *Heller* Rejected the City's Central Premise

The Central Premise of the City's argument is that when it decided *Heller*, the Supreme Court surely never intended to extend Second Amendment protection to a category of firearms that can be used in mass shootings. The City's Central Premise rests on a fundamental misunderstanding of *Heller* and is therefore false. This is easily demonstrated.

On April 16, 2007, Seung Hui Cho committed a mass shooting at Virginia Tech University.[3] At the time, Cho's crime was the worst mass shooting in American history. *Id*. Cho fired 174 rounds, killed thirty-two people, and wounded many others.[4] Aside from the first two murders, Cho was able to do all of this in only a few minutes. *Id*. Cho did not use an "assault rifle" to commit his crimes.[5] He used two semiautomatic handguns. *Id*.

Heller was argued less than one year later on March 18, 2008,[6] and D.C. made sure the Court was aware that the worst mass shooting in U.S. history up until then had recently been committed with handguns like those banned by its ordinance. It wrote in its brief: "In the recent Virginia Tech shooting, a single student with two **handguns** discharged over 170 rounds in

[3] Ben Williamson, *The Gunslinger to the Ivory Tower Came: Should Universities Have A Duty to Prevent Rampage Killings?,* 60 Fla. L. Rev. 895, 895–96 (2008).
[4] Grant Arnold, *Arming the Good Guys: School Zones and the Second Amendment*, 2015 B.Y.U. Educ. & L.J. 481, 500–01 (2015).
[5] *Craig R. Whitney, A Liberal's Case for the Second Amendment, 31 T.M. Cooley L. Rev. 15, 19 (2014).*
[6] *Id*., 554 U.S. at 570.

nine minutes, killing 32 people and wounding 25 more." Brief of Petitioners, *D.C. v. Heller*, 2008 WL 102223, 53 (emphasis added). Thus, when it decided *Heller*, the Supreme Court was keenly aware that semiautomatic handguns could be used in mass shootings. Nevertheless, it struck D.C.'s ban as unconstitutional. In doing so, the Court wrote:

> **We are aware of the problem of handgun violence** in this country, and **we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution**. The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns, [] But the enshrinement of constitutional rights necessarily **takes certain policy choices off the table. These include the absolute prohibition of handguns** held and used for self-defense in the home.

Heller, 554 U.S. at 636 (emphasis added).

Only months after the Virginia Tech shooting, the Supreme Court held that the very weapons used by the shooter were protected by the Second Amendment. It follows that the City's Central Premise is false. The fact that a weapon can be used in a mass shooting does not disqualify it from Second Amendment protection. Otherwise, *Heller* would have come out the other way.

The case for upholding Second Amendment rights is even more compelling here than in *Heller*. In *Heller*, the Court held that the rights of the millions of Americans who possess handguns will not be taken away even though handguns are used by thousands of criminals to kill over ten thousand people every year.[7] In contrast, as horrific as mass shootings are, they actually account for only a tiny fraction of homicides. Mot. 17-18. The banned arms are owned by millions. Mot. 13-20. The rights of those millions cannot be taken away because a few maniacs use semi-automatic rifles to kill tens of people each year in mass shootings.

Then-Judge Kavanaugh expressed the matter this way in his dissent in *Heller II*:

[7] U.S. Dept. of Just., *Expanded Homicide Data Table 8: Murder Victims by Weapon, 2015-2019, Crime in the United States*, 2019, FBI, available at https://bit.ly/31WmQ1V (last visited Feb. 12, 2023).

> [C]onsidering just the public safety rationale invoked by D.C., **semi-automatic handguns are more dangerous as a class** than semi-automatic rifles . . . [H]andguns 'are the overwhelmingly favorite weapon of armed criminals.'… So it would seem a bit backwards – at least from a public safety perspective – to interpret the Second Amendment to protect semi-automatic handguns but not semi-automatic rifles. … [Heller erects a] serious hurdle … in the way of D.C.'s attempt to ban semi-automatic rifles. Put simply, **it would strain logic and common sense to conclude that the Second Amendment protects semi-automatic handguns but does not protect semi-automatic rifles**.

Heller v. D.C., 670 F.3d 1244, 1286 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (emphasis added).[8]

In *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), the Seventh Circuit reached a similar conclusion. The Court reviewed the evidence Illinois submitted in support of its view that its firearm regulation would reduce gun violence. The Court ruled the evidence was not relevant to its resolution of the case because:

> **… the Supreme Court made clear in *Heller* that it wasn't going to make the right to bear arms depend on casualty counts.** 554 U.S. at 636, 128 S.Ct. 2783. If the mere possibility that allowing guns to be carried in public would increase the crime or death rates sufficed to justify a ban, *Heller* would have been decided the other way, for that possibility was as great in the District of Columbia as it is in Illinois.

Id., 702 F.3d at 939 (emphasis added).

Identical logic applies in this case. "If the mere possibility that [banning certain semi-automatic weapons would decrease the harm of mass shootings] sufficed to justify a ban, *Heller* would have been decided the other way, for that possibility was as great in the District of Columbia as it is in Illinois." *Id.*

VIII. The *Heller/Bruen* Historical Analysis

A. The Founding Era is the Relevant Time Frame

[8] Plaintiffs shall refer to Judge Kavanaugh's dissent in this case as "*Heller II*." Even though Judge Kavanaugh was in dissent, after *Bruen* his analysis almost certainly accurately reflects the law. Indeed, in *Bruen,* the Court cited Judge Kavanaugh's dissent with approval multiple times. *See, id.*, 142 S. Ct. at 2129, n.5, 2134, 2137,

This is a simple case that may be resolved under the "hardware test." But even if one engages in a detailed historical review, the result does not change. The challenged laws are unconstitutional. The first issue in a historical inquiry is to identify the relevant time period. In *Bruen*, the Court noted that "not all history is created equal. 'Constitutional rights are enshrined with the scope they were understood to have **when the people adopted them**.'" *Id*., 142 S.Ct at 2136, *citing Heller*, 554 U.S. at 634- 35 (emphasis in the original). The Second Amendment was adopted in 1791. The Court cautioned against "giving postenactment history more weight than it can rightly bear." *Id*., 142 S.Ct. at 2136. And "to the extent later history contradicts what the text says, the text controls." *Bruen*, 142 S.Ct. at 2137 (citation omitted). In examining the relevant history that was offered in *Bruen*, the Court noted that "[a]s we recognized in *Heller* itself, because post-Civil War discussions of the right to keep and bear arms 'took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources.'" *Bruen*, 142 S.Ct at 2137 (citing *Heller*, 554 U.S. at 614). The Court need not resolve the issue of whether 1791 or 1868[9] is the proper timeframe, because, as in *Bruen*, "the lack of support for [the City's] law in either period makes it unnecessary to choose between them." *Id*., 142 S.Ct at 2163 (Barrett, J., concurring)

B. The Court Should Not Focus on the 20th Century

[9] *Bruen* noted an "ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope ..." *Id*., 142 S.Ct. at 2138. At the same time, however, the Court noted that it had "generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791." *Id*., 142 S.Ct. at 2137 (citations omitted). The founding era is key. *See* Mark W. Smith, *"Not all History is Created Equal": In the Post-Bruen World, the Critical Period for Historical Analogues is when the Second Amendment was Ratified in 1791, and not 1868* (2022), available at bit.ly/3Xwtgze (last visited Feb. 16, 2023). This is evident for at least two reasons. First, in *McDonald*, the Court held that the Second Amendment bears the same meaning as applied against the federal government as it does against the states. *Id*., 561 U.S. at 765. Second, the Supreme Court has always treated the time of the ratification of the Bill of Rights as the key historical period for understanding the scope of those rights – regardless of whether the Court was applying the Amendments against the federal government or against the states. *See, e.g*., *Crawford v. Washington*, 541 U.S. 36, 42–50 (2004); *Virginia v. Moore*, 553 U.S. 164, 168–69 (2008); *Nevada Comm'n on Gaming Ethics v. Carrigan*, 564 U.S. 117, 122–25 (2011); *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984).

The thrust of the City's argument appears to be that even if there is no founding era precedent analogous to its ban, it may instead point to 20th century precedent because the arms it bans are the product of advances in weapons technology that have created new social problems. This is not proper. In *Bruen*, the Court stated: "We will not address any of the 20th-century historical evidence brought to bear by respondents or their *amici*. As with their late-19th-century evidence, the 20th-century evidence presented by respondents and their amici does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Bruen*, 142 S. Ct. at 2154, n. 28. The Supreme Court ignored 20th century precedent in *Bruen*. The Court should do the same in this case.

The City's argument is also inconsistent with *Heller*. The modern handguns at issue in *Heller* were the product of exactly the same sort of technological innovation cited by the City. Those handguns produced the same societal problems. Nevertheless, the Supreme Court held that D.C.'s ban was an extreme historical outlier, *Heller*, 554 U.S. at 629, and held the ban was unconstitutional. The flaw in the City's argument is that it believes that merely identifying advances in firearm technology satisfies its burden. But *Bruen* flatly states it does not: "Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, 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." *Id*., 142 S.Ct. at 2132, *quoting Heller*, 554 U.S. at 582.

In summary, the issue before the Court is whether historical precedent from the founding era (not from the 20th century) evinces a comparable tradition of regulation with the purpose of controlling the societal problem identified by the City. *Id*. 142 S. Ct. at 2131-32 (internal citations and quotation marks omitted). Like D.C., the City cannot point to a single

founding-era law (far less a national tradition) that prohibited mere possession of an entire class of commonly held firearms. As Judge Kavanagh stated in *Heller II* with respect to D.C.'s ban of semi-automatic rifles, the historical facts are substantially the same as in *Heller* and therefore the result should be the same as well. *Id*., 670 F.3d at 1287.

C. The City's Burden is to Identify "an Enduring American Tradition," Not a Handful of Isolated Examples and Outliers

Even if the City were able to identify a handful of isolated examples and outliers, that would not carry its burden. "[T]he burden falls on [the City] to show that [its regulation] is consistent with this **Nation's historical tradition** of firearm regulation." *Bruen*, 142 S. Ct. at 2135 (emphasis added). The issue is whether a widespread and enduring tradition of regulation existed, and a few isolated regulations do not establish such a tradition. The "bare existence" of "localized restrictions" is insufficient to counter an "American tradition." *Id*., 142 S. Ct. at 2154. A handful of examples is insufficient to show a tradition. *Id*., 142 S. Ct. at 2142 (three regulations insufficient to show a tradition). Isolated examples do not "demonstrate a broad tradition of [the] States." *Id*., 142 S. Ct. at 2156.

D. The City's Focus on Mass Shootings Does Not Distinguish This Case from *Heller*

"In some cases, [the historical] inquiry will be fairly straightforward. For instance, when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Bruen*, 142 S. Ct. at 2131. In *Heller*, D.C.'s flat ban on the possession of handguns was a regulation the Founders themselves could have adopted to confront the societal problem D.C. identified, i.e.

handgun violence in urban areas. *Bruen*, 142 S. Ct. at 2131. And since none of the founding era regulations identified by D.C. was analogous to its ban, the ban was unconstitutional.

The City has identified a subset of firearms violence, i.e., mass shootings, as the societal problem it seeks to address with its arms ban. But the City's focus on mass shootings does not distinguish this case from *Heller*, because, once again, D.C. could have made an identical argument in *Heller*. In fact, D.C. **did** make an identical argument in *Heller*. D.C. included a section in its brief in which it described the "harms posed by handguns" it was seeking to address. Brief of Petitioners, *D.C. v. Heller*, 49-55. One of the harms was the use of semi-automatic handguns in mass shootings. *Id*., at 53 (citing the Virginia Tech shooting as an example). Thus, D.C. specifically identified mass shootings as one of the social problems it was seeking to address. But the mass shooting problem D.C. identified did not change the result in *Heller*. The Court held, even in the face of this issue, that D.C. was required to demonstrate a historical tradition comparable to its firearms ban. There is no such tradition and the law was declared unconstitutional.

In this case, the City seems to believe that if it is able to identify an unprecedented societal concern (i.e., mass shootings), it need not identify a founding era analogue that is "relevantly similar" to the challenged laws. This is not true. Under *Bruen*, a court must determine whether the laws impose a comparable burden as that imposed by a historical analogue from the founding era. *Id*., 142 S. Ct. at 2132–33. The Court did note that when a regulation implicates unprecedented societal concerns or dramatic technological changes, the search for historical analogies may be more "nuanced." *Id*. But it never suggested that in those cases, the search for founding era analogues may be abandoned altogether. Even in these cases, the government is required to identify a relevantly similar tradition justifying its regulation.

Heller distinguishes between categorical bans and other types of regulations. The former is simple; the latter may be more nuanced. As discussed above, this case is straightforward and simple. It is not in the "nuanced" category. But even if that were not the case, the City would still be required to show founding era regulations that are "relevantly similar" to its absolute ban. It has not.

IX. The City Cannot Identify a Historical Tradition of Absolute Bans of Commonly Held Arms

The City has not identified anything in the historical record that suggests that *Heller's* conclusion – i.e., that bans on commonly possessed arms are not supported by the historical record – should be reconsidered. As then-Judge Kavanaugh stated in *Heller II*, semi-automatic rifles "have not traditionally been banned and are in common use today, and are thus protected under *Heller*." *Heller II*, 670 F.3d at 1287; see also *Bonta*, 542 F. Supp. 3d at 1024 ("a ban on modern rifles has no historical pedigree."). [10]

In its Order, the Court relied upon regulations on Bowie Knives and blunt weapons in its historical analysis. Order 20-23. But none of the laws cited by the Court supports the categorical bans at issue in this case. At best, the Court has established a founding era tradition of prohibiting concealed carry and imposing other regulations short of a ban. Again, *Heller* distinguishes between categorical bans and lesser regulations. *Heller* stated that a categorical ban may be imposed only on dangerous and unusual weapons, and conversely, weapons in common use may not be banned. If founding era laws prohibiting concealed carry and other lesser regulations supported a categorical ban, *Heller* would have come out differently, because *Heller* itself noted the existence of such laws. *Id*., 570 U.S. at 626.

[10] *Miller v. Bonta*, 542 F. Supp. 3d 1009 (S.D. Cal. 2021), vacated and remanded on other grounds, 2022 WL 3095986 (9th Cir. 2022). Plaintiffs will refer to this opinion as "*Bonta*."

None of the laws cited by the Court imposed a categorical ban on any weapon. After an exhaustive review of all nineteenth-century state and territorial statutes, Law professor David Kopel, whose work was cited favorably in *Bruen,* concluded: "As of 1899, there were 46 States in the Union; of these, 32 had at some point enacted a statute containing the words 'bowie knife' or variant. … At the end of the 19th century, **no state prohibited possession of Bowie knives**." David Kopel, *Bowie Knife Statutes 1837-1899*, available at bit.ly/3RNRpQD (last visited Feb. 10, 2023) (emphasis added). Kopel concluded that the history of Bowie knife law is no stronger in creating historical precedents for banning common firearms or magazines than that which was examined in *Heller* and *Bruen*. *Id*.

The laws banning trap guns cited by the Court also did not ban any class of arms. Rather, they regulated the manner of using them.[11] That is, they banned setting loaded, unattended guns to prevent unintended discharges. Since these laws were regulations of use and not categorical bans, they offer no support for the laws challenged here.

The Court cited several 20th century laws in its analysis. This was error. In *Bruen*, the Court stated: "We will not address any of the 20th-century historical evidence brought to bear by respondents or their *amici*. As with their late-19th-century evidence, the 20th-century evidence presented by respondents and their *amici* does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Bruen*, 142 S. Ct. at 2154, n. 28.

X. Typical Possession, Not Actual Use, is the Test

By posing and then using cherry-picked data to answer its own question of whether "assault weapons" are frequently used in self-defense, the City has simply attempted to reframe this case into a policy question: does the average citizen really need a semi-automatic rifle? But

[11] To this day Illinois' statute bans spring guns as an unlawful **use** of weapons. *See* 720 Ill. Comp. Stat. 5/24-1(a)(5).

the premise of the question was already rejected by *Heller*, which held that it is the choices of the American People – and not their governments – which settle that question.

XI. The Other Temporary Injunction Factors Are Met

A. The Factors Are Met on the Basis of the Constitutional Violation

In *Higher Soc'y of Indiana v. Tippecanoe Cnty., Indiana*, 858 F.3d 1113 (7th Cir. 2017), the Seventh Circuit held that in a constitutional case like this one, "the analysis begins and ends with the likelihood of success on the merits of [that] claim." *Id.*, 858 F.3d at 1116 (internal quotation omitted). *See also Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013) (same).

But even if one were to examine the other three factors, the result is the same. In *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011), the Seventh Circuit held that irreparable harm is presumptively established when there is a probable violation of Second Amendment rights. This Court stated that no binding precedent establishes that a violation of any constitutional right is presumed to cause irreparable harm. This is not correct. Indeed, the very case cited by the Court, *Elrod v. Burns*, 427 U.S. 347, 373 (1976), states just that: "The loss of First Amendment freedoms, for even minimal periods of time, **unquestionably** constitutes irreparable injury." (emphasis added). And after *Bruen*, Second Amendment rights are on par with First Amendment rights (*Id.*, 142 S. Ct. at 2156), so this rule should apply in this case as well.

As for the "balance of harm" and "public interest" prongs, injunctions protecting constitutional freedoms "are always in the public interest." *Am. C.L. Union of Illinois v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012). And if the moving party establishes a likelihood of success on the merits, the balance of harms favors granting preliminary injunctive relief. *Id.* In summary, the probable success on the merits prong is determinative. Plaintiffs have established

their constitutional rights are violated by the challenged law; therefore, they have necessarily established the irreparable harm, public interest, and balance of harms prongs.

B. The Factors Are Met Based on Law Weapons, Inc.'s Extreme Financial Duress

Plaintiff Law Weapons, Inc. ("LWI") as well as its customers are being prohibited from exercising their Second Amendment rights, which means LWI will be forced out of business. Bevis Dec. ¶ 10. 85% of the firearms LWI sells are banned under the Naperville ordinance and state law. *Id.*, ¶ 12. Cash reserves have been depleted, and as a result, LWI has had to lay off employees and ask Bevis' family to work without pay. *Id.*, ¶ 13. Bevis has extended his personal credit, missed personal payments like home and car payments, maxed his credit limits, and taken out loans to pay the monthly bills. *Id.* LWI will not be able to abide by the terms of its 15-year commercial lease for the business real property, as well as the equipment leases and inventory, if these bans remain in effect any longer. *Id.* In short, Law Weapons, Inc. will be put out of business if these laws are enforced. *Id.*

As this Court held in *Dumanian v. Schwartz*, 2022 WL 2714994, at *14 (N.D. Ill. 2022), a plaintiff suffers irreparable harm if, in the absence of a preliminary injunction, it will go out of business. "A likelihood of lost business is a form of irreparable injury because it is difficult to 'pin[ ] down what business has been or will be lost.'" *Id.*, *quoting Life Spine, Inc. v. Aegis Spine, Inc.*, 8 F.4th 531, 545 (7th Cir. 2021) (*quoting Hess Newmark Owens Wolf, Inc. v. Owens*, 415 F.3d 630, 632–33 (7th Cir. 2005)); *see In re Aimster Copyright Litig.*, 334 F.3d 643, 655 (7th Cir. 2003) (harm to business that "cannot be reliably estimated" was irreparable); *Gateway E. Ry. Co. v. Terminal R.R. Ass'n of St. Louis*, 35 F.3d 1134, 1140 (7th Cir. 1994) ("[A] damages remedy may be inadequate if it comes 'too late to save plaintiff's business'" (*quoting Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984))).

The "balance of harms" and "public interest" prongs merge when the government is the defendant. *Eli Lilly & Co. v. Cochran*, 526 F. Supp. 3d 393, 409 (S.D. Ind. 2021), *citing Nken v. Holder*, 556 U.S. 418, 435 (2009). In addition to the reasons identified above, these interests favor granting relief, because the State is not harmed by an injunction in this Court, because the law is already subject to an injunction in another court, as this Court noted in its Order. Moreover, this is not a case where Plaintiffs have sought an injunction against a law of long standing. Neither of the challenged laws was effective until 2023. Therefore, an injunction would preserve the status quo. And a "preliminary injunction is often said to be designed to maintain the status quo pending completion of the litigation. *Praefke Auto Elec. & Battery Co. v. Tecumseh Prod. Co.*, 255 F.3d 460, 464 (7th Cir. 2001).

