IN THE
SUPREME COURT OF THE UNITED STATES

No. 22A948

NATIONAL ASSOCIATION FOR GUN RIGHTS, et al.,

Applicants,

v.

CITY OF NAPERVILLE, ILLINOIS, et al.,

Respondents.

On Emergency Application for Emergency Injunction to the Honorable Amy Coney Barrett, Associate Justice of the United States Supreme Court and Circuit Justice for the Seventh Circuit

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BRIEF FOR *AMICUS CURIAE* NATIONAL SHOOTING SPORTS FOUNDATION IN SUPPORT OF APPLICANTS

PAUL D. CLEMENT
ERIN E. MURPHY
Counsel of Record
MATTHEW D. ROWEN*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
erin.murphy@clementmurphy.com

*Supervised by principals of the firm who are members of the Virginia Bar

Counsel for Amicus Curiae

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae National Shooting Sports Foundation does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST[1]

The National Shooting Sports Foundation ("NSSF") is the national trade association for the firearm, ammunition, hunting, and shooting sports industry. NSSF's interest in this case is manifest. The recently enacted Protect Illinois Communities Act, codified at 720 ILCS 5/24-1.9 & 5/24-1.10 ("HB 5471"), bans the manufacture, sale, and, come 2024, possession of common firearms and ammunition feeding devices that are widely owned by millions of law-abiding citizens for lawful purposes. Among NSSF's members are the leading manufacturers, distributors, and retailers of these and other constitutionally protected products. NSSF's Illinois-based members provide the means by which Illinois residents (and others) acquire arms, including those banned by HB 5471, for self-defense and other lawful purposes.

That is why NSSF filed suit alongside Illinois residents and retailers challenging HB 5471's ban on so-called "assault weapons" and "large-capacity ammunition feeding devices" as inconsistent with the Second Amendment. *See* Compl., *Barnett v. Raoul*, No. 3:23-cv-00209 (S.D. Ill. filed Jan. 24, 2023), Dkt.1. The district court in that case recently granted a preliminary injunction that enjoins the state from enforcing HB 5471, including against the applicants in this case. *See Barnett v. Raoul*, 2023 WL 3160285, at *1 (S.D. Ill. Apr. 28, 2023). But the state—and the Seventh Circuit—have already vitiated that relief. The state noticed an appeal and filed a motion for a stay mere hours after the injunction issued, and it

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

filed an "emergency" motion in the Seventh Circuit—one day *after* this Court called for a response to this application, and after giving the district court just two business days to consider the (non-emergency) stay request that it filed in that court. *See* Notice of Appeal, *Barnett v. Raoul* (S.D. Ill. Apr. 28, 2023), Dkt.102; Mot. to Stay Prelim. Inj. Pending Appeal, *Barnett v. Raoul* (S.D. Ill. Apr. 28, 2023), Dkt.103; Emergency Mot. to Stay Prelim. Inj. Pending Appeal, *Barnett v. Raoul*, No. 23-1825 (7th Cir. May 2, 2023), Dkt.6.

Needless to say, all that haste was not justified by the need to avoid the irreparable injury of lost constitutional rights. It was instead in service of the state's effort to halt the sale of arms that have been perfectly lawful in Illinois for the better part of a century, and in some cases even longer. Nevertheless, the Seventh Circuit entered an extraordinary one-judge order wiping away the *Barnett* injunction a mere two days later,without even giving the plaintiffs a chance to respond. Order on State Defs.' Emergency Mot. to Stay Prelim Inj. Pending Appeal, *Barnett v. Raoul*, No. 23-1825 (7th Cir. May 4, 2023), Dkt.9. The state thus is now free to enforce its sweeping ban once again including against the applicant here. More extraordinary still, that order indicates that at least some members of the Seventh Circuit seem to believe that the Seventh Circuit's pre-*Bruen* decisions from the two-step era upholding similar, local-level bans on common semiautomatic firearms and standard-capacity magazines somehow remain good law, even though those decisions did not apply *Bruen*'s historical tradition test, but rather upheld the bans on the grounds that they [1] did not "ban[] 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 [2] did not deprive law-abiding citizens of the right to keep and bear *all* firearms, and thus supposedly left them with "adequate means of self-defense." *Friedman v. City of Highland Park*, 784 F.3d 406, 410-12 (7th Cir. 2015); *Wilson v. Cook Cnty.*, 937 F.3d 1028 (7th Cir. 2019).