C. The Injunction Pending Appeal Must Apply to More Than Just The Plaintiffs

As the challenge to both laws is a facial challenge, the injunction can cover parties beyond the litigants in this case. *Smith v. Executive Dir. of Indiana War Memorials*, 742 F. 3d 282, 290 ("Because Smith has a reasonable likelihood of showing that the policy is unconstitutional both as it was applied to him and as it applies to individuals and small groups generally, the preliminary injunction should prohibit its enforcement against any individual or small group").[12]

Accordingly, for this injunction pending appeal to truly avert irreparable harm and be effective, it must of necessity apply to all affected by the City ordinance and state law.

[12] While *Smith* is a First Amendment case, Second Amendment cases are treated the same as First Amendment cases for purposes of constitutional analysis. *Ezell v. City of Chicago*, 651 F. 3d 684, 697 (7th Cir. 2011) ("The loss of a First Amendment right is frequently presumed to cause irreparable harm based on 'the intangible nature of the benefits flowing from the exercise of those rights; and the fear that, if those rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future.'" (Citations omitted.) The Second Amendment protects similarly intangible and unquantifiable interests," *id*, at 699).

Specifically, the injunction must enjoin enforcement of both laws against purchasers of the banned firearms as well as those who sell them. Otherwise irreparable harm will still accrue to businesses such as Plaintiff Law Weapons, Inc. as they will still not be able to sell the banned firearms if those purchasing them are subject to enforcement of these laws against such purchases.

X. Conclusion

For the foregoing reasons, Plaintiffs have met all of the Fed.R.Civ.P. 62(d) criteria for an injunction pending appeal and respectfully request the Court to enter such injunction forthwith.

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2023, I electronically filed a true and correct copy of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing via email counsel of record:

/s/ Jason R. Craddock

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ORDER

March 2, 2023

Before
MICHAEL Y. SCUDDER, *Circuit Judge*

No. 23-1353	ROBERT BEVIS, et al., Plaintiffs - Appellants v. CITY OF NAPERVILLE, a municipal corporation and JASON ARRES, Defendants - Appellees and STATE OF ILLINOIS, Intervening - Appellee
Originating Case Information:	
District Court No: 1:22-cv-04775 Northern District of Illinois, Eastern Division District Judge Virginia M. Kendall	

Upon consideration of the **MOTION TO INTERVENE AS OF RIGHT**, filed on February 23, 2023, by counsel for the State of Illinois as intervening,

IT IS ORDERED the motion for leave to intervene is **GRANTED**. The State of Illinois may participate in this appeal as an intervening appellee.

EXHIBIT 1
Historical Statutes Cited by District Court

1. Bans on Concealed Carry (10)

1. An Act to Suppress the Evil Practice of Carrying Weapons Secretly, ch. 77, § 1, 1839 Ala. Laws 67, 67

That if any person shall carry concealed about his person any species of fire arms, or any bowie knife, Arkansas tooth-pick, or any other knife of the like kind, dirk, or any other deadly weapon, the person so offending shall, on conviction thereof, before any court having competent jurisdiction, pay a fine not less than fifty, nor more than five hundred dollars, to be assessed by the jury trying the case; and be imprisoned for a term not exceeding three months, at the discretion of the Judge of said court.

2. Act of February 2, 1838, ch. 101, § 1, 1838 Va. Acts 76, 76

That if any person shall hereafter habitually or generally keep or carry about his person any pistol, dirk, bowie knife, or any other weapon of the like kind, from this use of which the death of any person might probabily ensue, and the same be hidden or concealed from common observation, and he be thereof convicted, he shall for every such offense forfeit and pay the sum of not less than fifty dollars nor more than five hundred dollars, or be imprisoned in the common jail for a term not less than one month nor more than six months, and in each instance at the discretion of the jury; and a moiety of the penalty recovered in any prosecution under this act, shall be given to any person who may voluntarily institute the same.

3. Act of May 31, 1887, No. 129, § 1, 1887 Mich. Pub. Acts 144, 144

It shall be unlawful for any person, except officers of the peace and night-watches legitimately employed as such, to go armed with a dirk, dagger, sword, pistol, air gun, stiletto, metallic knuckles, pocket-billy, sand bag, skull cracker, slung shot, razor or other offensive and dangerous weapon or instrument concealed upon his person.

4. Act of March 5, 1883, sec. 1, §1274, 1883 Mo. Laws 76, 76

If any person shall carry concealed, upon or about his person, any deadly or dangerous weapon, or shall go into any church or place where people have assembled for religious worship, or into any school room or place where people are assembled for educational, literary or social purposes, or to any election precinct on any election day, or into any court room during the

sitting of court, or into any other public assemblage of persons met for any lawful purpose other than for militia drill or meetings called under the militia law of this state, having upon or about his person any kind of fire arms, bowie knife, dirk, dagger, slung-shot, or other deadly weapon, or shall in the presence of one or more persons shall exhibit any such weapon in a rude, angry or threatening manner, or shall have or carry any such weapon upon or about his person when intoxicated or under the influence of intoxicating drinks, or shall directly or indirectly sell or deliver, loan or barter to any minor any such weapon, without the consent of the parent or guardian of such minor, he shall, upon conviction, be punished by a fine of not less than twenty-five nor more than two hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

5. Act of Feb. 28, 1878, ch. 46, § 1, 1878 Miss. Laws 175, 175

That any person not being threatened with or havin good and sufficient reason to apprehend an attack, or traveling (not being a tramp) or setting out on a long journey, or peace officers, or deputies in discharge of their duties, who carries concealed in whole or in part, any bowie knife, pistol, brass knuckles, slung shot or other deadly weapon of like kind or description shall be deemed guilty of a misdemeanor, and on conviction, shall be punished for the first offense by a fine of not less than five dollars nor more than one hundred dollars . . .

6. 1859 Ohio Laws 56, An Act to Prohibit the Carrying or Wearing of Concealed Weapons, § 1

[W]hoever shall carry a weapon or weapons, concealed on or about his person, such as a pistol, bowie knife, dirk, or any other dangerous weapon, shall be deemed guilty of a misdemeanor, and on conviction of the first offense shall be fined not exceeding two hundred dollars, or imprisoned in the county jail not more than thirty days; and for the second offense, not exceeding five hundred dollars, or imprisoned in the county jail not more than three months, or both, at the discretion of the court.

7. Act of Feb. 23, 1859, ch. 79, § 1, 1859 Ind. Acts 129

That every person not being a traveler, who shall wear or carry any dirk, pistol, bowie-knife, dagger, sword in cane, or any other dangerous or deadly weapon concealed, or who shall carry or wear any such weapon openly, with the intent or avowed purpose of injuring his fellow man, shall, upon conviction thereof, be fined in any sum not exceeding five hundred dollars.

8. John Prentiss Poe, Maryland Code. Public General Laws 468-69, § 30 (1888)

> Every person, not being a conservator of the peace entitled or required to carry such weapon as a part of his official equipment, who shall wear or carry any pistol, dirk-knife, bowie- knife, slung-shot, billy, sand-club, metal knuckles, razor, or any other dangerous or deadly weapon of any kind whatsoever, (penknives excepted,) concealed upon or about his person; and every person who shall carry or wear any such weapon openly, with the intent or purpose of injuring any person, shall, upon conviction thereof, be fined not more than five hundred dollars, or be imprisoned not more than six months in jail or in the house of correction.

9. Act of May 31, 1887, No. 129, § 1, 1887 Mich. Pub. Acts 144

> It shall be unlawful for any person, except officers of the peace and night-watches legitimately employed as such, to go armed with a dirk, dagger, sword, pistol, air gun, stiletto, metallic knuckles, pocket-billy, sand bag, skull cracker, slung shot, razor or other offensive and dangerous weapon or instrument concealed upon his person.

10. Act of Jan. 3, 1888, sec. 1, § 1274, Mo. Rev. Stat., 1883 Mo. Laws 76

> If any person shall carry concealed, upon or about his person, any deadly or dangerous weapon, or shall go into any church or place where people have assembled for religious worship, or into any school room or place where people are assembled for educational, literary or social purposes, or to any election precinct on any election day, or into any court room during the siting of court, or into any other public assemblage of persons met for any lawful purpose other than for militia drill or meetings called under the militia law having upon or about his person any kind of fire arms, bowie knife, dirk, dagger, slung-shot, or other deadly weapon, or shall in the presence of one or more persons shall exhibit and such weapon in a rude, angry or threatening manner, or shall have or carry any such weapon upon or about his person when intoxicated or under the influence of intoxicating drinks, or shall directly or indirectly sell or deliver, loan or barter to any minor any such weapon, without the consent of the parent or guardian of such minor, he shall, upon conviction be punished by a fine of not less than twenty-five nor more than two hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

2. Territorial, Kingdom and Municipal Laws (19)

11. Act of February 10, 1838, Pub. L. No. 24 §1, 1838 Fla. Laws 36, 36 (Florida Admitted to the Union in 1845)

> That from and after the passage of this act, it shall not be lawful for any person or person in this Territory to vend dirks, pocket pistols, sword canes, or bowie knives, until he or they shall have first paid to the treasurer of the county in which he or they intend to vend weapons, a tax of two hundred dollars per annum, and all persons carrying said weapons openly shall pay to the officer aforesaid a tax of ten dollars per annum . . .

12. Act of Aug. 14, 1862, § 1, 1862 Colo. Sess. Laws 56, 56 (Colorado admitted to the Union in 1876)

> If any person or persons shall, within any city, town, or village in this Territory, whether the same is incorporated or not, carry concealed upon his or her person any pistol, bowie knife, dagger, or other deadly weapon, shall, on conviction thereof before any justice of the peace of the proper county, be fined in a sum not less than five, nor more than thirty-five dollars.

13. Act of May 25, 1852, §§ 1, 1845–70 Haw. Sess. Laws 19, 19 (law enacted by the Kingdom of Hawaii; Hawaii admitted to the Union in 1959)

> Any person not authorized by law, who shall carry, or be found armed with, any bowie-knife, sword-cane, pistol, air-gun, slung-shot or other deadly weapon, shall be liable to a fine of no more than Thirty, and no less than Ten Dollars, or in default of payment of such fine, to imprisonment at hard labor, for a term not exceeding two months and no less than fifteen days, upon conviction of such offense before any District Magistrate, unless good cause be shown for having such dangerous weapons: and any such person may be immediately arrested without warrant by the Marshal or any Sheriff, Constable or other officer or person and be lodged in prison until he can be taken before such Magistrate.

14. Act of Feb. 26, 1872, ch. 42, § 246, 1872 Md. Laws 56, 57

> It shall not be lawful for any person to carry concealed, in Annapolis, whether a resident thereof or not, any pistol, dirk-knife, bowie-knife, sling-shot, billy, razor, brass, iron or other metal knuckles, or any other deadly weapon, under a penalty of a fine of not less than three, nor more than ten dollars in each case, in the discretion of the Justice of the Peace, before whom the same may be tried, to be collected. . .

15. C.B. Pierce, Charter and Ordinances of the City of Leavenworth, An Ordinance Relating to Misdemeanors, § 23 (1862)

> For carrying or having on his or her person in a concealed manner, any pistol, dirk, bowie knife, revolver, slung shot, billy, brass, lead or iron knuckles, or any other deadly weapon within this city, a fine not less than three nor more than one hundred dollars.

16. Act of May 23, 1889, Laws of the City of Johnstown, Pa

> No person shall willfully carry concealed upon his or her person any pistol, razor, dirk or bowie-knife, black jack, or handy billy, or other deadly weapon, and any person convicted of such offense shall pay a fine of not less than five dollars or more than fifty dollars with costs.

17. Act of March 18, 1889, No. 13, § 1, 1889 Ariz. Sess. Laws 16, 16

> If any person within any settlement, town, village or city within this territory shall carry on or about his person, saddle, or in his saddlebags, any pistol, dirk, dagger, slung shot, sword cane, spear, brass knuckles, bowie knife, or any other kind of knife manufactured or sold for purposes of offense or defense, he shall be punished by a fine of not less than twenty-five nor more than one hundred dollars; and in addition thereto, shall forfeit to the County in which his is convicted, the weapon or weapons so carried.

18. The Municipal Code of Saint Paul: Comprising the Laws of the State of Minnesota Relating to the City of Saint Paul, and the Ordinances of the Common Council; Revised to December 1, 1884, at 289, §§ 1-3 (1884)

> It shall be unlawful for any person, within the limits of the city of St. Paul, to carry or wear under his clothes, or concealed about his person, any pistol or pistols, dirk, dagger, sword, slungshot, cross-knuckles, or knuckles of lead, brass or other metal, bowie-knife, dirk-knife or razor, or any other dangerous or deadly weapon. § 2. Any such weapons or weapons, duly adjudged by the municipal court of said city to have been worn or carried by any person, in violation of the first section of this ordinance, shall be forfeited or confiscated to the said city of St. Paul, and shall be so adjudged. § 3. Any policeman of the city of St. Paul, may, within the limits of said city, without a warrant, arrest any person or persons, whom such policeman may find in the act of carrying or wearing under their clothes, or concealed about their person, any pistol or pistols, dirk, dagger, sword, slungshot, cross-knuckles, or knuckles of lead, brass or other metal, bowie-knife, dirk-knife or razor, or any other dangerous or deadly weapon, and detain him, her or them in the city jail, until a warrant can be procured, or complaint made for

> the trial of such person or persons, as provided by the charter of the city of St. Paul, for other offenses under said charter, and for the trial of such person or persons, and for the seizure and confiscation of such of the weapons above referred to, as such person or persons may be found in the act of carrying or wearing under their clothes, or concealed about their persons.

19. Ordinance No. 20, Compiled Ordinances of the City of Fairfield, Clay County, Nebraska, at 34 (1899)

> It shall be unlawful for any person to carry upon his person any concealed pistol, revolver, dirk, bowie knife, billy, sling shot, metal knuckles, or other dangerous or deadly weapons of any kind, excepting only officers of the law in the discharge or their duties; and any person so offending shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be subject to the penalty hereinafter provided.

20. Laws and Ordinances Governing the Village of Hyde Park Together with Its Charter and General Laws Affecting Municipal Corporations; Special Ordinances and Charters under Which Corporations Have Vested Rights in the Village, at 61, §§ 6, 8, (1876)

> No person, except peace officers, shall carry or wear under their clothes, or concealed about their person, any pistol, revolver, slung-shot, knuckles, bowie knife, dirk-knife, dirk, dagger, or any other dangerous or deadly weapon, except by written permission of the Captain of Police.

21. S.J. Quincy, Revised Ordinances of the City of Sioux City, Iowa 62 (1882)

> No person shall, within the limits of the city, wear under his clothes, or concealed about his person, any pistol, revolver, slung-shot, cross-knuckles, knuckles of lead, brass or other metal, or any bowie-knife, razor, billy, dirk, dirk-knife or bowie knife, or other dangerous weapon. Provided, that this section shall not be so construed as to prevent any United States, State, county, or city officer or officers, or member of the city government, from carrying any such weapon as may be necessary in the proper discharge of his official duties.

22. Act of Dec. 25, 1890, art. 47, § 8, 1890 Okla. Sess. Laws 495

> It shall be unlawful for any person in this Territory to carry or wear any deadly weapons or dangerous instrument whatsoever, openly or secretly, with the intent or for the avowed purpose of injuring his fellow man.

23. S.D. Terr. Pen. Code § 457 (1877), as codified in S.D. Rev. Code, Penal Code § 471 (1903)

> Every person who carries concealed about his person any description of firearms, being loaded or partly loaded, or any sharp or dangerous weapons, such as is usually employed in attack or defense of the person, is guilty of a misdemeanor.

24. William H. Bridges, Digest of the Charters and Ordinances of the City of Memphis, from 1826 to 1867, Inclusive, Together with the Acts of the Legislature Relating to the City, with an Appendix, at 44, § 4753 (1867)

> No person shall ride or go armed to the terror of the people, or privately carry any dirk, large knife, pistol or any dangerous weapon, to the fear or terror of any person.

25. Dangerous and Concealed Weapons, Feb. 14, 1888, reprinted in The Revised Ordinances of Salt Lake City, Utah, at 283, § 14 (1893)

> Any person who shall carry and slingshot, or any concealed deadly weapon, without the permission of the mayor first had and obtained, shall, upon conviction, be liable to a fine not exceeding fifty dollars.

26. 43 An Act to Prevent the Carrying of Concealed Weapons, Aug. 10, 1871, reprinted in Laws of the District of Columbia: 1871-1872, Part II, 33 (1872)

> That it shall not be lawful for any person or persons to carry or have concealed about their persons any deadly or dangerous weapons, such as daggers, air-guns, pistols, bowie-knives, dirk-knives, or dirks, razors, razor-blades, sword-canes, slung-shots, or brass or other metal knuckles, within the District of Columbia; and any person or persons who shall be duly convicted of so carrying or having concealed about their persons any such weapons shall forfeit and pay, upon such a conviction, not less than twenty dollars nor more than fifty dollars, which fine shall be prosecuted and recovered in the same manner as other penalties and forfeitures are sued for and recovered: Provided, That the officers, non-commissioned officers, and privates of the United States army, navy, and marine corps, police officers, and members of any regularly organized militia company or regiment, when on duty, shall be exempt from such penalties and forfeitures.

27. Act of Feb. 18, 1887, §§ 1-5, 8-10, 1887 N.M. Laws 55, 58

That any person who shall hereafter carry a deadly weapon, either concealed or otherwise, on or about the settlements of this territory, except it be in his or her residence, or on his or her landed estate, and in the lawful defense of his or her person, family or property, the same being then and there threatened with danger, or except such carrying be done by legal authority, upon conviction thereof shall be punished by a fine of not less than fifty dollars, nor more than three hundred, or by imprisonment not less than sixty days, nor more than six months, or by both such fine and imprisonment, in the discretion of the court or jury trying the same.

28. Act of Feb. 14, 1883, ch. 183, § 3, pt. 56 1883 Wis. Sess. Laws 713

To regulate or prohibit the carrying or wearing by any person under his clothes, or concealed about his person, any pistol or colt, or slung shot, or cross knuckles or knuckles of lead, brass, or other metal or bowie knife, dirk knife, or dirk or dagger, or any other dangerous or deadly weapon; and to provide for the confiscation or sale of such weapon.

Note: Authorizing Legislation for City of Oshkosh

29. Act of January 12, 1860, § 23, 1859 Ky. Acts 245, 245–46; An Act to Amend An Act Entitled "An Act to Reduce to One the Several Acts in Relation to the Town of Harrodsburg

If any person, other than the parent or guardian, shall sell, give or loan, any pistol, dirk, bowie knife, brass knucks, slung-shot, colt, cane-gun, or other deadly weapon, which is carried concealed, to any minor, or slave, or free negro, he shall be fined fifty dollars.

3. Regulations on Manner of Use of Weapons (7)

30. See, e.g., Act of June 30, 1837, No. 11, § 1 1837 Ala. Acts 7, 7

That if any person carrying any knife or weapon, known as Bowie Knives or Arkansaw [sic] Tooth-picks, or either or any knife or weapon that shall in form, shape or size, resemble a Bowie-Knife or Arkansaw [sic] Tooth-pick, on a sudden rencounter, shall cut or stab another with such knife, by reason of which he dies, it shall be adjudged murder, and the offender shall suffer the same as if the killing had been by malice aforethought.

31. Act of December 21, 1771, ch. 539, § 10, 1763-1775 N.J. Laws 343, 346

And Whereas a most dangerous Method of setting Guns has too much prevailed in this Province, Be it Enacted by the Authority aforesaid, That if

> any Person or Persons within this Colony shall presume to set any loaded Gun in such Manner as that the same shall be intended to go off or discharge itself, or be discharged by any String, Rope, or other Contrivance, such Person or Persons shall forfeit and pay the Sum of Six Pounds; and on Non-payment thereof shall be committed to the common Gaol of the County for Six Months.

32. Act of February 27, 1869, ch. 39, §§ 1, 1869 Minn. Laws 50, 50–51

> The setting of a so-called trap or spring gun, pistol, rifle, or other deadly weapon in this state is hereby prohibited, and declared to be unlawful.

33. Act of April 22, 1875, Pub. L. No. 97 § 1, 1875 Mich. Pub. Acts 136, 136

> [I]f any person shall set any spring or other gun, or any trap or device operating by the firing or explosion of gunpowder or any other explosive, and shall leave or permit the same to be left, except in the immediate presence of some competent person, he shall be deemed to have committed a misdemeanor; and the killing of any person by the firing of a gun or device so set shall be deemed to be manslaughter.