NSSF and the other *Barnett* plaintiffs will vigorously attempt to restore the district court's preliminary injunction (which, unlike the Seventh Circuit's temporary stay, was the product adversarial proceedings and full briefing) and prevent the Seventh Circuit's temporary stay from becoming permanent in the response that the Seventh Circuit has ordered them to file by May 9. Nevertheless, given the Seventh Circuit's extraordinary act of immediately staying the *Barnett* injunction while invoking pre-*Bruen* precedent even as the propriety of injunctive relief pending appeal is *sub judice* with this Court, at this point the best course would be for this Court to grant this Application, and make clear that both HB 5471 and Naperville's similar ordinance should be enjoined pending appellate proceedings, and ensure that millions of law-abiding citizens are not deprived of their Second Amendment rights while the Seventh Circuit considers these appeals and, if necessary, Applicants and the *Barnett* plaintiff pursue their rights before this Court.

SUMMARY OF THE ARGUMENT

There are many difficult constitutional questions surrounding the regulation of firearms. Whether Illinois or its municipalities may ban firearms and magazines owned by millions of law-abiding Americans for lawful purposes is not one of them. This Court made crystal clear this past Term that "the Second Amendment protects

the possession and use of weapons that are 'in common use.'" *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111, 2128 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)). The firearms Illinois has banned are more common than the most popular truck in the United States, and the feeding devices it has banned are at least ten times more common than that. These are not newfangled innovations that demand novel government intervention. Semiautomatic rifles and pistols with the features Illinois has singled out have been around for generations, as have ammunition feeding devices that hold more than ten or fifteen rounds. As recently as just a few decades ago, it was common ground that these common arms are "lawful," *Staples v. United States*, 511 U.S. 600, 612 (1994), and millions of law-abiding Americas continue to legally possess them.

Slapping the label "assault weapon" or moniker "weapon of war" on firearms owned by millions of Americans for lawful purposes such as self-defense does not take them outside of the Second Amendment's protection. Nor does dubbing standard-issue magazines "large capacity ammunition feeding devices" change the fact that tens of millions of Americans own hundreds of millions of them as integral components of arms that they keep and use for self-defense and other lawful purposes like target shooting and hunting. The arms Illinois has banned are not just in common use; they are ubiquitous. Under a straightforward application of the principles set forth in *Heller* and reiterated in *Bruen*, that puts HB 5471 profoundly out of step with our nation's historical tradition of firearms regulation.

Unfortunately, that has not stopped Illinois and other states from continuing to pass such laws in the wake of *Bruen*. Indeed, the response of these states to *Bruen* has been perverse to the point of purposeful defiance. Instead of treating *Bruen* as an occasion to reconsider existing restrictions on constitutional rights of law-abiding citizens, they have enacted *new* "assault weapon" and/or "large-capacity magazine" bans, with more still on the way. *See* Substitute H.B. 1240, 68th Legis. (Wash. 2023) (enacted "assault weapons" ban); H.B. 450, Ch. 328, 151st Gen. Assembly (Del. 2022) (codified at 11 Del. C. §§1464-1467) (enacted "assault weapons" ban); S. Substitute 1 for S.B. 6, 151st Gen. Assemb. (Del. 2022) (codified at 11 Del. C. §§1441, 1468-1469A) (enacted "large-capacity magazines" ban); Ballot Measure 114, §11 (Or. 2022) (enacted "large-capacity magazines" ban); H 5300 (R.I. 2023), available at https://bit.ly/44oBKgn (proposed "assault weapons" ban); S.B. 1569 (Tenn. 2023), available at https://bit.ly/44n9GtO (proposed "assault weapon[s]" ban).

Making matters worse, some district courts have continued to sanction these laws through reasoning that is flatly incompatible with this Court's admonition that what matters under our nation's historical tradition is whether arms are "in common use *today*," *Bruen*, 142 S.Ct. at 2143 (emphasis added). *See, e.g.*, *Hanson v. District of Columbia*, 2023 WL 3019777, at *8-12 (D.D.C. Apr. 20, 2023) (concluding that magazines holding more than ten rounds are not protected because they are "most useful in military service"); *Ocean State Tactical, LLC v. Rhode Island*, 2022 WL 17721175, at *12-13 (D.R.I. Dec. 14, 2022) (concluding that magazines are not even "Arms" because they are purportedly mere "*holders* of ammunition, as a quiver holds

arrows"); *Or. Firearms Fed'n v. Brown*, 2022 WL 17454829, at *8-9 (D. Or. Dec. 6, 2022) (concluding that magazines holding more than ten rounds are not protected because firearms are not incapable of operating without them).

Fortunately, the district court in *Barnett* got this Court's message and enjoined Illinois' obviously unconstitutional law. But the district court in this case took a markedly different approach, upholding Illinois' law without even *analyzing* whether the arms it bans are "in common use today." And the state continues to insist that no such inquiry is required. *See* Mot. to Stay Prelim. Inj. Pending Appeal at 6, *Barnett v. Raoul* (S.D. Ill. Apr. 28, 2023), Dkt.103 (accusing the *Barnett* district court, which enjoined HB 5471, of "impos[ing] a new obligation … to 'demonstrate that the "arms" [HB 5471] bans are not in "common use"'").

Unfortunately, the Seventh Circuit has already wiped that injunction away. Rather than respect the considered judgment of the district court that entered a preliminary injunction after full briefing and argument and preserve the status quo that prevailed for the better part of a century of *protecting* the common arms that Illinois has now outlawed—or even wait for this Court to resolve this Application—the Seventh Circuit acted without even giving the *Barnett* plaintiffs a chance to defend the injunction. Worse still, the Seventh Circuit's order indicates that at least some members of that court apparently continue to believe that its pre-*Bruen* cases remain good law, even though they failed to apply either *Bruen*'s history and tradition test or the "common use" test that this Court has thrice laid out. That is an untenable state of affairs—and not just because a court of appeals has no license to disregard

this Court's clear holdings. The denial of constitutional rights even on a temporary basis is the classic irreparable harm supporting a stay. By contrast, the desire of a state to impose new restrictions on commonly held firearms in defiance of a recent and emphatic decision of this Court should not be given effect unless and until this Court has considered and upheld the law on the merits. While one would have hoped that the Seventh Circuit would recognize as much, its actions in the *Barnett* case leave little doubt that the best course of action is for this Court to step in and grant injunctive relief itself.

ARGUMENT

I. The Firearms And Magazines Illinois Has Banned Are "Arms."

This Court made clear just this past year that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Bruen*, 142 S.Ct. at 2126. After *Bruen*, then, the first question a court must ask in a case implicating the right to keep and bear arms is whether "the Second Amendment's plain text covers [the] conduct" the challenged law restricts. *Id.*

Here, the answer to that question is easy. As *Bruen* squarely held, "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.* at 2132 (quoting *Heller*, 554 U.S. at 582). Illinois has prohibited "the people" whose rights the Second Amendment protects from obtaining wide swathes of rifles, pistols, and shotguns. Rifles, pistols, and shotguns plainly "constitute bearable arms"—i.e., "instruments that facilitate armed self-defense," *id.*—no matter what kind of grip, stock,

ammunition feeding device, or other features they may have. The right to keep and bear them is thus "presumptively protect[ed]" by the Constitution. *Id.* at 2126.

In breezily concluding that the firearms Illinois has banned are not even "Arms" covered by the plain text of the Second Amendment, the district court in this case inexplicably ignored the test that *Bruen* articulated, and instead simply declared that "[t]he *text* of the Second Amendment is limited to only certain arms." App.020 (emphasis added); *see also* App.020 n.7 (asserting, without citation to anything, that "the Second Amendment's text only protect[s] certain 'arms'"). That confuses the *textual* inquiry and the *historical tradition* inquiry. To be sure, the Second Amendment does not guarantee "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. But that is because, under our "historical tradition" of firearm regulation, some things that "constitute bearable arms" nevertheless may be prohibited. *See Bruen*, 142 S.Ct. at 2132, 2143; *infra* Part II. That does not make those things any less "arms" under "the Second Amendment's definition," which covers *all* "instruments that facilitate armed self-defense." *Id.* at 2132. The threshold textual inquiry thus begins and ends with the indisputable fact that the firearms Illinois has prohibited "constitute bearable arms," and hence are "presumptively protect[ed]." *Id.* at 2126, 2132.