34. Act of November 25, 1884, Pub. Law No. 76 §§ 1–2, 1884 Vt. Acts & Resolves 74, 74–75

> A person who sets a spring gun trap, or a trap whose operation is to discharge a gun or firearm at an animal or person stepping into such trap, shall be fined not less than fifty nor more than five hundred dollars, and shall be further liable to a person suffering damage to his own person or to his domestic animals by such traps, in a civil action, for twice the amount of such damage. If the person injured dies, his personal representative may have the action, as provided in sections two thousand one hundred and thirty-eight and two thousand one hundred and thirty-nine of the Revised Laws.

35. Penal Code, Crimes Against the Public Health and Safety, ch. 40, § 7094, 1895 N.D. Rev. Codes 1259, 1259

> Every person who sets any spring or other gun or trap or device operating by the firing or exploding of gunpowder or any other explosive, and leaves or permits the same to be left, except in the immediate presence of some competent person, shall be deemed to have committed a misdemeanor; and the killing of any person by the firing of a gun or other device so set shall be deemed to be manslaughter in the first degree.

36. George R. Donnan, Annotated Code of Criminal Procedure and Penal Code of the State of New York as Amended 1882-5, at 172, § 410 (1885)

> A person who attempts to use against another, or who, with intent so to use, carries, conceals or possesses any instrument or weapon of the kind commonly known as the slung-shot, billy, sand –club or metal knuckles, or a dagger, dirk or dangerous knife, is guilty of a felony. Any person under the age of eighteen years who shall have, carry or have in his possession in any public street, highway or place in any city of this state, without a written license from a police magistrate of such city, any pistol or other fire-arm of any kind, shall be guilty of a misdemeanor. This section shall not apply to the regular and ordinary transportation of fire-arms as merchandise, or for use without the city limits.

4. Applied to Slaves or Minors Only (2)

37. The Colonial Laws of New York from the Year 1664 to the Revolution (1894)

> And be it further enacted by the authority aforesaid that it shall not be lawful for any slave or slave to have or use any gun, pistol, sword, club or any other kind of weapon whatsoever, but in the presence or by the direction of his her or their Master or Mistress, and in their own ground on Penalty of being whipped for the same at the discretion of the Justice of the Peace before whom such complaint shall come or upon the view of the said justice not exceeding twenty lashes on the bare back for every such offense.

38. Act of March 5, 1883, ch. 105, § 1, 1883 Kan. Sess. Laws 159, 159

> § 1. Any person who shall sell, trade, give, loan or otherwise furnish any pistol, revolver, or toy pistol, by which cartridges or caps may be exploded, or any dirk, bowie knife, brass knuckles, slung shot, or other dangerous weapons to any minor, or to any person of notoriously unsound mind, shall be deemed guilty of a misdemeanor, and shall upon conviction before any court of competent jurisdiction, be fined not less than five nor more than one hundred dollars. § 2. Any minor who shall have in his possession any pistol, revolver or toy pistol, by which cartridges may be exploded, or any dirk, bowie-knife, brass knuckles, slung shot or other dangerous weapon, shall be deemed guilty of a misdemeanor, and upon conviction before any court of competent jurisdiction shall be fined not less than one nor more than ten dollars.

5. Sensitive Place Regulation (1)

39. Tex. Act of Apr. 12, 1871, as codified in Tex. Penal Code (1879)

If any person other than a peace officer, shall carry any gun, pistol, bowie knife, or other dangerous weapon, concealed or unconcealed, on any day of election , during the hours the polls are open, within the distance of one-half mile of any poll or voting place, he shall be punished as prescribed in article 161 of the code. Art. 318. If any person in this state shall carry on or about his person, saddle, or in his saddle bags, any pistol, dirk, dagger, slung-shot, sword cane, spear, brass-knuckles, bowie knife, or any other kind of knife manufactured or sold for purposes of offense or defense, he shall be punished by fine . . . in addition thereto, shall forfeit to the county in which he is convicted, the weapon or weapons so carried.

6. Regulation of Sales (3)

40. Act of Jun 30, 1837, ch. 77, § 2, 1837 Ala. Laws 7, 7

And be it further enacted, [t]hat for every such weapon, sold or given, or otherwise disposed of in this State, the person selling, giving or disposing of the same, shall pay a tax of one hundred dollars, to be paid into the county Treasury; and if any person so selling, giving or disposing of such weapon, shall fail to give in the same to his list of taxable property, he shall be subject to the pains and penalties of perjury.

41. Act of December 25, 1837, § 1, 1837 Ga. Laws 90, 91

it shall not be lawful for any merchant, or vender of wares or merchandize in this State, or any other person or persons whatsoever, to sell, or offer to sell, or to keep, or to have about their person or elsewhere, any of the hereinafter described weapons, to wit: Bowie, or any other kinds of knives, manufactured and sold for the purpose of wearing, or carrying the same as arms of offence or defense, pistols, dirks, sword canes, spears, &c., shall also be contemplated in this act, save such pistols as are known and used as horseman's pistols, &c.

42. Act of January 27, 1837, ch. 137, § 1,1837–1838 Tenn. Pub. Acts 200,

That if any merchant, . . . shall sell, or offer to sell . . . any Bowie knife or knives, or Arkansas tooth picks . . . such merchant shall be guilty of a misdemeanor, and upon conviction thereof upon indictment or presentment, shall be fined in a sum not less than one hundred dollars, nor more than five

hundred dollars, and shall be imprisoned in the county jail for a period not less than one month nor more than six months.

7. Surety Laws (2)

43. Revised Statutes of the Commonwealth of Massachusetts Passed November 4, 1835 to which are Subjoined, as Act in Amendment Thereof, and an Act Expressly to Repeal the Acts Which are Consolidated Therein, both Passed in February 1836, at 750, §16 (1836)

If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may, on complaint of any person having reasonable cause to fear an injury, or breach of the peace, be required to find sureties for keeping the peace, for a term not exceeding six months, with the right of appealing as before provided.

44. ch. 169, § 16, 1841 Me. Laws 709

If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury or violence to his person, or to his family or property, he may, on complaint of any person having reasonable cause to fear an injury or breach of the peace, be required to find sureties for keeping the peace, for a term not exceeding six months, with the right of appealing as before provided.

8. Regulation of Carry Generally but Not Possession (1)

45. Act of Mar. 29, 1882, ch. 135, § 7, 1882 W. Va. Acts 421–22

If a person carry about his person any revolver or other pistol, dirk, bowie knife, razor, slung shot, billy, metalic or other false knuckles, or any other dangerous or deadly weapon of like kind or character, he shall be guilty of a misdemeanor, and fined not less that twenty-five nor more than two hundred dollars, and may, at the discretion of the court, be confined in jail not less than one, nor more than twelve months; and if any person shall sell or furnish any such weapon as is hereinbefore mentioned to a person whom he knows, or has reason, from his appearance or otherwise, to believe to be under the age of twenty-one years, he shall be punished as hereinbefore provided; but nothing herein contained shall be so construed as to prevent any person from keeping or carrying about his dwelling house or premises

any such revolver or other pistol, or from carrying the same from the place of purchase to his dwelling house, or from his dwelling house to any place where repairing is done, to have it repaired, and back again. And if upon the trial of an indictment for carrying any such pistol, dirk, razor or bowie knife, the defendant shall prove to the satisfaction of the jury that he is a quiet and peacable citizen, of good character and standing in the community in which he lives, and at the time he was found with such pistol, dirk, razor or bowie knife, as charged in the indictment, he had good cause to believe and did believe that he was in danger of death or great bodily harm at the hands of another person, and that he was, in good faith, carrying such weapon for self-defense and for no other purpose, the jury shall find him not guilty. But nothing in this section contained shall be construed as to prevent any officer charged with the execution of the laws of the state from carrying a revolver or other pistol, dirk or bowie knife.

9. Twentieth Century Regulations (47)

46. Act of May 25, 1911, ch. 195, § 1, 1911 N.Y. Laws 442, 442

47. Act of Apr. 18, 1905, ch. 172, § 1, 1905 N.J. Laws 324, 324

48. Act of March 8, 1915, ch. 83, § 1, 1915 N.D. Laws 96, 96

49. Act of March 10, 1905, ch. 169, § 410, 1905 Ind. Acts 584, 677

50. Act of May 4, 1917, ch. 145, §§ 1, 2, 5, 1917 Cal. Sess. Laws 221, 221–22

51. Act of February 21, 1917, ch. 377, §§ 7-8 1917 Or. Laws 804, 804–808

52. Act of June 13, 1923, ch. 339, § 1, 1923 Cal. Stat. 695, 695–96

53. 1903 S.C. Acts 127-23, No. 86 § 1

54. 1909 Me. Laws 141, ch. 129

55. 1912 Vt. Acts & Resolves 310, No. 237

56. 1916 N.Y. Laws 338-39, ch. 137, § 1

57. 1926 Mass. Acts 256, ch. 261

58. 1927 Mich. Pub. Acts 888-89, ch. 372 § 3

59. 1927 R.I. Pub. Laws 259, ch. 1052 § 8

60. 1927 R.I. Pub. Laws 256-57, ch. 1052 §§ 1, 4

61. 1927 Mich. Pub. Acts 888-89, An Act to Regulate and License the Selling, Purchasing, Possessing and Carrying of Certain Firearms, § 3

62. 1933 Minn. Laws 231-32, ch. 190

63. 1933 Ohio Laws 189-90

64. 1933 S.D. Sess. Laws 245-47, ch. 206, §§ 1-8;

65. 1934 Va. Acts 137-40, ch. 96

66. 47 Stat. 650, H.R. 8754, 72d Cong. §§ 1, 14 (1932)

67. Act of May 20, 1933, ch. 450, § 2, 1933 Cal. Stat. 1169, 1170 ("ten cartridges")

68. Act of July 8, 1932, ch. 465, § 1, 47 Stat. 650, 650 ("more than twelve shots without reloading");

69. Act of July 7, 1932, No. 80, § 1, 1932 La. Acts 336, 337 ("more than eight cartridges successively without reloading")

70. Act of Apr. 27, 1927, ch. 326, § 1, 1927 Mass. Acts 413, 413

71. Act of June 2, 1927, No. 372, § 3, 1927 Mich. Pub. Acts 887, 888–89

72. Act of Apr. 10, 1933, ch. 190, § 1, 1933 Minn. Laws 231, 232

73. Act of March 22, 1920, ch. 31, § 9, 1920 N.J. Laws 62, 67

74. Act of Jan. 9, 1917, ch. 209, § 1, 1917 N.C. Sess. Laws 309, 309

75. Act of March 30, 1933, No. 64, § 1, 1933 Ohio Laws 189, 189

76. Act of Apr. 22, 1927, ch. 1052, § 1, 1927 R.I. Pub. Laws 256, 256

77. Act of March 2, 1934, No. 731, § 1, 1934 S.C. Acts 1288, 1288

78. Act of Feb. 28, 1933, ch. 206, § 1, 1933 S.D. Sess. Laws 245, 245

79. Act of March 7, 1934, ch. 96, § 1, 1934 Va. Acts 137, 137

80. Act of July 2, 1931, No. 18, § 1, 1931 Ill. Laws 452, 452

81. Act of March 9, 1931, ch. 178, § 1, 1931 N.D. Laws 305, 305–06

82. Act of March 10, 1933, ch. 315, § 2, 1933 Or. Laws 488, 488

83. Act of Apr. 25, 1929, No. 329, § 1, 1929 Pa. Laws 777, 777

84. Act of Oct. 25, 1933, ch. 82, § 1, 1933 Tex. Gen. Laws 219, 219

85. Act of March 22, 1923, No. 130, § 1, 1923 Vt. Acts and Resolves 127, 127

86. Act of Apr. 13, 1933, ch. 76, § 1, 1931–1933 Wis. Sess. Laws 245, 245–46

87. Act of Apr. 27, 1933, No. 120, § 2, 1933 Haw. Sess. Laws 117, 118

88. Act of June 1, 1929, § 2, 1929 Mo. Laws 170, 170

89. Act of March 6, 1933, ch. 64, § 2, 1933 Wash. Sess. Laws 335, 335

90. Act of Feb. 17, 1909, No. 62, § 1 1909 Id. Sess. Laws 6

91. Act of Feb. 21, 1917, § 7, 1917 Or. Sess. Laws 807

92. An Act to Prohibit the Carrying of Concealed Weapons, § 1; 1917 Cal. Sess. 221-225, § 5

93. 1915 N.D. Laws 96, An Act to Provide for the Punishment of Any Person Carrying Concealed Any Dangerous Weapons or Explosives, or Who Has the Same in His Possession, Custody or Control, unless Such Weapon or Explosive Is Carried in the Prosecution of a Legitimate and Lawful Purpose, ch. 83, §§ 1-3, 5[1]

[1] The district court stated: "By the early 1900s, almost half of states and some municipalities had laws relating to billy clubs. (Dkt. 34-4 ¶ 42). Many, such as North Dakota and the city of Johnstown, Pennsylvania, banned their concealed carry, while others outlawed them entirely." ECF No. pp 22-23. The court cited Penal Code, Crimes Against the Public Health and Safety, ch. 40, §§ 7311–13, 1895 N.D. Rev. Codes 1292, 1292–93, for the early 1900 North Dakota law. This law is from 1895 and does not appear to address billy clubs. The court appears to have intended to refer to the listed statute.

Exhibit 2
Militia Acts

1. Georgia Act for Revising and Amending the Several Militia Laws of the State (1784); *see* 19 Candler, *The Colonial Records of the State of Georgia Statutes, Colonial and Revolutionary 1774 to 1805*, at 353 (Byrd 1910) [Page 3]

Text: [T]hat in any case any person or persons so liable shall neglect or refuse to appear completely armed and furnished with one rifle musket, fowling-piece or fusee fit for action, with a cartridge box or powder-horn answerable for that purpose with six cartridges or powder and lead equal thereto and three flints, at any general musters of the regiment or battalion to which his company belongs, every such person shall forfeit and pay a sum not exceeding five shillings, and if an ordinary muster a sum not exceeding two shillings and six pence

2. Massachusetts Act for Regulating and Governing the Militia of the Commonwealth of Massachusetts, and for Repealing All Laws Heretofore Made for That Purpose (1784); *see* Miller, *Acts and Resolves of Massachusetts* 140, 142 (1784) [Page 4-11]

Text: That every noncommissioned officer and private soldier of the said militia not under the control of parents, masters or guardians, and being of sufficient ability therefor in the judgment of the Selectmen of the town in which he shall dwell, shall equip himself, and be constantly provided with a good fire arm, &c.'

3. United States Act More Effectually to Provide for the National Defence by Establishing an Uniform Militia Throughout the United States, 1 Stat. 271-74 (May 8, 1792); *see* Gooch, *Military Laws* 75-80 (1820) [Pages 12-17]

Text: Section 1. … That every citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball; or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear, so armed, accoutred and provided, when called out to exercise, or into service, except, that when called out on company days to exercise only, he may appear without a knapsack. That the commissioned offers shall severally be armed with a sword or hanger and espontoon, and that from and after five years from the passing of this act, all muskets for arming the militia as herein required, shall be of bores sufficient for balls of the eighteenth part of a pound. And every citizen so enrolled, and providing himself with the arms, ammunition and accoutrements required as

aforesaid, shall hold the same exempted from all suits, distresses, executions or sales, for debt or the payment of taxes.

…

Sec. 4 … That out of the militia enrolled, as is herein directed, there shall be formed for each battalion at least one company of grenadiers, light infantry or riflemen; and that to each division there shall be at least one company of artillery, and one troop of horse; there shall be to each company of artillery, one captain, two lieutenants, four sergeants, four corporals, six gunners, six bombadiers, one drummer, and one fifer. The officers to be armed with a sword or hanger, a fusee, bayonet and belt, with a cartridge-box to contain twelve cartridges; and each private or matross shall furnish himself with all the equipments of a private in the infantry, until proper ordnance and field artillery is provided….

shall be liable to the mulct or fine of five pounds to be levied and placed to such purposes, as this act hereafter points out and directs, and the said officer so commanding is hereby required to proceed in manner before mentioned to draw another or others in his or their room: PROVID'D NEVERTHELESS that this clause shall not extend to prevent any captain, previous to such election from appointing any serjeant or serjeants not exceeding the number aforesaid who may be found capable and willing to act in that capacity

AND BE IT FURTHER ENACTED that in case any person or persons so liable shall neglect or refuse to appear compleatly armed and furnished with one rifle musket, fowling-piece or fusee fit for action, with a cartridge box or powder-horn answerable for that purpose with six cartridges or powder and lead equal thereto and three flints, at any general musters of the regiment or battalion to which his company belongs, every such person shall forfeit and pay a sum not exceeding five shillings, and if an ordinary muster a sum not exceeding two shellings and six pence

AND WHEREAS it may much contribute to the safety and welfare of the state, by encouraging volunteer troops of horse and companies subject however to the Field Officers of each regiment or battalion: BE IT THEREFORE

mile south of a pond, called *Province Pond;* thence east, eight degrees south, by a spotted line, to an elm tree, spotted near a small frog pond; thence north, eight degrees east, by a spotted line, to the bank of *Great Ossipee* river; thence westerly by the said river to the bounds first mentioned; containing by estimation thirty-six square English miles, be, and hereby is, erected into a town by the name of *Parsonsfield;* and that the inhabitants thereof be, and they hereby are, vested with all the powers, privileges and immunities, which the inhabitants of towns within this Commonwealth do, or may by law enjoy. Invested with powers.

And be it further enacted, That *Simon Frye*, Esq; be, and he hereby is, empowered to issue his warrant to some principal inhabitant of the said town, requiring him to warn the inhabitants thereof to meet at such time and place as he shall therein set forth, to choose all such officers as towns are by law required and empowered to choose in the month of *March*, annually. Simon Frye, Esq; to call a meeting.

Provided always, That this act shall be so construed, any thing therein to the contrary notwithstanding, as not to affect the claim of this Commonwealth, or other corporate body, or of any private person whatever, to the said tract of land, or any part thereof, if any such claim exists. Proviso.

March 9, 1785.

1784. — Chapter 55.

[January Session, ch. 1.]

AN ACT FOR REGULATING AND GOVERNING THE MILITIA OF THE COMMONWEALTH OF *MASSACHUSETTS*, AND FOR REPEALING ALL LAWS HERETOFORE MADE FOR THAT PURPOSE. *Chap.* 55

Whereas the laws now in force, for regulating the militia of the Commonwealth, are found to be insufficient for the said purpose: Preamble.

Be it therefore enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, That the several laws heretofore made for regulating the militia aforesaid, be, and hereby are, repealed. Laws heretofore made for regulating the militia repealed.

Provided nevertheless, That all actions and processes commenced and depending in any Court within this Commonwealth, upon or by force of the said laws, shall, Proviso.

and may be sustained and prosecuted to final judgment and execution; and that all officers elected, appointed and commissionated agreeably to law, shall be continued in commission, and hold their respective commands in the militia, in the same manner as they would in case the said laws were still in force.

Militia, how formed.

And be it further enacted by the authority aforesaid, That the said militia shall be formed into a Train Band, and Alarm List: the Train Band to contain all able bodied men, from sixteen to forty years of age, and the Alarm List, all other men under sixty years of age, excepting in both cases such as shall be hereafter by this act exempted.

— to be in four divisions.

And be it further enacted by the authority aforesaid, That the said militia be, and hereby is formed into four divisions; the counties of *Suffolk*, *Essex* and *Middlesex*, composing the first division; the counties of *Hampshire*, *Worcester* and *Berkshire*, the second division; the counties of *Plymouth*, *Barnstable*, *Bristol*, *Dukes County* and *Nantucket*, the third division; and the counties of *York*, *Cumberland* and *Lincoln*, the fourth division.

General and divisionary staff to each of the divisions.

And be it further enacted by the authority aforesaid, That there shall be a general and divisionary staff to each of the divisions aforesaid, consisting of one Major General, who shall have two aids de camp, a Deputy Adjutant General, who shall also be Inspector, and a Deputy Quarter Master.

Governor with advice of Council to form divisions into brigades, &c.

And be it further enacted by the authority aforesaid, That the Governor, or Commander in Chief, with the advice of Council, be, and hereby is, authorized and empowered to form the said divisions into brigades, regiments and companies; and from time to time to alter and divide such brigades, regiments and companies, as he shall judge expedient.

Proviso.

Provided notwithstanding, That the several brigades, regiments and companies of militia, shall remain as they are now formed, until new arrangements thereof shall take place.

Each brigade to have a brigadier general, &c.

And be it further enacted by the authority aforesaid, That there shall be a Brigade General and Staff to each brigade of the militia aforesaid, consisting of a Brigadier General, a Brigade Major, who shall also be sub-inspector, and a Brigade Quarter Master.