That is no less true of the ammunition feeding devices Illinois has banned. Feeding devices are not just "holders" of ammunition; they are an integral part of the mechanism that makes semiautomatic firearms work: When a user pulls the trigger, the round in the chamber fires, and the semiautomatic action combines with the

magazine to feed a new round into the firing chamber. Without a device to feed ammunition to the firing chamber, modern semiautomatic firearms cannot operate as designed and intended, and are little more than overengineered clubs. Citizens thus carry firearms equipped with magazines for the same constitutionally protected reason that they load those magazines with ammunition: "[W]ithout bullets, the right to bear arms would be meaningless," and the central purpose of the Second Amendment—self-defense—would be eviscerated. *Jackson v. City & Cnty. of S.F.*, 746 F.3d 953, 967 (9th Cir. 2014). The fact that magazines and other ammunition feeding devices are integral to the firearms that citizens carry to "facilitate armed self-defense" suffices to make them "presumptively protect[ed]" by the Constitution. *Bruen*, 142 S.Ct. at 2126, 2132.

II. The Arms Illinois Has Banned Are Typically Possessed By Law-Abiding Citizens For Lawful Purposes, Including Self-Defense.

Because the firearms and feeding devices Illinois has banned easily fit within "the Second Amendment's definition of 'arms,'" the state bears the burden of proving that they nonetheless may be banned "consistent with this Nation's historical tradition of firearm regulation." *Id.* at 2126, 2132. The state cannot come close to meeting that burden. This Court has already determined which "arms" may be banned consistent with "historical tradition": those that are not "in common use today," but rather are "highly unusual in society at large"—in other words, not just those that are particularly "dangerous" according to some state officials or judge, but those that are "dangerous *and unusual*" in modern America. *Id.* at 2143 (emphasis added) (quoting *Heller*, 554 U.S. at 627); *contra* App.020 & n.9, App.025, App.032,

App.035. That is the irreducible minimum of the Second Amendment: The government may not prohibit arms that are "overwhelmingly chosen by American society for [a] lawful purpose." *Heller*, 554 U.S. at 628. In the context of a flat ban, then, the only question after *Bruen* is whether the arms that have been banned are "typically possessed by law-abiding citizens for lawful purposes." *Id.* at 625; *see also Caetano v. Massachusetts*, 577 U.S. 411, 420 (2016) (Alito, J., concurring in the judgment) ("[T]he pertinent Second Amendment inquiry is whether stun guns are commonly possessed by law-abiding citizens for lawful purposes *today*."); *Friedman v. City of Highland Park*, 136 S.Ct. 447, 449 (2015) (Thomas, J., dissenting from the denial of certiorari) ("The overwhelming majority of citizens who own and use such rifles do so for lawful purposes, including self-defense and target shooting. Under our precedents, that is all that is needed for citizens to have a right under the Second Amendment to keep such weapons." (citation omitted)). If they are, then the state may not ban them.

Once again, the answer is easy. The arms that HB 5471 bans are the furthest thing from "highly unusual." HB 5471 bans all AR-platform rifles, both by feature and by name. 720 ILCS 5/24-1.9(a)(1)(A), (B), (J). Recent estimates indicate that millions of Americans collectively own more than 24 million of these rifles. William English, PhD, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* 2 (May 13, 2022), https://bit.ly/3HaqmKv; NSSF, *Commonly Owned: NSSF Announces Over 24 Million MSRs in Circulation* (July 20, 2022), https://bit.ly/3zKDFh4. That exceeds by a considerable amount the number of Ford

F-150s, America's most popular automobile, in the country. *See* Brett Foote, *There Are Currently 16.1 Million Ford F-Series Pickups on U.S. Roads*, Ford Auth. (Apr. 9, 2021), https://bit.ly/3GLUtaB.

Those figures should come as little surprise. This Court recognized nearly three decades ago that "AR-15 rifle[s]" are "widely accepted as lawful possessions." *Staples*, 511 U.S. at 603, 612. And "the numbers have been steadily increasing" since then. *Miller v. Bonta*, 542 F.Supp.3d 1009, 1020, 1022 (S.D. Cal. 2021), *vacated and remanded*, 2022 WL 3095986 (9th Cir. Aug. 1, 2022). "In 2018 alone[,] … 1,954,000 modern rifles were manufactured or imported into the United States." *Id.* at 1022. Again, that figure far outstrips the number of Ford F-series trucks sold in the same year. *See Fourth-Quarter 2020 Sales* at 2, Ford (Dec. 2020), https://ford.to/3H87Y5T (787,442 F-series trucks were sold in the U.S. in 2020). To state what should be obvious, a product lawfully owned and lawfully used by millions of Americans—and 20% of all gun owners in this country, *see* Wash. Post Staff, *Sept. 30-Oct. 11, 2022, Washington Post-Ipsos poll of AR-15 owners* (Mar. 26, 2023), https://wapo.st/3KrUouy— is not "highly unusual in society at large." *See Caetano*, 577 U.S. at 420 (Alito, J., concurring in the judgment) (deeming stun guns, which "approximately 200,000 civilians" owned as of 2016, sufficiently "widely owned and accepted" to come within the Second Amendment's protection).