Each regiment to have a regimental, field,

And be it further enacted by the authority aforesaid, That there shall be a regimental, field, commissioned and non-commissioned staff to each regiment of the militia

aforesaid, consisting of one Colonel, one Lieutenant-Colonel, one Major, one Adjutant, one Quarter Master, one Serjeant Major, one Quarter Master Serjeant, one Drum Major and one Fife Major. commissioned and non-commissioned staff.

And be it further enacted by the authority aforesaid, That there shall be one Captain, one Lieutenant, one Ensign, one Clerk, who shall be sworn to the faithful discharge of his duty, four Serjeants, four Corporals, one Drummer and one Fifer, to each company of the said militia. *Provided, notwithstanding*, That in companies where, in pursuance of the law which by this act is repealed, two Lieutenants are in commission, they shall continue to hold their present rank. Companies to have one captain &c. Clerk to be sworn. Proviso.

And be it further enacted by the authority aforesaid, That the Governor, or Commander in Chief, shall appoint the Deputy Adjutant General; the Major Generals shall appoint the Deputy Quarter Masters of their respective divisions; the Brigadier Generals shall appoint the Quarter Masters of their respective brigades; the Colonels shall appoint the Serjeant Majors, Quarter Master Serjeants, Drum Majors and Fife Majors of their respective regiments; and the Captains shall appoint the non-commissioned officers of their respective companies. Deputy Adjutant General, Deputy Qua. Masters, &c. by whom appointed.

And be it further enacted by the authority aforesaid, That the Adjutant General shall be commissioned with the rank of Brigadier General, the Deputy Adjutant Generals with the rank of Colonels, and the Aids de Camp and Brigade Majors with the rank of Majors; the Adjutants shall be commissioned with the rank of first Lieutenant, and the Serjeants shall each receive a warrant from the Colonel of the regiment to which they shall belong. Adjutant Gen. Deputy Adj. General, &c. their rank.

And be it further enacted by the authority aforesaid, That each and every Major General be, and hereby is, empowered and it shall be his duty to give all such orders as shall from time to time be necessary, consistent with the law, for electing Brigadier Generals, Field Officers, Captains and Subalterns, in brigades, regiments and companies, within his respective division, which have not been already commissioned; and for filling up vacancies of such officers, or any of them, where they now are, or may hereafter happen. *Provided always*, That whenever a time shall be appointed for the election of any officer or officers, the electors shall have ten days notice thereof at least; and all returns of elections, and of neglects or Major Generals, their duty. Proviso.

refusals to make choice of officers, shall be made to the Governor, by the Major General, in whose division the election shall be ordered; and all commissions shall pass through the hands of the Major Generals to the officers, in their respective divisions, for whom they shall be made out; and every person who shall be elected to any office in the said militia, and shall not within ten days after he shall have been notified of his election, signify his acceptance thereof, shall be considered as declining to serve in such office, and orders shall be forthwith issued for a new choice.

Persons elected to the offices aforesaid to be sworn, &c.

And be it further enacted by the authority aforesaid, That every person who shall be elected or appointed to any of the offices aforementioned, shall, at the time of receiving his commission, take and subscribe the oath and declaration required by the constitution of this Commonwealth, before some Justice of the Peace, or some general or field officer, who shall have previously taken and subscribed them himself; and a certificate thereof shall be made upon the back of every commission, by the Justice of the Peace, or general or field officer, before whom the said oath and declaration shall have been taken and subscribed.

Non-commissioned officers and soldiers to equip themselves with arms and accoutrements.

And be it further enacted by the authority aforesaid, That every non-commissioned officer and private soldier of the said militia not under the controul of parents, masters or guardians, and being of sufficient ability therefor in the judgment of the Selectmen of the town in which he shall dwell, shall equip himself, and be constantly provided with a good fire arm, with a steel or iron ramrod, a spring to retain the same, a worm, priming wire and brush, a bayonet fitted to his fire arm, and a scabbard and belt for the same, a cartridge box that will hold fifteen cartridges at least, six flints, one pound of powder, forty leaden balls suitable for his fire arm, a haversack, blanket and canteen; and if any non-commissioned officer or private soldier shall neglect to keep himself so armed and equipped, he shall forfeit and pay a fine not exceeding Three pounds, in proportion to the value of the article or articles in which he shall be deficient, at the discretion of the Justice of the Peace before whom trial shall be had.

Fine for non-equipment.

Parents, masters and guardians to equip those

And be it further enacted by the authority aforesaid, That all parents, masters and guardians, shall furnish those of the said militia who shall be under their care

and command, with the arms and equipments aforementioned, under the like penalties for any neglect. under their care under the like penalties.

And be it further enacted by the authority aforesaid, That whenever the Selectmen of any town shall judge any inhabitant thereof, belonging to the said militia, unable to arm and equip himself in manner as aforesaid, they shall, at the expence of the town, provide for and furnish such inhabitant with the aforesaid arms and equipments, which shall remain the property of the town at the expence of which they shall be provided; and if any soldier shall embezzle or destroy the arms and equipments, or any part thereof, with which he shall be so furnished, he shall upon conviction before some Justice of the Peace in the county where such offender shall live, be adjudged to replace the article or articles which shall be by him so embezzled or destroyed, and to pay the cost arising from the process against him; and in case he shall not within fourteen days after such adjudication against him perform the same, it shall be in the power of the Selectmen of the town to which he shall belong, to bind him out to service or labor, for such term of time as shall, in the discretion of the said Justice, be sufficient to procure a sum of money equal to the amount of the value of the article or articles embezzled or destroyed, and to pay the cost arising as aforesaid.

Persons unable to equip themselves to be provided by the town.

Soldiers embezzling or destroying their arms &c. furnished them, how punished upon conviction.

In case.

And be it further enacted by the authority aforesaid, That every captain or commanding officer of a company, shall call the Train Band of his company together four days in a year, and oftener if he shall judge necessary, not exceeding six days in the whole, for the purpose of examining their arms and equipments, and instructing them in military exercises; and shall also once in a year, on a day when he shall muster the Train Band of his company, call together the Alarm List belonging to his company, within the limits of the town of which they shall be inhabitants, for the purpose of examining their arms and equipments

Officers to call together the train band four days in a year and the alarm-list once a year.

And be it further enacted by the authority aforesaid, That when any captain or commanding officer of a company shall think fit to muster or call his company together, he shall issue his orders therefor to one or more of his non-commissioned officers, if he shall have any, otherwise to one or more of the private soldiers belonging to his company, directing him or them to notify and warn the said

Manner of calling together militia companies.

company to appear at such time and place as shall be appointed, and with such arms and equipments as shall be mentioned in the said orders; and the non-commissioned officer or officers, or other person or persons who shall receive such orders, shall give notice of the time and place appointed for, and of the arms and equipments to be carried to the said muster, to each and every person he or they shall be ordered to warn, either verbally or by leaving a written notification thereof at the usual place of abode of the person thus to be notified and warned; and no notice shall be deemed legal for musters for the purpose of common and ordinary military exercises, unless it shall be given four days at least previous to the time appointed therefor; and every non-commissioned officer or other person who shall neglect to give the said notice and warning when ordered thereto, by the captain or commanding officer of the company to which he shall belong, shall, for such offence, forfeit and pay a sum not exceeding Forty shillings, nor less than Twenty shillings, at the discretion of the Justice of the Peace, before whom trial shall be had.

Penalties for neglect of duty and misbehaviour in non commissioned officers and privates.

And be it further enacted by the authority aforesaid, That every non-commissioned officer and private soldier belonging to the Train Band, and every person belonging to the Alarm List, who, being duly notified of the time and place appointed for the muster of the company to which he shall belong, shall unnecessarily neglect to appear armed and equipped as the captain or commanding officer shall direct, shall pay a fine of ten shillings; and every non-commissioned officer and private soldier of the Train Band, and every person belonging to the Alarm List, who shall be disorderly or disobedient on a muster day, shall be confined during the time of said muster at the discretion of his officers, and shall pay a fine not exceeding Forty shillings, nor less than Twelve shillings, at the discretion of the Justice of the Peace to whom complaint shall be made. *Provided nevertheless*, That when any non-commissioned officer or private soldier belonging to the Train Band, or any other person belonging to the Alarm List, shall neglect to appear on a muster day when notified as aforesaid, and shall within eight days thereafter make application to the captain or commanding officer of the company to which he shall belong, and obtain the excuse of the said captain or commanding officer, or shall

Proviso.

pay him the aforesaid fine of ten shillings, and shall procure a certificate thereof, in every such case he shall be barred against any action or suit for such offence.

Testimony of non-commissioned officers and other persons under oath sufficient to prove due notification.

And be it further enacted by the authority aforesaid, That the testimony of any non-commissioned officer or other person, under oath, who shall have received orders agreeably to law for notifying and warning any company, or a part thereof, to appear at a time and place appointed for a muster, shall be sufficient to prove that due notice shall have been given to the party against whom complaint may be made, unless such testimony shall be invalidated by other sufficient evidence.

Unless.

Persons neglecting duty — forfeiture.

And be it further enacted by the authority aforesaid, That when any person belonging to the Train Band or Alarm List, shall, by neglect of duty by not appearing on muster days, or by not being provided with arms and equipments as this law directs, or by disobedience of orders, or by disorderly behaviour, forfeit any sum of money set and affixed by this law to such offences, or either of them, under the sum of four pounds, the same shall be recovered in manner following, *that is to say*, The clerk of the company to which the offender shall belong, shall after the expiration of eight days, and within sixty days after the offence shall be committed, make complaint thereof, and of all matters of substance and material circumstances attending the same, to some Justice of the Peace in the county where such offender shall live, who shall make a record thereof, and shall issue a summons to the party complained of, to be served seven days at least before the time appointed for the trial, in the form following, *mutatis mutandis*.

How recovered.

[SEAL.] ss.

To the Sheriff of the said County, or his Deputy, or any or either of the Constables of the Town of within the same County, GREETING.

Form of a summons.

In the name of the Commonwealth of *Massachusetts*, you are hereby required to summon *C. D.* of in the county of to appear before me *E. F.* one of the Justices of the Peace for the county aforesaid, at in on the day of at of the clock in the noon; then and there to shew cause, if any he has, why a warrant of distress shall not issue against him for [here insert the complaint] Hereof fail

not, and make due return of this writ and of your doings therein, unto myself, at or before the said day of . Dated at aforesaid, the day of in the year of our LORD, .

E. F. Justice of the Peace.

Party appearing may plead the general issue &c. and if defaulted and shall neglect to satisfy the judgment then in this case.

And when the said party shall by himself, or his attorney, appear accordingly, he may plead the general issue and give any special matter in evidence; and if the said party shall make default, or if judgment shall be given against him, and he shall neglect for four days thereafter to satisfy the same, and legal costs, then the Justice of the Peace before whom the trial may be had, shall issue his warrant of distress, under his hand and seal, in the form following, *mutatis mutandis*.

[SEAL.] ss.

To the Sheriff of the said County, or his Deputy, or any or either of the Constables of the Town of within the same County, GREETING.

Form of a warrant of distress.

Whereas *C. D.* of upon the day of being a private soldier in the Train Band (as the case may be) of the company of foot commanded by in the regiment of militia in the said county of , commanded by , was duly notified to appear upon the day of , in the town of in the county aforesaid, with his arms and equipments, as the law of this Commonwealth directs; and the said *C. D.* in violation of the said law, did unnecessarily neglect to appear, (or did not appear armed and equipped, as the case may be) whereby he hath forfeited and ought to pay the sum of shillings, to the uses directed by law: And the said *C. D.* having been duly summoned to appear before me *E. F.* one of the Justices of the Peace for the county aforesaid, to shew cause, if any he had, why a warrant of distress should not be issued for the same sum, did not appear, (or appearing, did not shew sufficient cause why the same warrant should not be issued, as the case may be):

In the name of the Commonwealth of *Massachusetts*, you are therefore commanded forthwith, of the goods or chattels of the said *C. D.* within your precinct, to levy by distress and sale thereof the aforesaid sum of shillings, with for charges of suit, being in the

is amendatory; and one copy of the laws so to be published, shall be furnished to each court of enquiry to be kept and preserved by the clerk thereof.

5. This act shall be in force from and after the passing thereof. Commencement.

AN ACT

More effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States.

1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That each and every free able-bodied white male-citizen of the respective States, resident therein, who is or shall be at the age of eighteen years, and under the age of forty-five years, (except as is herein after excepted) shall severally and respectively be enrolled in the militia by the captain or commanding officer of the company, within whose bounds such citizen shall reside, and that within twelve months after the passing of this act. And it shall at all times hereafter be the duty of every such captain or commanding officer of a company to enroll every such citizen, as aforesaid, and also those who shall, from time to time, arrive at the age of eighteen years, or being of the age of eighteen years, and under the age of forty-five years (except as before excepted) shall come to reside within his bounds; and shall without delay notify such citizen of the said enrollment, by a proper non-commissioned officer of the company, by whom such notice may be proved.—That every citizen so enrolled and notified, shall within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with Militia, how and by whom to be enrolled.

How to be armed and accoutred.

a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or fire-lock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear so armed, accoutred and provided, when called out to exercise, or into service, except, that when called out on company-days to exercise only, he may appear without a knapsack. That the commissioned officers shall severally be armed with a sword or hanger and espontoon, and that from and after five years from the passing of this act, all muskets for arming the militia as herein required, shall be of bores sufficient for balls of the eighteenth part of a pound. And every citizen so enrolled and providing himself with the arms, ammunition and accoutrements required, as aforesaid, shall hold the same exempted from all suits, distresses, executions or sales, for debt or for the payment of taxes.

See act 2d March, 1803.

Executive officers, &c. exempted.

2. *And be it further enacted*, That the Vice-President of the United States; the officers, judicial and executive of the government of the United States; the members of both houses of Congress, and their respective officers; all custom-house officers with their clerks; all post-officers, and stage-drivers, who are employed in the care and conveyance of the mail of the post-office of the United States; all ferrymen employed at any ferry on the post-road; all inspectors of exports; all pilots; all mariners actually employed in the sea-service of any citizen or merchant within the United States; and all persons who now are or may hereafter be exempted by the laws of the respective States, shall be, and are hereby exempted from militia duty, notwithstanding their being above the age of eighteen, and under the age of forty-five years.

Militia, how to be arranged, and

3. *And be it further enacted*, That within one year after the passing of this act, the militia of the respective States shall be arranged into divisions, brigades, regiments, battalions and companies, as

the legislature of each State shall direct; and each division, brigade and regiment, shall be numbered at the formation thereof; and a record made of such numbers in the adjutant-general's office in the State; and when in the field, or in service in the State, each division, brigade, and regiment shall, respectively, take rank according to their numbers, reckoning the first or lowest number highest in rank. That if the same be convenient, each brigade shall consist of four regiments; each regiment of two battalions; each battalion of five companies; each company of sixty-four privates. That the said militia shall be officered by the respective States, as follows: To each division, one major-general and two aids-de-camp, with the rank of major; to each brigade, one brigadier-general, with one brigade-inspector, to serve also as brigade-major, with the rank of a major; to each regiment, one lieutenant-colonel commandant; and to each battalion one major; to each company one captain, one lieutenant, one ensign, four sergeants, four corporals, one drummer and one fifer or bugler.—That there shall be a regimental staff, to consist of one adjutant and one quarter-master, to rank as lieutenants; one pay-master, one surgeon, and one surgeon's mate; one sergeant-major; one drum-major, and one fife-major.

by whom officered.

For additional officers, see act 2d March, 1803.

4. *And be it further enacted*, That out of the militia enrolled, as is herein directed, there shall be formed for each battalion at least one company of grenadiers, light infantry or riflemen; and that to each division, there shall be at least one company of artillery, and one troop of horse: there shall be to each company of artillery, one captain, two lieutenants, four sergeants, four corporals, six gunners, six bombardiers, one drummer and one fifer. The officers to be armed with a sword or hanger, a fusee, bayonet and belt, with a cartridge box to contain twelve cartridges; and each private or matross shall furnish himself with all the equipments of a private in the infantry, until proper ordnance and field artillery is provided. There shall be to

Each battalion to have one company of grenadiers, &c. and one company of artillery.

Officers how to be armed.

Troops of horse how

officered, &c. each troop of horse, one captain, two lieutenants, one cornet, four sergeants, four corporals, one saddler, one farrier, and one trumpeter. The commissioned officers to furnish themselves with good horses, of at least fourteen hands and an half high, and to be armed with a sword, and pair of pistols, the holsters of which to be covered with bearskin caps. Each dragoon to furnish himself with a serviceable horse, at least fourteen hands and an half high, a good saddle, bridle, mail-pillion and valise, holsters, and a breast-plate and crupper, a pair of boots and spurs, a pair of pistols, a sabre, and a cartouch-box, to contain twelve cartridges for pistols.

Artillery and horse of whom to be formed;

That each company of artillery and troop of horse shall be formed of volunteers from the brigade, at the discretion of the commander in chief of the State, not exceeding one company of each to a regiment, nor more in number than one eleventh part of the infantry, and shall be uniformly cloathed in regimentals, to be furnished at their own expense; the colour and fashion to be determined by the brigadier commanding the brigade to which they belong.

to be uniformly clad at their own expense.

What colors, &c. and by whom to be furnished.

5. *And be it further enacted*, That each battalion and regiment shall be provided with the State and regimental colors by the field officers, and each company with a drum and fife or bugle-horn, by the commissioned officers of the company in such manner as the legislature of the respective States shall direct.

Adjutant general in each state, his duty.

6. *And be it further enacted*, That there shall be an adjutant-general appointed in each State, whose duty it shall be to distribute all orders from the commander in chief of the State to the several corps; to attend all public reviews when the commander in chief of the State shall review the militia, or any part thereof; to obey all orders from him relative to carrying into execution and perfecting the system of military discipline established by this act; to furnish blank forms of different returns that may be required, and to explain the principles on which they should be made; to receive from the

several officers of the different corps throughout the State, returns of the militia under their command, reporting the actual situation of their arms, accoutrements and ammunition, their delinquencies and every other thing which relates to the general advancement of good order and discipline: All which the several officers of the divisions, brigades, regiments and battalions, are hereby required to make in the usual manner, so that the said adjutant-general may be duly furnished therewith: From all which returns, he shall make proper abstracts, and lay the same annually before the commander in chief of the State.

7th Section—*obsolete.*

Officers how to take rank.

8. *And be it further enacted*, That all commissioned officers shall take rank according to the date of their commissions; and when two of the same grade bear an equal date, then their rank to be determined by lot, to be drawn by them before the commanding officer of the brigade, regiment, battalion, company or detachment.

Provision in case of wounds, &c.

9. *And be it further enacted*, That if any person, whether officer or soldier, belonging to the militia of any State, and called out into the service of the United States, be wounded or disabled while in actual service, he shall be taken care of and provided for at the public expense.

Brigade inspector's duty.

10. *And be it further enacted*, That it shall be the duty of the brigade inspector, to attend the regimental and battalion meetings of the militia composing their several brigades, during the time of their being under arms, to inspect their arms, ammunition and accoutrements; superintend their exercise and manœuvres, and introduce the system of military discipline throughout the brigade, agreeable to law, and such orders as they shall, from time to time, receive from the commander in chief of the State; to make returns to the adjutant general of the State, at least once in every year, of the militia of the brigade to which he belongs, reporting therein the actual situation of the arms, accoutrements and ammunition of the several corps, and

every other thing which, in his judgment, may relate to their government and the general advancement of good order and military discipline; and the adjutant general shall make a return of all the militia of the State, to the commander in chief of the said State, and a duplicate of the same to the President of the United States.

Artillery, &c. now existing,

And whereas sundry corps of artillery, cavalry and infantry, now exist in several of the said States, which by the laws, customs or usages thereof have not been incorporated with, or subject to the general regulations of the militia:

to retain their privileges.

II. *Be it further enacted*, That such corps retain their accustomed privileges, subject, nevertheless, to all other duties required by this act in like manner with the other militia.

[*Approved, May* 8, 1792.]

AN ACT

To regulate the pay of the non-commissioned officers, musicians and privates of the Militia of the United States, when called into actual service, and for other purposes.

Monthly pay of non-commissioned officers, &c.

I. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That from and after the passing of this act, the allowance of bounty, clothing and pay to the non-commissioned officers, musicians and privates of the infantry, artillery and cavalry of the militia of the United States, when called into actual service, shall be at the rate per month, as follows: Each sergeant-major and quarter-master sergeant, nine dollars; each drum and fife-major, eight dollars and thirty-three cents; each sergeant, eight dollars; each corporal, drummer, fifer and trumpeter, seven dollars and thirty-three cents;

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL ASSOCIATION FOR GUN RIGHTS, ROBERT C. BEVIS, and LAW WEAPONS, INC., d/b/a LAW WEAPONS & SUPPLY, an Illinois corporation, Plaintiffs, v. CITY OF NAPERVILLE, ILLINOIS, and JASON ARRES, Defendants.	)	Case No. 22-cv-04775

MOTION FOR TEMPORARY RESTRAINING ORDER AND FOR PRELIMINARY INJUNCTION

Plaintiffs submit the following Motion for Temporary Restraining Order and for Preliminary Injunction against Jason Arres ("Arres").

NOTICE

On January 24, 2023, the undersigned discussed this motion with Christopher B. Wilson, who stated he had no authority to consent to a TRO. In addition, the undersigned left voicemail messages with Barbara Greenspan and Gretchen Helfrich of the Illinois Attorney General's Office in which he informed them this motion was forthcoming. The undersigned spoke with Aaron Wenzloff of the Illinois Attorney General's Office and informed him this motion was forthcoming. Mr. Wenzloff informed the undersigned that Sarah Hunger was perhaps the best person to contact, and the undersigned also left a voicemail message with Ms. Hunger.

TERMS

For purposes of this Motion:

(a) the term "State Law" means HB5471, which became effective on January 10, 2023, available at IL LEGIS 102-1116 (2022), 2022 Ill. Legis. Serv. P.A. 102-1116 (H.B. 5471);

(b) the term "State Banned Firearm" shall have the same meaning as "assault weapon" as defined in 720 ILCS 5/24-1.9; and

(c) the term "Banned Magazine" shall have the same meaning as "large capacity ammunition feeding device" as defined in 720 ILCS 5/24-1.10.

FACTS

1. Plaintiff National Association for Gun Rights ("NAGR") is a nonprofit membership and donor-supported organization qualified as tax-exempt under 26 U.S.C. § 501(c)(4). Delaraation of Dudley Brown ¶ 2. NAGR seeks to defend the right of all law-abiding individuals to keep and bear arms. *Id*. NAGR has over 240,000 members nationwide. *Id*. Over 8,000 NAGR members reside in the State of Illinois, several of whom reside in Naperville. *Id*. NAGR is not required to provide identifying information regarding its members; nevertheless, the following are the initials of a sample of NAGR's members who reside in the City of Naperville (the "City"): B.S., D.B., G.S., G.K., L.J., and R.K. *Id*. NAGR represents the interests of its members whose Second Amendment rights are infringed by the State Law. *Id*.

2. Plaintiff Robert C. Bevis is a business owner in the City and a law-abiding citizen of the United States. Declaration of Robert C. Bevis ¶ 2. Mr. Bevis is a member of NAGR. *Id*.

3. Plaintiff Law Weapons, Inc. d/b/a Law Weapons & Supply ("LWI") is an Illinois corporation which operates in the City. Bevis Dec. ¶ 3. LWI is engaged in the commercial sale

of firearms. *Id*. A substantial part of LWI's business consists of the commercial sale of State Banned Firearms and Banned Magazines. *Id*.

4. Arres is the City's Chief of Police. He is responsible for the performance of the City's Police Department. Naperville Municipal Code 1-8A-2. Arres has the duty to see to the enforcement of all applicable laws, including the Ordinance and the State Law. Naperville Municipal Code 1-8A-3. Arres is or will perform his duty to enforce the Ordinance and State Law. Thus, Arres is or will deprive Plaintiffs of their constitutional rights by enforcing these unconstitutional laws against them.

5. The State Law states that a person commits the offense of unlawful use of weapons when he knowingly carries, possesses, sells, delivers, imports, or purchases any State Banned Firearm in violation of 720 ILCS 5/24-1.9. Section 1.9 in turn states that with certain exceptions not applicable to Plaintiffs it is "unlawful for any person within this State to knowingly manufacture, deliver, sell, import, or purchase . . . [a State Banned Firearm]. In addition, Section 1.9 states that with certain exceptions, "beginning January 1, 2024, it is unlawful for any person within this State to knowingly possess [a State Banned Firearm]."

6. 720 ILCS 5/24-1.10(b) states that with certain exceptions not applicable to Plaintiffs "it is unlawful for any person within this State to knowingly manufacture, deliver, sell, purchase, or cause to be manufactured, delivered, sold, or purchased a [Banned Magazine].
720 ILCS 5/24-1.10(c) states that with certain exceptions after April 9, 2023, it will be "unlawful to knowingly possess a [Banned Magazine].

7. The State Law provides for substantial criminal penalties for violation of its provisions.

8. Plaintiffs and/or their members and/or customers desire to exercise Second Amendment right to acquire, possess, carry, sell, purchase and transfer State Banned Firearms and Banned

Magazines for lawful purposes, including, but not limited to, the defense of their homes. Brown Dec. ¶ 3. Bevis Dec. ¶ 4. The State Law prohibits or soon will prohibit Plaintiffs from exercising their Second Amendment rights in this fashion. *Id.* LWI asserts the claims set forth in this action on its own behalf and on behalf of its customers who are prohibited by the State Law from acquiring arms protected by the Second Amendment. *Id.*

9. At least 20 million semi-automatic firearms such as those defined as "assault weapons" in the State Law are owned by millions of American citizens who use those firearms for lawful purposes. Declaration of James Curcuruto ¶ 6. Mr. Curcuruto's declaration was originally submitted in *Rocky Mountain Gun Owners, et al. v. Town of Superior,* 22-CV-1685-RM. It is used with permission in this action.

10. At least 150 million magazines with a capacity greater than ten rounds are owned by law-abiding American citizens, who use those magazines for lawful purposes. Declaration of James Curcuruto ¶ 7.

STANDARD FOR GRANTING TRO AND PRELIMINARY INJUNCTION

The standard for issuing a temporary restraining order is identical to that governing the issuance of a preliminary injunction. *Mays v. Dart*, 453 F. Supp. 3d 1074, 1087 (N.D. Ill. 2020). To be entitled to preliminary relief, Plaintiffs must establish as a threshold matter: (1) they are likely to suffer irreparable harm in the absence of preliminary relief; (2) inadequate remedies at law exist; and (3) they have a reasonable likelihood of success on the merits. (3) the balance of the equities tips in their favor. *Whitaker v. Kenosha Unified School District*, 858 F. 3d 1034, 1044 (7th Cir. 2017). If the movant successfully makes this showing, the court must engage in a balancing analysis, to determine whether the balance of harm favors the moving party or whether the harm to other parties or the public sufficiently outweighs the movant's

interests. *Id.*, *Higher Soc'y of Indiana v. Tippecanoe Cnty., Indiana*, 858 F.3d 1113, 1116 (7th Cir. 2017), *citing Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008).

In a case involving an alleged violation of a constitutional right, the likelihood of success on the merits will often be the determinative factor. *Id*., *citing Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012).[1] That is because even short deprivations of constitutional rights constitute irreparable harm, and the balance of harms normally favors granting preliminary injunctive relief because the public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitutional. *Id*. So "the analysis begins and ends with the likelihood of success on the merits" of the constitutional claim. *Id*., *citing Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013).

In *Ezell v. City of Chicago*, 651 F.3d 684, 997 (7th Cir. 2011), the Court equated the standard for obtaining a preliminary injunction in the Second Amendment context with the standard for obtaining that relief in a First Amendment case. Also in *Ezell*, the Court granted preliminary relief against a Chicago ordinance which *inter alia* prohibited commercial activity found to be protected by the Second Amendment. Namely, the ordinance prohibited all shooting galleries, firearm ranges, or any other places where firearms are discharged.

THE GOVERNMENT BEARS THE BURDEN OF DEMONSTRATION

In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court unambiguously placed on the government a substantial burden of demonstrating

[1] *Higher Soc'y of Indiana* was a First Amendment case, but that difference does not matter, because in *Bruen*, *infra*, the Supreme Court held that Second Amendment rights should be protected in the same way First Amendment rights are protected. *Id*., 142 S. Ct. at 2130.

that any law seeking to regulate firearms is consistent with this Nation's historical tradition of firearm regulation.[2] Specifically, the Court stated:

> "To support that [its claim that its regulation is permitted by the Second Amendment], the burden falls on [the government] to show that New York's proper-cause requirement is consistent with this Nation's historical tradition of firearm regulation. Only if respondents carry that burden can they show that the pre-existing right codified in the Second Amendment, and made applicable to the States through the Fourteenth, does not protect petitioners' proposed course of conduct."

Bruen, 142 S. Ct. at 2135.

In this case, the Second Amendment's plain text covers Plaintiffs' conduct. *Bruen*, 142 S. Ct. at 2132 ("the Second Amendment extends, prima facie, to all instruments that constitute bearable arms"). Accordingly, Plaintiff's conduct is **presumptively** protected by the Second Amendment. *Bruen*, 142 S. Ct. at 2126 ("when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct"). It is impossible for the government to rebut that presumption by demonstrating that the law is consistent with this Nation's historical tradition of firearm regulation because no such tradition exists.

ARGUMENT

I. The Supreme Court has Reaffirmed the *Heller* Standard

A. A Regulation Burdening the Right to Keep and Bear Arms is Unconstitutional Unless it is Consistent with the Text of the Second Amendment and the Nation's History and Traditions

In *Bruen*, the Court rejected the two-part balancing test for Second Amendment challenges that several courts of appeal adopted in the wake of *Heller* and *McDonald v. City of*

[2] "Significantly, the plaintiff need not demonstrate the absence of regulation in order to prevail; the burden rests squarely on the government to establish that the activity has been subject to some measure of regulation." *Friedman v. City of Highland Park, Illinois*, 784 F.3d 406, 415 (7th Cir. 2015) (Manion, J., dissenting).

Chicago, Ill., 561 U.S. 742 (2010). Instead, it reiterated the *Heller* standard, which it summarized as follows:

> "Today, we decline to adopt that two-part approach. In keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command."

Bruen, 142 S. Ct. at 2126 (internal quotation marks omitted).

The *Bruen* court spent significant time describing how lower courts are to proceed in Second Amendment cases. As particularly relevant here, *Bruen* described the proper analysis of the term "arms." That word, *Bruen* affirmed, has a "historically fixed meaning" but one that "applies to new circumstances." *Id*. at 2132. It thus "covers modern instruments that facilitate armed self-defense." *Id*., *citing Caetano v. Massachusetts*, 577 U.S. 411, 411—412 (2016) *(per curiam*) (stun guns). Accordingly, the text of 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." *Id*.

The Court then explained that "[m]uch like we use history to determine which modern 'arms' are protected by the Second Amendment, so too does history guide our consideration of modern regulations that were unimaginable at the founding." *Id*. In considering history, courts are to engage in "reasoning by analogy." *Id*. This analogical reasoning requires the government to identify a well-established and representative historical analogue to the challenged regulation. *Id*. at 2133. But to be a genuine "analogue," the historical tradition of regulation identified by the government must be "relevantly similar" to the restriction before the Court

today. *Id*. at 2132. Two metrics are particularly salient in determining if a historical regulation is relevantly similar: [1] how and [2] why the regulations burden a law-abiding citizen's right to armed self-defense. *Id*. at 2133. By considering these two metrics, a court can determine if the government has demonstrated that a modern-day regulation is analogous enough to historical precursors that the regulation may be upheld as consistent with the Second Amendment's text and history. *Id*.

As noted above, the Court held that the judicial balancing of means and ends pursuant to intermediate scrutiny review plays no part in Second Amendment analysis. "*Heller* does not support applying means-end scrutiny." *Id*., 142 S. Ct. at 2127; *see also Id*., 142 S. Ct. at 2129 (inquiry into the Code's alleged "salutary effects" upon "important governmental interests" is not part of the test).

B. Only "Dangerous and Unusual Arms" Can be Categorically Banned Consistent with Our History and Tradition

This case involves a categorical ban of two classes of arms. Both *Bruen* and *Heller* identified only one aspect of the nation's history and tradition that is sufficiently analogous to – and therefore capable of justifying – such a ban: the tradition, dating back to the Founding, of restricting "dangerous and unusual weapons" that are not "in common use at the time." *Bruen*, 142 S. Ct. at 2128. By contrast, where a type of arm is in common use, there is, by definition, no historical tradition of banning it. Thus, for the type of restriction at issue in this case, the Court has already analyzed the relevant historical tradition and established its scope: "dangerous and unusual" weapons may be subject to a blanket ban, but arms "in common use at the time" may not be. *Id*.

The *Heller* test is based on historical practice and "the historical understanding of the scope of the right," but with reference to modern realities of firearm ownership. *Heller*, 554

U.S. at 625; *see also Bruen*, 142 S. Ct. at 2131 ("The test that we set forth in *Heller* and apply today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding."); *Rocky Mountain Gun Owners v. Town of Superior*, Colo., 1:22- cv-01685, Doc. 18 at 9 (D. Colo. 2022) (granting, post-*Bruen*, a temporary restraining order against enforcement of a ban on certain semiautomatic rifles and noting "the Court is unaware of historical precedent that would permit a governmental entity to entirely ban a type of weapon that is commonly used by law-abiding citizens for lawful purposes"); and *Rocky Mountain Gun Owners v. Bd. of Cnty. Commissioners of Boulder Cnty*., 2022 WL 4098998 (D. Colo. 2022) (also granting TRO against similar law).

In summary, in the context of blanket bans on bearable arms, the Supreme Court has already done the historical spadework, and the only restrictions of this kind that it has deemed consistent with the historical understanding of the right to keep and bear arms are restrictions limited to dangerous and unusual arms that are not in common use.

This Court's task is therefore a simple one: it merely must determine whether the banned arms are "dangerous and unusual." Importantly, this is a "conjunctive test: A weapon may not be banned unless it is both dangerous and unusual." *Caetano*, 577 U.S. at 417 (Alito, J., *concurring*). An arm that is in common use for lawful purposes is, by definition, not unusual. Such an arm therefore cannot be both dangerous and unusual and therefore cannot be the subjected to a blanket ban. *Bruen*, 142 S. Ct. at 2143*; Heller*, 554 U.S. at 629.

To determine whether an arm is "unusual" the Supreme Court has likewise made clear that the Second Amendment focuses on the practices of the American people nationwide, not just, say, in this State. *See id*. at 2131 ("It is this balance – struck by the traditions of the American people – that demands our unqualified deference."); *Heller*, 554 U.S. at 628

(handguns are "overwhelmingly chosen by American society" for self-defense); *Caetano*, 577 U.S. at 420 (Alito, J., *concurring*) ("stun guns are widely owned and accepted as a legitimate means of self-defense across the country"). Therefore, the Second Amendment protects those who live in states or localities with a less robust practice of protecting the right to keep and bear firearms from outlier legislation just as much as it protects those who live in jurisdictions that have hewed more closely to America's traditions.

Furthermore, courts and legislatures do not have the authority to second-guess the choices made by law-abiding citizens by questioning whether they really "need" the arms that ordinary citizens have chosen to possess. While *Heller* noted several reasons that a citizen may prefer a handgun for home defense, the Court held that "[w]hatever 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. The Court reaffirmed that the traditions of the American people, which includes their choice of preferred firearms, demand the courts' "unqualified deference." *Id*., 142 S. Ct. at 2131.

As set forth below, the State Banned Firearms and the Banned Magazines are "typically possessed by law-abiding citizens for lawful purposes." **Under *Heller* and *Bruen*, that is the end of the analysis**. The Second Amendment "[does] not countenance a complete prohibition on the use of the most popular weapon chosen by Americans for self-defense in the home." *Id*., 142 S. Ct. at 2128 (internal quotation marks omitted).

Finally, the Second Amendment inquiry focuses on the choices commonly made by contemporary law-abiding citizens. *Heller* rejected as "bordering on the frivolous" "the argument . . . that only those arms in existence in the 18th century are protected," *Id*. at 582. And in *Caetano*, the Supreme Court reiterated this point, holding that arms protected by the

Second Amendment need not have been in existence at the time of the Founding. 577 U.S. 411-12, *quoting Heller*, 554 U.S. at 582. The *Caetano* Court flatly denied that a particular type of firearm's being "a thoroughly modern invention" is relevant to determining whether the Second Amendment protects it. *Id*. And *Bruen* cements the point. Responding to laws that allegedly restricted the carrying of handguns during the colonial period, the Court reasoned that "even if these colonial laws prohibited the carrying of handguns because they were considered 'dangerous and unusual weapons' in the 1690s, they provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today." *Bruen*, 142 S. Ct. at 2143.

II. The Seventh Circuit's Decision in *Friedman* is no Longer Good Law

In *Friedman v. City of Highland Park, Illinois*, 784 F.3d 406 (7th Cir. 2015), the Seventh Circuit upheld as constitutional an ordinance similar to the State Law challenged in this action, and normally that case would preclude this challenge. However, "[s]tare decisis cannot justify adherence to an approach that Supreme Court precedent forecloses." *Fed. Trade Comm'n v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 767 (7th Cir. 2019). And *Bruen* flatly forecloses the approach taken by the Court in *Friedman*. *See also United States v. Wahi*, 850 F.3d 296, 302 (7th Cir. 2017) ("When an intervening Supreme Court decision unsettles [the Seventh Circuit's] precedent, it is the ruling of the [Supreme] Court that . . . must carry the day.").

In *Friedman* the Court announced a unique three-part test to determine Second Amendment questions. Under this test, a court asks: whether a regulation [1] bans weapons that were common at the time of ratification or [2] those that have some reasonable relationship to the preservation or efficiency of a well regulated militia and [3] whether law-abiding citizens

retain adequate means of self-defense. *Id*., 784 F.3d at 410. This test is not supported by *Heller*. Indeed, two of the three prongs of the test are specifically **foreclosed** by *Heller* as the Court made plain in *Bruen*.

[1] The Second Amendment's "reference to 'arms' does not apply only to those arms in existence in the 18th century." *Bruen*, 142 S. Ct. at 2132 (cleaned up). Indeed, *Heller* characterized this argument as "bordering on the frivolous." *Heller*, 554 U.S. at 582.

[2] The Second Amendment's operative clause "does not depend on service in the militia." *Bruen*, 142 S. Ct. at 2127, *citing Heller*, 554 U.S. at 592.

[3] As for the third prong, "[T]he right to bear other weapons is 'no answer' to a ban on the possession of protected arms." *Caetano v. Massachusetts*, 577 U.S. 411, 420 (2016), *quoting Heller*, 554 U.S. at 629.

But there are more problems with *Friedman*. Not only is its three-part test no longer viable, but other central parts of its holding are inconsistent with *Bruen*. First, the *Friedman* Court based its decision in large part on its view of the benefits of the ordinance. *Id*., 784 F.3d at 411-12 (reviewing the benefits of the ordinance, including the fact that the ban on arms reduced "perceived risk" and "makes the public feel safer"). But, as discussed *supra*, *Bruen* emphatically rejected exactly this sort of means-end scrutiny. *Id*., 142 S. Ct. at 2127; *see also Id*., 142 S. Ct. at 2129 (inquiry into the Code's alleged "salutary effects" upon "important governmental interests" is not part of the test). Second, the *Friedman* court held that categorical bans on kinds of weapons may be proper even if the limits did not "mirror restrictions that were on the books in 1791." *Id*., 784 F.3d 410. This holding is contradicted by the central thrust of *Bruen's* holding that a restriction on Second Amendment rights will survive

scrutiny only if "the government identif[ies] a well-established and representative historical analogue" to the regulation. *Id*. 142 S. Ct. 2133.

In summary, for many reasons it is not possible to square subsequent Supreme Court precedent with the Seventh Circuit's holding in *Friedman*. Accordingly, that case is no longer binding precedent,, and in rendering is decision on this motion, this Court must reject the Seventh Circuit's *Friedman* analysis in favor of the Supreme Court's *Bruen* analysis.

III. The State's Prohibition on Possession of State Banned Firearms is Unconstitutional

A. Introduction

Under *Bruen*, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. *Bruen*, 142 S. Ct. at 2126. To justify its regulation, the government . . . must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id*. Here, the Second Amendment's plain text covers the State Banned Firearms, so it falls to the government to attempt to justify the law as consistent with historical tradition rooted in the Founding. It cannot possibly do so, because the State Banned Firearms are commonly possessed by law abiding citizens, and *Bruen* has already established that, by definition, there cannot be a tradition of banning an arm if it is commonly possessed.