HB 5471 does not stop with AR-platform rifles. It goes on to prohibit not only all semiautomatic rifles with a fixed (i.e., non-detachable) magazine that have "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," 720 ILCS 5/24-1.9(a)(1)(B), but also several commonly owned semiautomatic pistols and shotguns that are commonly used for hunting, target shooting, and home defense, 720 ILCS 5/24-1.9(a)(1)(C), (D), (F), (K), (L). To call these additional commonly owned firearms "highly unusual in society at large," *see Bruen*, 142 S.Ct. at 2143, is to deny reality—which likely explains why neither the state nor the district court even tried to make such a claim, even though the state must sustain that claim to carry its burden.

The district court instead appears to have concluded (albeit implicitly) that the arms Illinois has banned are not protected by the Second Amendment because they are not possessed *for lawful purposes*. But the court reached that conclusion only by emphasizing the terrible crimes that a very small number of people have committed by misusing firearms that the state now labels "assault weapons." *See* App.028-032. There is, of course, no question that these arms can be used to perpetrate horrific crimes, just as nearly any modern firearm can. But that has nothing to do with the relevant legal question—i.e., whether these arms are "*typically* possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625 (emphasis added). Indeed, the *Heller* dissenters protested that handguns "are specially linked to urban gun deaths and injuries" and "are the overwhelmingly favorite weapon of armed criminals." *Id.* at 682 (Breyer, J., dissenting). The majority did not dispute that. It just found it irrelevant to whether they are constitutionally protected, as that turns not on whether arms can be misused by criminals, but on whether law-abiding

citizens commonly own and use them for lawful purposes. So it was enough that handguns—the overwhelming majority of which today are semiautomatic—are typically possessed for lawful purposes. *See id.* at 624-25 (majority op.).

What was true in *Heller* is no less true here given the millions of Americans who own the arms that HB 5471 bans. Indeed, on the question that matters, the record is undisputed and indisputable: Purchasers consistently report that self-defense, hunting, and sport shooting are the most important reasons why they buy rifles on the AR-15 platform. *See* English, *2021 National Firearms Survey*, *supra*, at 33-34. Just as in *Heller*, then, Illinois' flat ban on these common arms is flatly unconstitutional.[2]

The same goes for its magazine ban. According to the most recent National Firearms Survey, approximately 39 million Americans—more than 10% of the nation's total population and more than 15% of all American adults—have owned feeding devices that hold more than ten rounds. English, *2021 National Firearms Survey*, *supra*, at 22; *see* NSSF, *Firearm Production in the United States* 7 (2020), https://bit.ly/3jfDUMt (300+ million magazines sold from 1990 to 2018, 52% of which had a capacity larger than ten rounds). And the numbers are trending upward: Recent data indicates that 75% of modern sporting rifle magazines have a standard capacity above ten rounds. NSSF, *Modern Sporting Rifle Comprehensive Consumer Report* (July 14, 2022), https://bit.ly/3GLmErS. In short, while "[t]here may well be

[2] And it bears repeating that HB 5471 ban does not just ban modern sporting rifles like AR-15s; it also bans a plethora of commonly owned pistols and shotguns as well.

some capacity above which magazines are not in common use[,] … that capacity surely is not ten." *Heller v. Dist. of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011).

The numbers are only slightly less staggering for magazines that can hold more than fifteen rounds. Many of the most popular rifles and handguns in the country come standard with magazines that hold more than fifteen rounds. *See* David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 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."); *see also, e.g.*, *Gun Digest 2018* at 386-88, 408 (Jerry Lee & Chris Berens eds., 2017). And the average American gun owner owns more ammunition feeding devices that can hold *over* fifteen rounds than feeding devices that hold *under* ten rounds. *See* English, *2021 National Firearms Survey*, *supra*, at 24-25. The feeding devices that HB 5471 bans are thus even more ubiquitous than the firearms it bans, making Illinois' effort to prohibit them every bit as unconstitutional.

III. There Is No Historical Tradition In This Country Of Banning These Ubiquitous Arms.

The analysis should end there. "[T]he traditions of the American people … demand[] our unqualified deference," *Bruen*, 142 S.Ct. at 2131, and the tradition of the American people is that law-abiding citizens may keep and bear arms that are commonly possessed for lawful purposes like self-defense. In the context of a flat ban on the acquisition or even possession of classes of arms, that *is* the historical test—*i.e.*, the key inquiry under *Bruen*—and it forecloses the state's effort to ban these commonly possessed arms. Simply put, a state may not prohibit what the

Constitution protects. In all events, historical regulations do not help the state anyway. While there are interesting questions about whether the proper historical framework should focus on 1791 or 1868, *see Bruen*, 142 S.Ct at 2163 (Barrett, J., concurring), no one could credibly claim that a regulatory effort initiated in 1989 qualifies as a historical tradition of the American people. In reality, Illinois' effort to revive a recent, short-lived, and abandoned federal effort to regulate commonly owned firearms—and to do so in the immediate wake of *Bruen*, no less—is an act of defiance, not an effort to follow any American tradition worthy of the name.

1. Before "the 1990's, there was no national history of banning weapons because they were equipped with furniture like pistol grips, collapsible stocks, flash hiders, … or barrel shrouds." *Miller*, 542 F.Supp.3d at 1024. The earliest laws treating such features as sufficient to convert an otherwise-lawful firearm into a so-called unlawful "assault weapon" date back to only 1989, and the earliest restriction on magazine capacity dates back only to 1990, which is far too late to serve as an indicator of a "historical tradition." *See Bruen*, 142 S.Ct at 2126. Even today, moreover, such laws remain rare; the arms Illinois has banned are legal in (at least) 40 states, and the magazines it has banned are legal in (at least) 36.[3] As for the federal government, it did not restrict semiautomatic arms, semiautomatic firing capacity, or magazine capacity until 1994, when Congress adopted a nationwide ban on certain semiautomatic firearms and ammunition feeding devices with a capacity

[3] Illinois' ban is so aggressive that it reaches many arms that even some of the states that do have "assault weapon" bans do not prohibit. *See, e.g.*, Haw. Rev. Stat. Ann. §134-1 (defining assault pistol as a semiautomatic firearm that "accepts a detachable magazine and has two or more" additional features).

of more than ten rounds. *See* Pub. L. No. 103-322, 108 Stat. 1796 (1994) (formerly codified at 18 U.S.C. §922(w)). And Congress allowed that law to expire in 2004 after a Justice Department study revealed that it had produced "no discernable reduction" in violence committed with firearms. Christopher S. Koper et al., *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets & Gun Violence, 1994-2003,* Rep. to the Nat'l Inst. of Justice, U.S. Dep't of Justice 96 (2004), available at https://bit.ly/3wUdGRE.

The lack of any historical tradition of prohibiting arms with the features Illinois has singled out is not owing to some "dramatic technological change[]" that came about in the past few decades. *See Bruen*, 142 S.Ct. at 2132. "[T]he first firearm that could fire more than ten rounds without reloading was invented around 1580." *Duncan v. Becerra*, 970 F.3d 1133, 1147 (9th Cir. 2020), *reh'g en banc granted, opinion vacated*, 988 F.3d 1209 (9th Cir. 2021), *rev'd and remanded on reh'g en banc sub nom.*, *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021), *cert. granted, judgment vacated*, 142 S.Ct. 2895 (2022), *and vacated and remanded*, 49 F.4th 1228 (9th Cir. 2022). Several such arms pre-dated the Revolution, some by nearly 100 years. For example, the popular Pepperbox-style pistol could "shoot 18 or 24 shots before reloading individual cylinders," and the Girandoni air rifle, which "had a 22-round capacity," "was famously carried on the Lewis and Clark expedition." *Id.*