B. The State Banned Firearms are in Common Use

This case thus reduces to the following, straightforward inquiry: are State Banned Firearms in "common use," according to the lawful choices by contemporary Americans? They unquestionably are. There is no class of firearms known as "assault weapon." "Prior to 1989, the term 'assault weapon' did not exist in the lexicon of firearms. It is a political term, developed by anti-gun publicists . . ." *Stenberg v. Carhart*, 530 U.S. 914, 1001 (2000) at n. 16

(Thomas, J., dissenting). But while "assault weapon" is not a recognized category of firearms, "semiautomatic rifle" is. And it is semiautomatic rifles that the "assault weapon" ban targets. The "automatic" part of "semiautomatic" refers to the fact that the user need not manually load another round in the chamber after each round is fired. But unlike an automatic rifle, a semiautomatic rifle will not fire continuously on one pull of its trigger; rather, a semiautomatic rifle requires the user to pull the trigger each time he or she wants to discharge a round. *See Staples v. United States*, 511 U.S. 600, 602 (1994) at n. 1.

There is therefore a significant practical difference between a truly automatic and a merely semiautomatic rifle. According to the United States Army, for example, the maximum effective rates of fire for various M4- and M16-series firearms is between forty-five and sixty-five rounds per minute in semiautomatic mode, versus 150-200 rounds per minute in automatic mode. Dept. of the Army, RIFLE MARKSMANSHIP: ML6-/M4-SERIES WEAPONS, 2-1 tbl. 2-1 (2008), available at https://bit.ly/3pvS3SW.

There is a venerable tradition in this country of lawful private ownership of semiautomatic rifles. The Supreme Court has held as much. In *Staples*, it concluded that semiautomatics, unlike machine guns, "traditionally have been widely accepted as lawful possessions." *Staples*, 511 U.S. at 612. Semiautomatic rifles have been commercially available for over a century. *See Heller v. District of Columbia* ("*Heller II*"), 670 F.3d 1244, 1287 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); David B. Kopel, *Rational Basis Analysis of "Assault Weapon" Prohibition*, 20 J. CONTMP. L. 381, 413 (1994).

In contrast to this long history of legal ownership of semi-automatic rifles, the first "assault weapon" ban was not enacted until California did so in 1989, a full 200 years after the Constitution became effective. Obviously, that is far too late to demonstrate anything about the

original meaning of the Second or Fourteenth Amendment, no matter which is the relevant historical reference point. *Bruen*, 142 S.Ct. at 2126 (cautioning against giving post enactment history more weight than it can rightly bear). Even today, the vast majority of states (42 out of 50)[3], do not ban semiautomatic weapons that would be deemed "assault weapons" under the Code at issue in this action.[4]

Thus, there is no historical tradition of banning semi-automatic firearms. This is borne out by the fact that millions of law-abiding citizens choose to possess firearms in that category. *Duncan v. Becerra ("Duncan IV")*, 970 F.3d 1133, 1147 (9th Cir. 2020) ("Commonality is determined largely by statistics."); *Ass'n of N.J Rifle & Pistol Clubs, Inc. v. Att'y Gen.*, 910 F.3d 106, 116 (3d Cir. 2018) (finding an arm is commonly owned because the record shows that "millions" are owned); *New York State Rifle & Pistol Ass 'n, Inc. v. Cuomo,* 804 F.3d 242, 255 (2d Cir. 2015) ("Even accepting the most conservative estimates cited by the parties and by *amici*, the assault weapons at issue are 'in common use' as that term was used in *Heller*."); *Heller II*, 670 F.3d at 1261 ("We think it clear enough in the record that semi-automatic rifles . . . are indeed in 'common use.'").

The AR-15 is America's "most popular semi-automatic rifle," *Heller II*, 670 F.3d at 1287 (Kavanaugh, J., dissenting), and in recent years it has been "the best-selling rifle type in the United States," Nicholas J. Johnson, *Supply Restrictions at the Margins of Heller and the*

[3] The federal government banned semi-automatic rifles from 1994 to 2004 when Congress allowed that law after the Justice Department concluded that it produced "no discernible reduction" in gun violence. Christopher S. Koper, Assessing the Potential to Reduce Deaths and Injuries from Mass Shootings Through Restrictions on Assault Weapons and Other High-Capacity Semiautomatic Firearms, 19 Crim'y & Pub. Pol'y 96 (2020).

[4] The bans and the year each was enacted are: CAL. PENAL CODE §§ 30600, 30605 (**1989**); N.J. STAT. §§ 2C:39-5(f), 2C:39-9(g) (**1990**); HAW. REV. STAT. § 134-8(a) (**1992**); CONN. GEN. STAT. § 53-202c (**1993**); MD. CODE ANN., CRIM. LAW §§ 4-301, 4-303 (**1994**); MASS. GEN. LAWS ch. 140, § 131M (**1994**); N.Y. PENAL LAW §§ 265.02(7), 265.10(1)-(3) (**2000**); 11 DEL. CODE § 1466 (**2022**).

Abortion Analogue, 60 HASTINGS L.J. 1285, 1296 (2009); *see also Duncan v. Becerra* ("*Duncan III*"), 366 F. Supp. 3d 1131, 1145 (S.D. Cal. 2019).

This issue was addressed in *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017), abrogated by *Bruen*, *supra*. In his dissent (which, after *Bruen*, likely represents the correct interpretation of the law), Judge Traxler stated:

> "It is beyond any reasonable dispute from the record before us that a statistically significant number of American citizens possess semiautomatic rifles (and magazines holding more than 10 rounds) for lawful purposes. Between 1990 and 2012, more than 8 million AR- and AK- platform semiautomatic rifles alone were manufactured in or imported into the United States. In 2012, semiautomatic sporting rifles accounted for twenty percent of all retail firearms sales. In fact, in 2012, the number of AR- and AK- style weapons manufactured and imported into the United States was more than double the number of the most commonly sold vehicle in the U.S., the Ford F-150. In terms of absolute numbers, these statistics lead to the unavoidable conclusion that popular semiautomatic rifles such as the AR-15 are commonly possessed by American citizens for lawful purposes within the meaning of *Heller*."

Id., 849 F.3d at 153, Traxler, J. dissenting (internal citations and quotation marks omitted).

Today, the number of AR-rifles and other modern sporting rifles in circulation in the United States exceeds twenty-four million. The Firearms Industry Trade Ass'n, *Commonly Owned: NSSF Announces Over 24 Million MSRS in Circulation*, (July 20, 2022), available at https://bit.ly/3pUj8So.[5]

According to industry sources, as of 2018, roughly thirty-five percent of all newly manufactured guns sold in America are modern semiautomatic rifles, Bloomberg, *Why Gunmakers Would Rather Sell AR-15s Than Handguns*, FORTUNE (June 20, 2018), available at https://bit.ly/3R2kZ3s, and an estimated 5.4 million Americans purchased firearms for the first time in 2021. The Firearms Industry Trade Ass'n, *NSSF Retailer Surveys Indicate 5.4 million*

[5] *See also* Declaration of James Curcuruto ¶ 6 ("At least 20 million semi-automatic firearms such as those defined as "assault weapons" are owned by millions of American citizens who use those firearms for lawful purposes."

First-Time Gun Buyers in 2021, (Jan. 25, 2022), available at https://bit.ly/3dV6RKI. In fact, a recent survey of gun owners estimated that 24.6 million Americans have owned AR-15 or similar rifles. *See* William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* at 1 (May 13, 2022), available at https://bit.ly/3yPfoHw .

AR-style rifles are commonly and overwhelmingly possessed by law-abiding citizens for lawful purposes. In a 2021 survey of 16,708 gun owners, recreational target shooting was the most common reason (cited by 66% of owners) for possessing an AR-style firearm, followed closely by home defense (61.9% of owners) and hunting (50.5% of owners). English, *supra*, at 33-34. This is consistent with the findings of an earlier 2013 survey of 21,942 confirmed owners of such firearms, in which home-defense again followed (closely) only recreational target shooting as the most important reason for owning these firearms. *See also Friedman v. City of Highland Park*, 68 F. Supp. 3d 895, 904 (N.D. Ill. 2014), *aff'd* 784 F.3d 406 (7th Cir. 2015). "An additional survey estimated that approximately 11,977,000 people participated in target shooting with a modern sporting rifle." *Id*. Indeed the "AR-15 type rifle . . . is the leading type of firearm used in national matches and in other matches sponsored by the congressionally established Civilian Marksmanship program." *Shew v. Malloy*, 994 F. Supp. 2d 234, 245 n.40 (D. Conn. 2014).

The fact that "assault" rifles are used extremely rarely in crime underscores that AR-15s and other State Banned Firearms are commonly possessed by law-abiding citizens for lawful purposes. Evidence indicates that "well under 1% [of crime guns] are 'assault rifles.'" Gary Kleck, TARGETING GUNS: FIREARMS AND THEIR CONTROL 112 (1997). This conclusion is borne out by FBI statistics. In the five years from 2015 to 2019 (inclusive), there were an average of 14,556 murders per year in the United States. On average, rifles of all types (of

which so-called "assault weapons" are a subset) were identified as the murder weapon in 315 murders per year. U.S. Dept. of Just., *Expanded Homicide Data Table 8: Murder Victims by Weapon, 2015-2019, Crime in the United States*, 2019, FBI, available at https://bit.ly/31WmQ1V. By way of comparison, on average 669 people are murdered by "personal weapons" such as hands, fists and feet. *Id*. According to the FBI, a murder victim is more than twice as likely to have been killed by hands and feet than by a rifle of any type.

Even in the counterfactual event that a modern semiautomatic rifle had been involved in each rifle-related murder from 2015 to 2019, an infinitesimal percentage of the approximately 24 million modern sporting rifles in circulation in the United States during that time period – around .001 percent – would have been used for that unlawful purpose. More broadly, as of 2016, only 0.8 percent of state and federal prisoners reported using any kind of rifle during the offense for which they were serving time. Mariel Alper & Lauren Glaze, *Source and Uses of Firearms Involved in Crimes: Survey of Prison Inmates*, 2016, U.S. DEPT OF JUST., OFF. OF JUST. PROGS., BUREAU OF JUST. STATS. 5 tbl. 3 (Jan. 2019), available at https://bit.ly/31VjRa9

Finally, the Supreme Court's decision in *Caetano* further confirms that the banned arms are in common use. That case concerned Massachusetts's ban on the possession of stun guns, which that state's highest court had upheld on the ground that such weapons are not protected by the Second Amendment. *Id*., 577 U.S. at 411. In a brief *per curiam* opinion, the Supreme Court vacated that decision. *Id*. at 411-12. Though the Court remanded the case back to the state court without deciding whether stun guns are constitutionally protected, Justice Alito filed a concurring opinion expressly concluding that those arms "are widely owned and accepted as a legitimate means of self-defense across the country," based on evidence that "hundreds of

thousands of Tasers and stun guns have been sold to private citizens." *Id*. at 420 (Alito, J., concurring) (cleaned up) (citation omitted). If hundreds of thousands" of arms constitute wide ownership, *a fortiori* so does the tens of millions of semiautomatic rifles sold to private citizens nationwide.

The Massachusetts court got the message. In a subsequent case, that court, relying on *Caetano*, held that because "stun guns are 'arms' within the protection of the Second Amendment," the state's law barring "civilians from possessing or carrying stun guns, even in their home, is inconsistent with the Second Amendment and therefore unconstitutional." *Ramirez v. Commonwealth*, 94 N.E.3d 809, 815 (Mass. 2018). The Illinois Supreme Court followed suit with a similar ruling in 2019, relying on *Caetano* and *Ramirez* to conclude that "[a]ny attempt by the State to rebut the prima facie presumption of Second Amendment protection afforded stun guns and tasers on the grounds that the weapons are uncommon or not typically possessed by law-abiding citizens for lawful purposes would be futile." *People v. Webb*, 131 N.E. 3d 93, 96 (Ill. 2019). This reasoning is sound, and it necessarily entails the invalidity of the categorial ban at issue here, which restricts arms that are many times more common than stun guns.

III. The Prohibition on Possession of Banned Magazines is Unconstitutional

A. Magazines Capable of Holding More Than 10 Rounds Are in Common Use

Magazines are indisputably "arms" protected by the Second Amendment, as the right to keep and bear arms necessarily includes the right to keep and bear components such as ammunition and magazines that are necessary for the firearm to operate. *See United States v. Miller*, 307 U.S. 174, 180 (1939) (citing seventeenth-century commentary recognizing that "[t]he possession of arms also implied the possession of ammunition"); *Jackson v. City & Cnty.*

of San Francisco, 746 F.3d 953, 967 (9th Cir. 2014) (without bullets, the right to bear arms would be meaningless).

Just as the First and Fourteenth Amendments protect modern forms of communications and search, "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; *Caetano*, *supra* (stun guns). Thus, as the Supreme Court reiterated in *Bruen*, when assessing whether arms are protected by the Second Amendment, the question is whether they are "in common use today." 142 S.Ct. at 2134. If they are, then they are presumptively protected by the Second Amendment, and it is the government's burden to prove that any efforts to restrict their possession or use have a "well- established and representative historical analogue." *Bruen*, 142 S.Ct. at 2133. But, as noted above, in the context of a categorial ban such as that at issue here with respect to the Banned Magazines, establishing such an analogue is impossible. The government may impose a blanket prohibition only on "dangerous and unusual" arms, but by definition, an arm in common use is not unusual. The Second Amendment "[does] not countenance a complete prohibition on the use of the most popular weapon chosen by Americans for self-defense in the home." *Id*., 142 S. Ct. at 2128 (internal quotation marks omitted).

The Banned Magaziens unquestionably satisfy the "common use" test. *See Duncan III*, 366 F.Supp.3d at 1143-45; *Duncan IV*, 970 F.3d at 1142, 1146-47. Magazines capable of holding more than 10 rounds of ammunition are commonly owned by millions and millions of Americans for all manner of lawful purposes, including self-defense, sporting, and hunting.[6] They come standard with many of the most popular handguns and long guns on the market, and

[6] *See* Declaration of James Curcuruto ¶ 7 ("At least 150 million magazines with a capacity greater than ten rounds are owned by law-abiding American citizens, who use those magazines for lawful purposes.")

Americans own roughly **115 million of them**, *Duncan IV*, 970 F.3d at 1142, accounting for "approximately half of all privately owned magazines in the United States," *Duncan v. Bonta ("Duncan V")*, 19 F.4th 1087, 1097 (9th Cir. 2021), *cert. granted, judgment vacated*, 142 S. Ct. 2895 (2022). Indeed, the most popular handgun in America, the Glock 17 pistol, comes standard with a 17-round magazine. *See Duncan III*, 366 F.Supp.3d at 1145. In short, there can be no serious dispute that magazines capable of holding more than 10 rounds are bearable arms that satisfy the common use test and thus are presumptively protected by the Second Amendment.

In his dissent in *Kolbe v. Hogan*, Judge Traxler also addressed magazines such as the Banned Magazines. He stated:

> "The record also shows unequivocally that magazines with a capacity of greater than 10 rounds are commonly kept by American citizens, as there are more than 75 million such magazines owned by them in the United States. These magazines are so common that they are standard on many firearms: On a nationwide basis most pistols are manufactured with magazines holding ten to 17 rounds. Even more than 20 years ago, fully 18 percent of all firearms owned by civilians were equipped with magazines holding more than ten rounds."

Id., 849 F.3d at 154, Traxler, J. dissenting (internal citations and quotation marks omitted).

Magazines such as those banned by the Banned Magazines are without the slightest question commonly possessed by law abiding citizens for lawful purposes (again, the dispositive fact under *Heller* and *Bruen*). Therefore, based on this fact alone, the Code is unconstitutional.

B. There Is No Historical Tradition of Restricting Firearms Capable of Firing More Than 10 Rounds Without Reloading.

Even if Banned Magazines were not in common use, the City cannot come close to proving that restrictions on firing or magazine capacity are part of the nation's historical tradition. To the contrary, history and tradition establish the exact opposite. *See Duncan III*,

366 F.Supp.3d at 1149-53; *Duncan IV*, 970 F.3d at 1147-51 (when the Founders ratified the Second Amendment, no laws restricted ammunition capacity despite multi-shot firearms having been in existence for some 200 years); *Duncan V*, 19 F.4th at 1148-59 (Bumatay, J., dissenting) (summarizing history)

Firearms capable of firing more than 10 rounds without reloading are nothing new. "[T]he first firearm that could fire more than ten rounds without reloading was invented around 1580," and several such handguns and long guns "pre-date[d] the American Revolution." *Duncan IV*, 970 F.3d at 1147. Well before the framing of the Fourteenth Amendment, they had become "common," as witnessed by popular firearms such as the Pepperbox-style pistol, which could "shoot 18 or 24 shots before reloading individual cylinders." *Id*. By the end of the Civil War, "repeating, cartridge-fed firearms" were ubiquitous, and many of the most popular models had magazines that held more than 10 rounds. *Id*. at 1148. For example, the Winchester 66 had a 17- round magazine and could fire all 17 rounds plus the one in the chamber in under nine seconds. *Id*. Later models, including the famed Winchester 73 ("the gun that won the West"), likewise had magazines that held more than 10 rounds and sold a combined "over 1.7 million total copies" between 1873 and 1941. *Id*.

As detachable box-style magazines became more popular around the turn of the twentieth century, so too did rifles and handguns with box magazines capable of holding more than 10 rounds, such as Auto Ordnance Company's semi-automatic rifle (1927, 30 rounds) and the Browning Hi-Power pistol (1935, 13 rounds). *Id*. In 1963, the U.S. government sold hundreds of thousands of surplus 15- and 30-round M-1 carbines to civilians at a steep discount. *Id*. That same year, the first AR-15 rifle was released. *Id*. The AR-15 comes standard with a 30-round magazine and as noted above, remains the most popular rifle in America today.

Id.; *Duncan III*, 366 F.Supp.3d 1145. Today, the most popular handgun in America is the Glock 17, which comes standard with a 17-round magazine. *Duncan IV*, 970 F.3d at 1142, 1148. Many other popular pistols likewise come standard with magazines that hold more than 10 rounds. For example, the Beretta Model 92 comes standard with a sixteen-round magazine, Smith & Wesson M&P 9 M2.0 nine-millimeter magazines contain seventeen rounds, and the Ruger SR9 has a 17-round standard magazine. *Id*. at 1142 & n.4.

Firearms capable of firing more than 10 rounds predate the founding by more than a century. *See Duncan IV*, 970 F.3d at 1147. Such arms were neither novelties nor confined to the military; to the contrary, they were marketed to and bought by civilians from the start. "[I]n 1821, the New York Evening Post described the invention of a new repeater as 'importan[t], both for public and private use,' whose 'number of charges may be extended to fifteen or even twenty.'" *Ass 'n of N J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. of N J.* ("ANJRPC II"), 974 F.3d 237, 255 (3d Cir. 2020) (Matey, dissenting). The popular Pepperbox-style pistol was marketed to civilians, the Girandoni air rifle "was famously carried on the Lewis and Clark expedition," and millions of Winchesters were sold to civilians in the decades following the ratification of the Fourteenth Amendment. *Duncan IV*, 970 F.3d at 1147-48; *Duncan V*, 19 F.4th at 1154-55 (Bumatay, J., dissenting). And the federal government itself sold hundreds of thousands of surplus 15- and 30-round M-1 carbines to civilians at a steep discount just as the AR-15 and its standard 30-round magazine came on the market. *Duncan IV*, 970 F.3d at 1148.

The historical record confirms that, "[l]ong before 1979, magazines of more than ten rounds had been well established in the mainstream of American gun ownership." David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 862 (2015). In short, arms that could fire more than 10 rounds without reloading would by no

means have been "unforeseen inventions to the Founders." *Duncan IV*, 970 F.3d at 1147. They have been available for centuries, and "magazines of more than ten rounds had been well established in the mainstream of American gun ownership" "long before" a handful of capacity restrictions started to pop in the late twentieth century. *See Kopel*, *supra* at 862-64.

There were no restrictions on firing or magazine capacity when either the Second or the Fourteenth Amendment was ratified. The first such laws did not come until the Prohibition Era, and, even then, they were few and far between. Many states and the federal government began regulating automatic weapons almost as soon as they came on the market in the 1920s and 1930s. In contrast, only during Prohibition did a handful of state legislatures enact capacity restrictions, many of which were soon repealed. *Duncan IV*, 970 F.3d at 1150. These states included Michigan (1927, repealed in 1959), Rhode Island (1927, repealed in 1975), and Ohio (1933, repealed in 2014). *Id*. at n.10. It is important to note that the Rhode Island and Michigan statutes applied only to weapons rather than magazines, and the Ohio statute was interpreted to only forbid the simultaneous purchase of a firearm and compatible 18-round magazine. *Id*.

These anomalous laws not only were "short lived," *Bruen*, 142 S.Ct. at 2155, but emerged several decades after the isolated "late-19th-century" territorial laws that the Supreme Court found to be too few and too late to have meaningful historical relevance. *Id*. at 2154; *cf Heller II*, 670 F.3d at 1292 (Kavanaugh, J., dissenting) (six states not enough to make a "strong showing that such laws are common"). Here too, then, "the bare existence of these localized restrictions cannot overcome the overwhelming evidence of an otherwise enduring American tradition permitting law-abiding citizens to keep and bear arms with a firing capacity of more than 10 rounds.

The first state to restrict magazine capacity as such (New Jersey) did not do so until 1990 – more than two centuries after the founding. As with "assault weapon" bans, that is far too late to demonstrate anything about the original meaning of the Second or Fourteenth Amendment. The federal government did not restrict magazine capacity until 1994, and Congress allowed that law to expire in 2004. Since 1990, when the first magazine capacity restriction was adopted, a total of 12 states have enacted such restrictions, with half of those restrictions enacted within the last decade.[7] The City thus cannot even identify a "well-established" tradition of restricting magazine capacity today, let alone identify any representative historical analogue that might justify its confiscatory magazine ban. *Bruen*, 142 S.Ct. at 2133 (emphasis omitted).

Yet, despite a long historical tradition of law-abiding citizens possessing these firearms for lawful purposes, there is no similar tradition of government regulation, let alone confiscation. To the contrary, the historical tradition of advancement in firearms technology reflects a steady trend toward increasing the firing capacity of the most popular and common arms, with no corresponding trend of government restrictions on firing capacity. The City thus cannot possibly meet its burden of "affirmatively prov[ing] that its [magazine ban] is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Bruen*, 142 S.Ct. at 2127.

Respectfully submitted this 24th day of January 2023.

/s/ Barry K. Arrington

Barry K. Arrington

[7] The Codes and the year they were enacted are: N.J. Stat. Ann. §2C:39- l(y), - 3G) (**1990**); 1992 Haw. Sess. Laws 740, 742 (**1992**); Md. Code Ann., Crim. Law §4-305 (**1994**); Cal. Penal Code §§32310, 16740 (**1999**); Mass. Gen. Laws ch. 140 §§121, 131a (**1998**); N.Y. Penal Law §265.36 (**2000**); Colo. Rev. Stat. §18-12-302(1)) (**2013**); Conn. Gen. Stat. §53- 202w (**2013**); Vt. Stat. Ann. tit. 13, §4021 (**2017**); Wash. Rev. Code Ann. §§9.41.010, .370 (**2022**); 11 R.I. Gen. Laws Ann. § 11-47.1-3 (**2022**); Del. Code Ann. tit. 11, § 1469 (**2022**).

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CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2023, I electronically filed a true and correct copy of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing via email counsel of record.

In addition, a true and correct copy of this Notice and the First Amended and Supplemented Complaint were emailed to:

barbara.greenspan@illinois.gov
aaron.wenzloff@ilag.gov
gretchen.helfrich@ilag.gov
sarah.hunger@ilag.gov

/s/ Barry K. Arrington
_____
Barry K. Arrington

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
Case No. 23-1353

NATIONAL ASSOCIATION FOR GUN RIGHTS, ROBERT C. BEVIS, and LAW WEAPONS, INC., d/b/a LAW WEAPONS & SUPPLY, an Illinois corporation;

v.

CITY OF NAPERVILLE, ILLINOIS, and JASON ARRES, CHIEF OF POLICE OF NAPERVILLE

MOTION FOR INJUNCTION PENDING APPEAL

Pursuant to FRAP 8 and Circuit Rule 8, Plaintiffs submit the following Motion for Injunction Pending Appeal.

PROCEDURAL BACKGROUND

Plaintiffs filed motions for preliminary injunction with respect to the City of Naperville Ordinance on November 18, 2022, and with respect to the State of Illinois Statute on January 24, 2023. Dkt. 10. The Court denied Plaintiffs' motions for preliminary injunction in an order dated February 17, 2023. Dkt. 63. On February 21, 2023, Plaintiffs appealed the Order to the United States Court of Appeals for the Seventh Circuit. Dkt. 64. *See* 28 U.S.C. § 1292(a)(1) (order denying request for preliminary injunction appealable). Fed.R.App.P. 8(a)(1)(C) states that a party must move first in the district court for an injunction pending appeal. On February 28, 2023, Plaintiffs moved in the district court for an injunction pending appeal. Dkt. 71. The district court denied Plaintiffs' motion for injunction pending appeal on March 2, 2023. Dkt. 73. Plaintiffs have attached their declarations filed in the trial court (Dkts. 10-1, 10-3, and 71-1) in the Appendix filed with this Motion and incorporate them in and with this motion.

STANDARD OF REVIEW

A party seeking an injunction pending appeal must establish that he is [1] likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest. *Protect Our Parks, Inc. v. Buttigieg*, 10 F.4th 758, 763 (7th Cir. 2021), *quoting Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008) (quotation marks omitted; bracketed numbers added). Although a plaintiff need not show by a preponderance of the evidence that she will win her suit, the mere possibility of success is not enough; she must make a "strong" showing on the merits. *Id*. (internal citation omitted). This is an extraordinary remedy. *Id*.

ARGUMENT

I. Plaintiffs Have Made a Strong Showing of Likely Success on the Merits

A. Justice Thomas: Laws Like the Illinois Statute and the City's Ordinance are Clearly Unconstitutional

This is not a close case. The Second Amendment protects arms that are "typically possessed by law-abiding citizens for lawful purposes." *D.C. v. Heller*, 554 U.S. 570, 625 (2008) (Scalia, J.). Justice Thomas, the author of the recent landmark Second Amendment decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), joined by Justice Scalia, provided a roadmap to the resolution of this matter in *Friedman v. City of Highland Park, Ill.*, 577 U.S. 1039 (2015) (Thomas, J., dissenting from denial of cert.). In that case Justice Thomas examined an arms ban that was for practical purposes identical to the laws challenged here. He noted millions of Americans own AR-style semiautomatic rifles for lawful purposes, including self-defense and target shooting. *Id*. (Thomas, J., dissenting). He then

wrote: "**Under our precedents, that is all that is needed for citizens to have a right under the Second Amendment to keep such weapons**." *Id.* (emphasis added).

When it comes to bans of commonly possessed arms, this is *Heller's* simple rule. This is a case involving an arms ban, and therefore it turns on *Heller's* simple rule. Is the banned firearm hardware commonly owned by law-abiding citizens for lawful purposes? "If the answer [is] 'yes,' the test is over." *Duncan v. Becerra ("Duncan III")*, 366 F. Supp. 3d 1131, 1142 (S.D. Cal. 2019)[1]. Plaintiffs proved that millions of the banned arms are possessed by law-abiding citizens for lawful purposes. Thus, the answer to the "hardware" test is "yes." The test is over. The challenged laws are unconstitutional. It is that simple.

Unfortunately, the district court did not apply *Heller's* simple test. Instead, the district court held that the challenged laws are constitutional because the arms they ban are "particularly dangerous." This was clear error because "[the *Heller* test] is a conjunctive test: A weapon may not be banned unless it is **both** dangerous **and** unusual." *Caetano v. Massachusetts*, 577 U.S. 411, 417 (2016) (Alito, J. concurring) (emphasis in the original). An arm that is commonly possessed by law-abiding citizens for lawful purposes is, by definition, not unusual. Thus, such an arm cannot be both dangerous and unusual and therefore it cannot be subjected to a categorical ban. *Heller*, 554 U.S. at 629. It follows, that "the relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes." *Caetano*, 577 U.S. at 418 (Alito, J. concurring).

[1] *aff'd*, 970 F.3d 1133 (9th Cir. 2020), *reh'g en banc granted, opinion vacated*, 988 F.3d 1209 (9th Cir. 2021), *and on reh'g en banc sub nom. Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021), *cert. granted, judgment vacated*, 213 L. Ed. 2d 1109, 142 S. Ct. 2895 (2022), *and vacated and remanded*, 49 F.4th 1228 (9th Cir. 2022), *and rev'd and remanded sub nom. Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021), and *cert. granted, judgment vacated*, 142 S. Ct. 2895 (2022).

Last June the Supreme Court held in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), that Second Amendment challenges are to be decided by applying a text informed by history test. *Id*., 142 S. Ct. at 2129–30. Moreover, the Court emphatically and repeatedly rejected the application of means-end scrutiny in Second Amendment cases. *Id*., 142 S. Ct. at 2126. Unfortunately, not only did the district court fail to apply *Heller's* simple test, but also it compounded its error by engaging in the means-end analysis forbidden by *Bruen*. The district court engaged in a lengthy analysis of the governmental interest Defendant sought to achieve. Dkt. 63, pp. 17-30. The district court followed that discussion by holding that the challenged laws addressed those public safety concerns, and for that reason the laws are constitutional. Dkt. 63, p. 30. This, too, was clear error.

In summary, Plaintiffs made a strong showing of likely success on the merits based on *Heller's* simple test. The district court failed to apply the *Heller* test. Instead, it erred by upholding the laws for a constitutionally irrelevant reason ("relative dangerousness") and a reason forbidden by the Supreme Court (means-end scrutiny).

B. The Parties

Plaintiff National Association for Gun Rights ("NAGR") is a nonprofit membership and donor-supported organization that seeks to defend the right of law-abiding individuals to keep and bear arms. Dkt. 48, p.2. NAGR has members who reside within the City and the State. Dkt. 48, p.2. NAGR represents the interests of its members who reside in the City and the State. Dkt.48, p.2.

Plaintiff Robert C. Bevis is a business owner in the City and a law-abiding citizen of the United States. Dkt. 48, p.2. Bevis owns and operates Plaintiff Law Weapons, Inc. d/b/a Law Weapons & Supply ("LWI"). Dkt. 48, p.2. LWI operates in the City and is engaged in the

commercial sale of firearms. Dkt. 48, p.2. A substantial part of LWI's business consists of the commercial sale of firearms and magazines that are banned by the challenged laws. Dkt. 48, p.2. Since the challenged laws went into effect a few weeks ago, LWI's business has plummeted, and if the laws remain in force, it will go out of business. Dkt. 48, p.2.

Defendant City of Naperville passed the unconstitutional Ordinance last summer with an effective date of January 1, 2023. Dkt. 1, p.3. Defendant Arres is the City's Chief of Police. In his Answer, Arres confirmed that he intends to enforce the unconstitutional Ordinance and State Law against Plaintiffs. Plaintiffs seek to enjoin Defendants from enforcing the challenged laws against them and their members. Dkt. 59, p.4.

B. The Challenged Laws

Plaintiffs challenge Illinois HB5471, which became effective on January 10, 2023, available at IL LEGIS 102-1116 (2022), 2022 Ill. Legis. Serv. P.A. 102-1116 (the "State Law") and Chapter 19 of Title 3 of the Naperville Municipal Code (the "Ordinance"). The State Law bans certain semi-automatic firearms that it calls "assault weapons," which are defined in 720 ILCS 5/24-1.9. The State Law also bans what it calls "large capacity ammunition feeding devices," which are defined in 720 ILCS 5/24-1.10. Section 3-19-2 of the Ordinance bans the commercial sale of "assault weapons," which are defined in a way similar to the State Law. Ordinance, Section 3-19-1.

C. The *Heller/Bruen* Standard

In *New York State Rifle and Pistol Association v. Bruen*, 521 U.S. 898 (2022), the Court rejected the two-part balancing test for Second Amendment challenges that several circuit courts adopted in the wake of *Heller* and *McDonald v. City of Chicago, Ill.*, 561 U.S. 742

(2010). Instead, it reiterated *Heller's* text informed by history standard. That standard has two parts:

> [T]he standard for applying the Second Amendment is as follows:
>
> [Step One:] When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct.
>
> [Step Two:] The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.

Bruen, 142 S. Ct. at 2129–30.

"*Bruen* makes clear that the first step is one based **solely** on the text of the Second Amendment to determine if it presumptively protects an individual's conduct – a presumption that the [government] can **then** rebut with history and tradition." *U.S. v. Harrison*, 2023 WL 1771138 *4 (W.D. Okla. 2023) (emphasis in original). If the text "presumptively protects [Plaintiffs'] conduct, the burden shifts to the [government] to demonstrate that [its absolute ban] is 'consistent with the Nation's historical tradition of firearm regulation.'" *U.S. v. Harrison*, *supra*, *5.

D. Plaintiffs Easily Met Their Burden Under Step One

Plaintiffs seek to keep and bear bearable arms that are banned by the challenged laws. Dkt. 71-1. "[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms." *Bruen*, 142 S. Ct. at 2132. Therefore, because the Second Amendment's plain text covers Plaintiffs' conduct – i.e., possessing certain bearable arms – "the Constitution presumptively protects that conduct." *Id.*, 142 S. Ct. at 2126. Thus, Plaintiffs have easily met their burden. The banned arms are presumptively protected by the Constitution. That Plaintiffs seek to keep and bear bearable arms was not disputed in the district court.

E. It is Impossible for the City to Meet its Burden Under Step Two

The challenged laws categorically ban certain commonly possessed arms (as shown in detail below). Under *Heller*, absolute bans of commonly held firearms are "categorially unconstitutional." *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011). ("Both *Heller* and *McDonald* suggest that broadly prohibitory laws restricting the core Second Amendment right – like the handgun bans at issue in those cases … are categorically unconstitutional."). Therefore, it is impossible for the City to carry its burden under step two of the *Heller/Bruen* test. The reason for this is apparent from *Heller* itself – there is no historical analogue to such a ban. "[A]fter considering 'founding-era historical precedent,' including 'various restrictive laws in the colonial period,' and finding that none was analogous to the District's ban, *Heller* concluded that the handgun ban was unconstitutional." *Bruen*, 142 S. Ct. at 2131.

In summary, the complete absence of regulations even remotely analogous to D.C.'s absolute ban allowed *Bruen* to characterize the *Heller* historical inquiry as "relatively simple." *Id*., 142 S. Ct. at 2132. It was simple because, under *Heller*, absolute bans of commonly held firearms are, in *Ezell's* words, "categorically unconstitutional."[2] *See also People v. Webb*, 2019 IL 122951, 131 N.E.3d 93) (absolute bans of commonly possessed arms are "necessarily" unconstitutional).[3]

F. The Banned Firearms are Commonly Possessed by Law-Abiding Citizens

At least 20 million semi-automatic firearms such as those defined as "assault weapons" in the challenged laws are owned by millions of American citizens who use those firearms for lawful purposes. Declaration of James Curcuruto ¶ 6. Dkt. 10-3. The banned rifles are perfectly

[2] The Court failed to apply this principle in *Friedman*, which is why Justice Thomas criticized that decision so vociferously.

[3] In that case, the Court held that a commonly held bearable arm may not be "subjected to a categorical ban." *Id*., 2019 IL 122951, ¶ 21, 131 N.E.3d 93, 98. And since the Illinois statute in question constituted a categorical ban "that provision **necessarily** [could not] stand." *Id*. (emphasis added).

legal to build, buy, and own under federal law and the laws of over 40 states. *Miller v. Bonta*, 542 F. Supp. 3d 1009, 1022 (S.D. Cal. 2021), *vacated and remanded on other grounds*, 2022 WL 3095986 (9th Cir. Aug. 1, 2022). The AR-15 in particular, the quintessential arm banned by the State, is America's "most popular semi-automatic rifle." *Heller v. D.C.*, 670 F.3d 1244, 1287 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("*Heller II*"). And in recent years it has been "the best-selling rifle type in the United States," Nicholas J. Johnson, *Supply Restrictions at the Margins of Heller and the Abortion Analogue*, 60 HASTINGS L.J. 1285, 1296 (2009). These rifles are the second-most common type of firearm sold, at approximately 20% of all firearm sales, behind only semiautomatic handguns. See National Shooting Sports Foundation, Inc., *2021 Firearms Retailer Survey Report*, 9, available at https://bit.ly/3gWhI8E (last visited Jan. 30, 2023).[4]

There is a venerable tradition in this country of lawful private ownership of semiautomatic rifles such as those banned by the challenged laws. The Supreme Court has held as much. In *Staples,* it concluded that semiautomatics, unlike machine guns, "traditionally have been widely accepted as lawful possessions." *Staples*, 511 U.S. at 612. Semiautomatic rifles have been commercially available for over a century. *See* David B. Kopel, *Rational Basis Analysis of "Assault Weapon" Prohibition*, 20 J. CONTMP. L. 381, 413 (1994).

In *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017), *abrogated on other grounds by Bruen*, *supra*, Judge Traxler stated:

> **It is beyond any reasonable dispute** from the record before us that a statistically significant number of American citizens possess semiautomatic rifles (and magazines holding more than 10 rounds) for lawful purposes. Between 1990 and 2012, more than 8 million AR- and AK- platform semiautomatic rifles alone were manufactured in or imported into the United States. In 2012, semiautomatic sporting rifles accounted for twenty percent of all retail firearms sales… In terms

[4] *See also* Mot. 14-20 for an extensive discussion of this issue.

> of absolute numbers, these statistics lead to the unavoidable conclusion that popular semiautomatic rifles such as the AR-15 are commonly possessed by American citizens for lawful purposes within the meaning of *Heller*.

Id., 849 F.3d at 153 (Traxler, J., dissenting) (internal citations and quotation marks omitted, emphasis added).

In 2021, a professional survey firm conducted a comprehensive assessment of firearms ownership and use patterns in America. William English, *2021 National Firearms Survey: Updated Analysis* (hereinafter, "English"), 1, available at https://bit.ly/3yPfoHw (last visited Jan. 30, 2023). The survey was administered to a representative sample of approximately 54,000 U.S. residents aged 18 and over, and it identified 16,708 gun owners. The survey found that 30.2% of gun owners, about 24.6 million people, have owned an AR-15 or similarly styled rifle. English, 33. In summary, under any reasonable analysis, the firearms banned by the challenged laws are commonly possessed by law-abiding citizens for lawful purposes, just as Justice Thomas asserted in *Friedman*.

G. The Banned Magazines are Commonly Possessed by Law-Abiding Citizens

In *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014), the Court noted that while recognizing the Second Amendment does not explicitly protect ammunition, "without bullets, the right to bear arms would be meaningless." *Id*. At 967. *Jackson* thus held that "'the right to possess firearms for protection implies a corresponding right' to obtain the bullets necessary to use them." *Id*. In *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011), this Court also noted that the Second Amendment protects that which is necessary for the right to be effective. Justice Thomas cited both *Jackson* and *Ezell* with approval in *Luis v. United States*, 578 U.S. 5 (2016), in which he explained that constitutional rights implicitly protect those closely related items necessary to their exercise. *Id*., 578 U.S. at 26-27 (Thomas, J., concurring).

Magazines are arms protected by the Second Amendment because they are necessary for a semi-automatic firearm to be effective. Indeed, they are what makes semi-automatic fire possible. Therefore, in *Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267 (N.D. Cal. 2014), the Court found that magazines are "arms" within the meaning of the Second Amendment because "they are integral components to vast categories of guns." *Id*. at 1276. And in affirming that decision, the Ninth Circuit held that the "law supports the conclusion that there must also be some corollary, albeit not unfettered, right to possess the magazines necessary to render [certain] firearms operable." *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015).

And at least 150 million magazines such as those banned by the State Law (i.e., with a capacity greater than ten rounds) are owned by law-abiding American citizens, who use those magazines for lawful purposes. Declaration of James Curcuruto ¶ 7. Dkt. 10-3. According to the English survey, 48.0% of gun owners, about 39 million people, have owned magazines that hold over 10 rounds, and hundreds of millions of such magazines have been owned. English, 20. There is nothing surprising about that result. Many of the most popular semi-automatic rifles are manufactured with standard magazines holding more than ten rounds. *See, e.g*., David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 and ALB. L. REV. 849, 859 (2015) ("The most popular rifle in American history is the AR-15 platform, a semiautomatic rifle with standard magazines of twenty or thirty rounds."). Indeed, over three quarters of modern sporting rifle magazines in the country have a capacity of more than 10 rounds. *See* Modern Sporting Rifle Comprehensive Consumer Report, at 31, NSSF (July 14, 2022), available at https://bit.ly/3GLmErS (last visited Jan. 30, 2023). See also, *Kolbe, supra* ("It is beyond any reasonable dispute" that magazines holding more than 10 rounds are commonly possessed for lawful purposes.) (Traxler, J., dissenting).