Cartridge-fed repeating firearms came onto the scene "at the earliest in 1855 with the Volcanic Arms lever-action rifle that contained a 30-round tubular magazine, and at the latest in 1867, when Winchester created its Model 66, … a full-

size lever-action rifle capable of carrying 17 rounds" that "could fire 18 rounds in half as many seconds." *Id.* at 1148; *see* Louis A. Garavaglia & Charles G. Woman, *Firearms of the American West 1866-1894*, at 128 (1984). These multi-shot firearms were not novelties; they were common among civilians by the end of the Civil War. "[O]ver 170,000" Winchester 66's "were sold domestically," *Duncan*, 970 F.3d at 1148; the successors that replaced the Model 66, the Model 73 and Model 92, sold more than ten times that amount in the ensuing decades, *id.*; and Winchesters were far from unique in this regard, *see* Harold F. Williamson, *Winchester: The Gun That Won The West* 28-31 (1952) (Henry lever action rifle could fire 16 rounds without reloading); Norm Flayderman, *Flayderman's Guide to Antique American Firearms and Their Values* 305 (9th ed. 2007) (14,000 Henry rifles were sold between 1860 and 1866).

Even narrowing the lens to semiautomatic firearms equipped with detachable box magazines and features like a pistol grip, these too have been around for more than a century. *See* Nicholas J. Johnson, et al., *Firearms Law and the Second Amendment* 463, 519 (2d ed. 2018). Indeed, one of the firearms Illinois has specifically identified in the *Barnett* case as prohibited by HB 5471 is the Broomhandle, which dates back to 1896. *See* Ex. A to Decl. of William E. Demuth II, at 8, *Barnett v. Raoul*, No. 3:23-cv-00209 (S.D. Ill. Mar. 2, 2023), Dkt.37-3; *Duncan*, 970 F.3d at 1148. Yet while many states and the federal government began restricting *fully automatic* firearms during the Prohibition Era, only a handful of states and D.C. imposed any restrictions on *semi*automatic arms—and most were either repealed outright or replaced with laws regulating only machine guns.

Duncan, 970 F.3d at 1150 & n.10.[4] That divergent historical treatment is particularly notable because semiautomatic arms had been on the civilian market for decades before anyone tried to market automatic firearms to civilians. In fact, unlike automatics, semiautomatic arms were civilian arms from the start. *See* Johnson et al., *Firearms Law*, *supra*, at 463, 519. Yet while more than a dozen states banned automatic arms within only a couple years of their entry onto the civilian market in 1925, very few ever restricted semiautomatic arms.

None of that is terribly surprising. Centuries of experience demonstrate that people have *always* gravitated toward firearms with features that enhance their ability to fire more rounds more quickly without compromising accuracy, safety, or functionality. That explains why single-shot muskets gave way to multi-shot Pepperbox pistols, revolvers, and repeating rifles in the decades after the Founding, why Winchester rifles quickly became the weapon of choice for many in the late-nineteenth century, why semiautomatic models largely displaced models with more cumbersome, less efficient feeding devices in the twentieth century, and why pistols and AR-platform rifles soared in popularity precisely when detachable magazines capable of holding more rounds became more compact and reliable.

[4] The district court claimed that "nine states passed semiautomatic-weapon regulations" in the 1920s and 1930s, App.026, but some of the laws it cited did not apply to semiautomatics. For instance, South Dakota's "Act Relating to Machine Guns" applied only to *automatic* weapons from which multiple shots could be discharged "by a single function of the firing device." 1933 S.D. Sess. Laws 245-47, ch. 206, §§1-8. Minnesota's law applied to semiautomatics only to the extent they were "altered or modified to increase the magazine capacity from the original design as manufactured by the manufacturers." 1933 Minn. Laws ch. 190, §1(b). And two others merely required a special license; they did not prohibit sale or possession. *See* 1933 Cal. Stat., ch. 450; 1933 Ohio Laws 189. In all events, and most important, *all* of these Prohibition-era laws were either repealed entirely within a few decades or replaced with laws regulating only fully automatic weapons.

Simply put, there is no "enduring American tradition of state regulation" forbidding the possession of any kinds of semiautomatic rifles and pistols by law-abiding citizens for lawful purposes. *Bruen*, 142 S.Ct. at 2135. To the contrary, the enduring American tradition is one of protecting the right of the people to possess firearms that, like semiautomatic rifles and pistols equipped with common features such as detachable magazines, pistol grips, and thumbhole stocks, are "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 624-25. Because Illinois cannot "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," *Bruen*, 142 S.Ct. at 2127, HB 1240 violates the Second Amendment.