G. Summary

Plaintiffs have met their burden under the first step of the *Heller*/*Bruen* analysis. Thus, the bearable arms they seek to possess are presumptively protected by the Second Amendment. The evidence is overwhelming that the arms are commonly possessed by law-abiding citizens for lawful purposes. Therefore, the City cannot meet its burden under the second step of the test. The arms are owned by millions of law-abiding Americans. Under the Supreme Court's precedents, "that is all that is needed for citizens to have a right under the Second Amendment to keep such weapons." *Friedman, supra* (Thomas, J., dissenting from denial of cert.). Therefore, Plaintiffs have made a strong showing of probable success on the merits.

II. The City's Absolute Ban on Commercial Sales is Unconstitutional

"The right to possess firearms for protection implies a corresponding right to **acquire** and maintain proficiency in their use . . ." *Ezell v. City of Chicago ("Ezell I")*, 651 F.3d 684, 704 (7th Cir. 2011) (emphasis added). Obviously, the right to keep and bear arms would be meaningless if citizens were unable to acquire arms in the first place. This is why the City's absolute ban on the sale of commonly possessed firearms is unconstitutional. In *Bruen*, the Court cited with approval the Third Circuit's decision in *Drummond v. Robinson Twp*., 9 F.4th 217 (3rd Cir. 2021). *Id*., 142 S.Ct. at 2133. In *Drummond*, the Court held that laws "prohibiting the commercial sale of firearms would be untenable in light of *Heller*." *Id*., 9 F.4th at 227 (internal citation and quotation marks omitted).

III. The District Court Properly Held That *Friedman* is No Longer Good Law

In *Friedman v. City of Highland Park, Illinois*, 784 F.3d 406 (7th Cir. 2015), the Court announced a unique three-part test to determine Second Amendment questions. Under this test, a court asks: whether a regulation [1] bans weapons that were common at the time of

ratification or [2] those that have some reasonable relationship to the preservation or efficiency of a well-regulated militia and [3] whether law-abiding citizens retain adequate means of self-defense. *Id*., 784 F.3d at 410. As noted, Justice Thomas criticized this holding harshly. That is because this test is not supported by *Heller*. Indeed, two of the three prongs of the test are specifically foreclosed by *Heller* as the Court made plain in *Bruen*.

[1] The Second Amendment's "reference to 'arms' does not apply only to those arms in existence in the 18th century." *Bruen*, 142 S. Ct. at 2132 (cleaned up). Indeed, *Heller* characterized this argument as "bordering on the frivolous." *Heller*, 554 U.S. at 582.

[2] The Second Amendment's operative clause "does not depend on service in the militia." *Bruen*, 142 S. Ct. at 2127, *citing Heller*, 554 U.S. at 592.

[3] As for the third prong, "[T]he right to bear other weapons is 'no answer' to a ban on the possession of protected arms." *Caetano v. Massachusetts*, 577 U.S. 411, 420 (2016), *quoting Heller*, 554 U.S. at 629.

Thus, the district court was correct when it held that "*Friedman* cannot be reconciled with *Bruen*." Dkt. 63, p.16.

IV. The District Court Erred in Four Critical Respects

A. The District Court Failed to Apply the *Heller* Common Use Test

The challenged laws ban arms commonly possessed by law-abiding citizens for lawful purposes. *Heller's* central holding is that a categorical ban on arms held by law-abiding citizens is unconstitutional. *Id*., 554 U.S. at 625. One would suppose that the district court would apply the *Heller* test or, failing that, at least explain why it believed the test is not applicable. The district court did neither. It erred when it simply ignored *Heller's* central holding. Nowhere in its opinion does it apply, or even acknowledge, *Heller's* holding in this regard.

B. The District Court Misunderstood Heller's "Dangerous and Unusual" Test

Under *Heller,* "dangerous **and** unusual" weapons may be banned. *Heller*, 554 U.S. at 627 (emphasis added). Here, apparently relying on this passage from *Heller*, the district court held that "[b]ecause assault weapons are particularly dangerous weapons and high-capacity magazines are particularly dangerous weapon accessories, their regulation accords with history and tradition." Dkt. 63, p.30. This is error. The district court misinterpreted *Heller*. Importantly, "[the *Heller* test] is a conjunctive test: A weapon may not be banned unless it is **both** dangerous **and** unusual." *Caetano v. Massachusetts*, 577 U.S. 411, 417 (2016) (Alito, J., concurring) (emphasis in the original). An arm that is commonly possessed by law-abiding citizens for lawful purposes is, by definition, not unusual. Thus, such an arm cannot be both dangerous and unusual and therefore it cannot be subjected to a categorical ban. *Heller*, 554 U.S. at 629. It follows, that "the relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes." *Caetano*, 577 U.S. at 418.

In summary, under *Heller*, the nation's history of firearms regulation supports a law banning a "dangerous and unusual" weapon. Conversely, nothing in *Heller* suggests that the nation's history of firearms regulation supports a law banning a weapon commonly used for lawful purposes because it is "particularly dangerous." This district court did not recognize this critical distinction, and it erred when it upheld the challenged laws merely because the banned arms are, in its view, particularly dangerous.

C. The District Court Failed to Distinguish Between "Ban" and "Regulation"

The district court held that because, in its view, the banned weapons are particularly dangerous, "their **regulation** accords with history and tradition." Dkt. 63, p.30. (emphasis added). The word "regulation" is misplaced. This is a ban, not a regulation, and *Heller* distinguishes between laws that ban arms and laws that regulate arms. The flaw in the district

court's historical analysis is that it has failed to distinguish between the two types of laws. Arms typically possessed by law-abiding citizens may not be banned. *Id*., 554 U.S. at 628. But *Heller* held that various regulations – short of bans – such as prohibitions on concealed carry, possession of firearms by felons, possession of firearms in sensitive places, and conditions on the commercial sales of weapons, are legitimate. *Id*., 554 U.S. at 627-28. The reason for this dichotomy is that nothing in the Nation's history and tradition of firearm laws, "remotely burden[s] the right of self-defense as much as an absolute ban." *Id*., 554 U.S. at 632. Whereas regulations that do not burden the right anywhere near as much as a ban may be "fairly supported by [] historical tradition." *Id*., 554 U.S. at 628. Thus, the district court erred in failing to distinguish between the two types of laws.

D. This District Court Erred When It Engaged in Means-End Scrutiny

This district court properly recognized that *Bruen* rejected means-end scrutiny as a mode of analysis in the context of the Second Amendment. Dkt. 63, p.17. Therefore, it did not call its analysis by that name. But the Supreme Court also warned courts to be careful not to allow means-end analysis to impact their analysis in other, less obvious ways. In particular, *Bruen* stated that "courts may [not] engage in independent means-end scrutiny under the guise of an analogical inquiry." *Id*., 142 S. Ct. at 2133 n. 7. Unfortunately, the district court erred when it did just that. Pages 26 to 30 of its Order recite the district court's public safety concerns implicated by the semi-automatic rifles and magazines banned by the challenged laws. Dkt 63, pp. 26-30. The district court followed that discussion by stating that the challenged laws addressed these public safety concerns, and for that reason the laws are constitutional. Dkt 63, p. 30. Indeed, the district court went further going so far as claiming constitutional rights were

irrelevant to "irreparable harm" as a backdoor means of instituting the means-end test to evade the Second Amendment rights at stake in this case. Dkt 63, p.31.

But it is just this sort of means-end scrutiny that may not be used to justify a firearms law. "To justify its regulation, the government **may not simply posit that the regulation promotes an important interest**. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126 (emphasis added). Thus, a court may not identify an important governmental interest (such as public safety) and uphold the challenged laws on the ground that the means the State and the City chose further that governmental end.

V. The Other Injunction Factors Are Met

A. The Factors Are Met on the Basis of the Constitutional Violation

In *Higher Soc'y of Indiana v. Tippecanoe Cnty., Indiana*, 858 F.3d 1113 (7th Cir. 2017), the Seventh Circuit held that in a constitutional case like this one, "the analysis begins and ends with the likelihood of success on the merits of [that] claim." *Id.*, 858 F.3d at 1116 (internal quotation omitted). *See also Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013) (same). But even if one were to examine the other three factors, the result is the same.

The loss of Second Amendment rights necessarily establishes irreparable harm. In *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011), the Plaintiffs established probable success on the merits of their Second Amendment claim. The Court held no further showing of irreparable harm was required because "[w]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Id.*, 651 F.3d at 699, *quoting* Charles Alan Wright, *et al*, *Federal Practice and Procedure* § 2948.1 (2d ed. 1995).

As for the "balance of harm" and "public interest" prongs, injunctions protecting constitutional freedoms "are always in the public interest." *Am. C.L. Union of Illinois v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012). And if the moving party establishes a likelihood of success on the merits, the balance of harms favors granting preliminary injunctive relief. *Id*. In summary, the probable success on the merits prong is determinative. Plaintiffs have established their constitutional rights are violated by the challenged laws; therefore, they have necessarily established the irreparable harm, public interest, and balance of harms prongs.

B. The Factors Are Met Based on Law Weapons, Inc.'s Extreme Financial Duress

Plaintiffs LWI as well as its customers are being prohibited from exercising their Second Amendment rights, which means LWI will be forced out of business. Dkt. 71-1. 85% of the firearms LWI sells are banned under the Naperville ordinance and State law. *Id*., ¶ 12. Cash reserves have been depleted, and as a result, LWI has had to lay off employees and ask Bevis' family to work without pay. *Id*., ¶ 13. Bevis has extended his personal credit, missed personal payments like home and car payments, maxed his credit limits, and taken out loans to pay the monthly bills. *Id*. LWI will not be able to abide by the terms of its 15-year commercial lease for the business real property, as well as the equipment leases and inventory, if these bans remain in effect any longer. *Id*. In short, LWI will be put out of business if these laws are enforced. *Id*.

In *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544, 546 (7th Cir. 2007), the Court held that the plaintiffs "made a compelling case that it needs the injunction pending appeal to avert serious irreparable harm—the uncompensated death of its business." *See also*, *Dumanian v. Schwartz*, 2022 WL 2714994, at *14 (N.D. Ill. 2022), ("A likelihood of lost business is a form of irreparable injury because it is difficult to 'pin[ ] down what business has been or will be

lost.'"), *quoting Life Spine, Inc. v. Aegis Spine, Inc.*, 8 F.4th 531, 545 (7th Cir. 2021) (*quoting Hess Newmark Owens Wolf, Inc. v. Owens*, 415 F.3d 630, 632–33 (7th Cir. 2005)); *Gateway E. Ry. Co. v. Terminal R.R. Ass'n of St. Louis*, 35 F.3d 1134, 1140 (7th Cir. 1994) ("[A] damages remedy may be inadequate if it comes 'too late to save plaintiff's business'") (*quoting Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984)).

The "balance of harms" and "public interest" prongs merge when the government is the defendant. *Eli Lilly & Co. v. Cochran*, 526 F. Supp. 3d 393, 409 (S.D. Ind. 2021), *citing Nken v. Holder*, 556 U.S. 418, 435 (2009). In addition to the reasons identified above, these interests favor granting relief, because the State is not harmed by an injunction in this court, because the law is already subject to an injunction in another court, as this Court noted in its Order. Moreover, this is not a case where Plaintiffs have sought an injunction against a law of long standing. Neither of the challenged laws was effective until 2023. Therefore, an injunction would preserve the status quo. And a "preliminary injunction is often said to be designed to maintain the status quo pending completion of the litigation." *Praefke Auto Elec. & Battery Co. v. Tecumseh Prod. Co.*, 255 F.3d 460, 464 (7th Cir. 2001).

C. The Injunction Pending Appeal Must Apply to More Than Just the Plaintiffs

As the challenge to both laws is a facial challenge, the injunction can cover parties beyond the litigants in this case. *Smith v. Executive Dir. of Indiana War Memorials*, 742 F. 3d 282, 290 ("Because Smith has a reasonable likelihood of showing that the policy is unconstitutional both as it was applied to him and as it applies to individuals and small groups

generally, the preliminary injunction should prohibit its enforcement against any individual or small group").[5]

Accordingly, for this injunction pending appeal to truly avert irreparable harm and be effective, it must of necessity apply to all affected by the City ordinance and State law. Specifically, the injunction must enjoin enforcement of both laws against purchasers of the banned firearms as well as those who sell them. Otherwise, irreparable harm will still accrue to businesses such as Plaintiff LWI as they will still not be able to sell the banned firearms if those purchasing them are subject to enforcement of these laws against such purchases.

CONCLUSION

For the foregoing reasons, Plaintiffs have met all of the criteria for an injunction pending appeal and respectfully request the Court to enter such injunction forthwith.

/s/ Jason R. Craddock

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[5] While *Smith* is a First Amendment case, Second Amendment cases are treated the same as First Amendment cases for purposes of constitutional analysis. *Ezell v. City of Chicago*, 651 F. 3d 684, 697 (7th Cir. 2011) ("The loss of a First Amendment right is frequently presumed to cause irreparable harm based on 'the intangible nature of the benefits flowing from the exercise of those rights; and the fear that, if those rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future.'" (Citations omitted.) The Second Amendment protects similarly "intangible and unquantifiable interests," *id*, at 699).

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2023, I electronically filed a true and correct copy of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing via email counsel of record:

/s/ Jason R. Craddock

_____

Jason R. Craddock

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 22-cv-1685

ROCKY MOUNTAIN GUN OWNERS,
NATIONAL ASSOCIATION FOR GUN RIGHTS, and
CHARLES BRADLEY WALKER,

Plaintiffs,

v.

THE TOWN OF SUPERIOR, a Colorado municipality, and
JOE PELLE, in his capacity as Sheriff of Boulder County, Colorado

Defendant.

DECLARATION OF JAMES CURCURUTO

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1. My name is James Curcuruto.

2. I received my associate's degree in business administration from the State University of New York at Cobleskill in 1991 and my bachelor's degree in business management from the University of North Carolina at Wilmington in 1993. My 30-year business work history has focused primarily on sales, marketing, advertising, research, and analysis. I am currently the Executive Director of Outdoor Stewards of Conservation Foundation.

3. From November 2009 until January 2021, I was the Director, Research and Market Development, at the National Shooting Sports Foundation, Inc. (the "NSSF"). The NSSF, formed in 1961, is the trade association for the firearms, ammunition, hunting, and recreational shooting sports industry. Its mission is to promote, protect and preserve hunting and the shooting sports. The NSSF has a membership of 8,000 manufacturers, distributors, firearms retailers, shooting ranges, sportsmen's organizations, and publishers.

4. In my position as Director, Research and Market Development at the NSSF, I was responsible for most of the research activities at NSSF, and I directed the activities of an internal research manager as well as several outside companies retained to conduct research and gather market and consumer information useful to NSSF members.

5. Under my direction, dozens of informational reports and studies focusing on industry topics and trends, including firearms, ammunition, target shooting, and hunting, were released

to the NSSF member base, and many NSSF reports were shared outside the organization as well. Data from these releases has been referenced many times in endemic, non-endemic, online and print newspaper and magazine articles, used in corporate 10K reports, and mentioned in other media. I have authored and provided information for several articles published in trade magazines.

6. Plaintiffs' counsel has asked me to provide an opinion on (1) the prevalence of AR15 and similar firearms in American society, including rates of ownership of such firearms by law-abiding citizens; and (2) the prevalence of firearm magazines capable of holding more than ten rounds of ammunition in American society, including rates of ownership of such magazines by law-abiding citizens.

7. In summary, (1) between 1990 – 2021, more than 20 million AR-platform rifles have been manufactured in the United States and are owned by millions of persons in the United States and, (2) there are at least one hundred fifty million magazines of a capacity of more than ten rounds in possession of American citizens, commonly used for various lawful purposes including, but not limited to, recreational and competitive target shooting, self-defense, collecting and hunting.

I, James Curcuruto, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury that I have reviewed the foregoing, that I am competent to testify in this matter, and that the facts contained therein are true and correct

James Curcuruto

Date: July 13, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL ASSOCIATION FOR GUN RIGHTS, ROBERT C. BEVIS, and LAW WEAPONS, INC., d/b/a LAW WEAPONS & SUPPLY, an Illinois corporation;	)	Case No. 22-cv-04775
Plaintiffs,	)	
v.	)	
CITY OF NAPERVILLE, ILLINOIS, and JASON ARRES, Chief of Police of Naperville, Illinois;	)	
Defendants.	)	

DECLARATION OF ROBERT C. BEVIS IN SUPPORT OF MOTION FOR INJUNCTIVE RELIEF PENDING APPEAL

I, Robert C. Bevis, Plaintiff in the above-captioned suit, state the following under oath as if testifying in court:

1. I am a business owner in the City of Naperville, Illinois, and a law-abiding citizen of the United States.
2. The business I own in Naperville is (Plaintiff) Law Weapons, Inc. d/b/a Law Weapons & Supply, which is a duly registered Illinois corporation and Federally Licensed Firearm Dealer, which operates in Naperville, and is actively engaged in the commercial sale of firearms, including the most commonly owned semi-automatic rifles the AR-15.
3. On August 16, 2022, Naperville passed an ordinance banning the commercial sale of the most commonly owned semi-automatic rifles, and on January 10, 2023, the State of Illinois passed a similar law statewide.
4. I and as well as my customers desire to exercise our Second Amendment rights to acquire the firearms banned by the City of Naperville and the State of Illinois within the City of

Naperville for lawful purposes, including, but not limited to, the defense of our homes and personal protection.

5. The state law became effective upon passage on January 10, 2023, and the Naperville ordinance (which was stayed by agreement) became effective on February 17, 2023, when this Court denied our motion for preliminary injunction and temporary restraining order.
6. The Naperville ordinance applies only to Federally Licensed Commercial gun dealers, but not to private sales by unlicensed parties, which discriminates against me as a licensed gun dealer as well as my business.
7. The State Law exempts from its ban certain class of people because of their employment status, namely peace officers, active and retired law enforcement officers (including wardens and parole officers), active-duty only members of the Armed Forces of the United States and Illinois National Guard, and security companies and the guards they employ, but does not even exempt sitting or retired judges or people like myself (I am a Federally Licensed Firearm Dealer, a Certified Master Gunsmith, and an Illinois Licensed Private Detective and Law Enforcement Firearm Instructor licensed by the Illinois Department of Financial and Professional Regulation).
8. This ordinance will make the public less safe by limiting the ability of the public to protect themselves in the precious time it would take for police to respond to any threat to the public.
9. Law Weapons, Inc. has served the Citizens of Illinois, Law Enforcement, Security Companies and Guards as well as the FBI with training and equipment since it moved into in Naperville in 2014.

10. I as well as my customers are being prohibited now from exercising our Second Amendment rights in this fashion, which means I and my business will be forced out of business, but even worse, the citizens of Naperville (and now the State of Illinois) will be left as sitting ducks for criminals who will still get the banned firearms to accomplish their nefarious purpose, as history has confirmed.
11. I, the owner of Law Weapons, Inc., supported by my family, my staff, and a legion of friends and supporters, have been vigorously fighting against the Naperville ban, and now the State ban, since the beginning.
12. 85% of the firearms my business sells are banned under the Naperville ordinance and state law. Since the Naperville ordinance passed in August 2022, my business has seen a substantial continuing drop in sales, as many loyal customers aware of these laws assume we are closing and have begun buying the banned weapons from other dealers in municipalities and states where such sales are legal.
13. Further, cash reserves have been depleted, and as a result, I have had to lay off employees, ask my family to not accept paychecks, extended our credit, missing personal payments like home and car, maxing credit limits, taken out loans to pay the monthly bills and will not be able to abide by the terms of my 15-year commercial lease for the real property Law Weapons Dealership in Naperville as well as the equipment leases and inventory, if these bans remain in effect any longer. In short, Law Weapons, Inc. will be put out of business if these laws are enforced.
14. This is not an issue limited to Law Weapons, Inc., in Naperville; those opposing the Second Amendment right to keep and bear arms have banned firearms throughout the State of Illinois, using Naperville's ordinance as a model.

15. Thus, it is essential to enjoin ordinances such as the one enacted in Naperville and statutes such as the one enacted in Illinois as unconstitutional violations of the Second Amendment to the United States Constitution, at least pending the appeal of the denial of our Motion for Preliminary Injunction and TRO, so among other reasons my business and livelihood do not become a nullity.
16. Further, it is necessary to enjoin enforcement of these laws against my customers, for the reasons stated above, as any relief to me would be meaningless if not applied to my customers.

I, Robert C. Bevis, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury that I have reviewed the foregoing, that I am competent to testify in this matter, and that the facts contained therein are true and correct.

/s/ Robert C. Bevis
Robert C. Bevis

February 27, 2023
Date