2. The district court's contrary conclusion was every bit as flawed as its atextual conclusion that rifles, pistols, and shotguns somehow cease to be "Arms" entirely if they are equipped with certain features. The court began by insisting that "history and tradition demonstrate that particularly 'dangerous' weapons are unprotected," without even addressing common possession. App.020. But this Court has recognized only a "historical tradition of prohibiting the carrying of 'dangerous *and* unusual weapons.'" *Bruen*, 142 S.Ct. at 2128 (emphasis added) (quoting *Heller*, 554 U.S. at 627). As Justice Alito has explained, "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 in the judgment). Dangerousness is not enough; states may ban only those arms that are, at a minimum, "highly unusual in society at large." *Bruen*, 142 S.Ct. at 2143 (quoting *Heller*, 554 U.S. at 627).

Given that the district court started off in fundamentally the wrong place, it should come as little surprise that its read of the history was fundamentally confused. "Laws regulating melee weapons," App.024, are indeed part of our nation's history, but they do not show that commonly owned but "uncommonly" dangerous arms were commonly banned. They show exactly what *Heller* and *Bruen* held: The only arms that states and municipalities have historically restricted in this country are those sparingly chosen by law-abiding citizens for lawful purposes but overwhelmingly chosen by criminals for illicit ends—in other words, weapons that were *both* dangerous *and* unusual. Moreover, most of the laws the district court cited did not even ban the weapons they regulated outright; rather, as *Bruen* explained in painstaking detail, they either prohibited concealed carry (while allowing open carry and possession) or merely "prohibit[ed] bearing arms in a way that spreads 'fear' or 'terror' among the people." 142 S.Ct. at 2145; *see id.* at 2142-56. Those laws thus "cannot pass 'constitutional muster' as a historical analogue to demonstrate this Nation's historical tradition regarding an 'arms' ban" like Illinois'. *Barnett*, 2023 WL 3160285, at *11 (quoting *Bruen*, 142 S.Ct. at 2133). After all, "the relevant analysis of each historic firearm regulation must be centered around 'how and why' the regulation burdened Second Amendment rights," and "[t]he 'how and why' of a concealed carry regulation is categorically different than the 'how and why' of a ban on possession." *Id.* (quoting *Bruen*, 142 S.Ct. at 2133).

As for the rest of the district court's historical narrative, this Court has already determined the import of the fact "that colonial legislatures sometimes prohibited the

carrying of 'dangerous and unusual weapons'": "[E]ven if these colonial laws prohibited the carrying of [certain arms] 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 (quoting *Heller*, 554 U.S. at 627). And rightly so, as it would be particularly perverse to restrict law-abiding citizens' access to arms *because* they are more accurate, reliable, and efficient than their predecessors—which likely explains why no such historical tradition exists. Instead, far from treating technological advancements aimed at improving the accuracy, firing capacity, and functionality of firearms as nefarious developments that made them "too dangerous," history establishes time after time that those are precisely the kinds of things people have consistently looked for when determining how best to protect self, others, and home.

* * *

In short, the district court's analysis in this case was profoundly out of step with this Court's precedent, which makes it troubling that the Seventh Circuit declined to intervene and restore the longstanding status quo that HB 5471 abruptly disrupted. While NSSF had hoped that that decision could be chalked up to an effort to exercise restraint in the procedural posture of a request for extraordinary relief pending appeal, it is now clear that that is not the case. Rather than exercise that same restraint when confronted with the state's extraordinary request to stay the *Barnett* court's status-quo-preserving preliminary injunction entered after full briefing and argument pending the state's appeal, the Seventh Circuit granted the

state relief before even giving the plaintiffs an opportunity to respond to the state's motion. The net result is that the *Barnett* court's state-wide preliminary injunction has been wiped away, putting the ball squarely in this Court. Accordingly, this Court should grant the application and make clear that Applicants, NSSF's members, and countless other law-abiding Illinois residents are not deprived of their Second Amendment rights while the Seventh Circuit considers the constitutionality of laws that are exceedingly unlikely to survive in the final analysis.

CONCLUSION

For the foregoing reasons, this Court should grant the application.

Respectfully submitted,

PAUL D. CLEMENT
ERIN E. MURPHY
Counsel of Record
MATTHEW D. ROWEN*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
erin.murphy@clementmurphy.com

* Supervised by principals of the firm who are members of the Virginia Bar

Counsel for Amicus Curiae

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