No. 22A948

In The
Supreme Court of the United States

NATIONAL ASSOCIATION FOR GUN RIGHTS; ROBERT C. BEVIS; and LAW WEAPONS, INC d/b/a LAW WEAPONS & SUPPLY, an Illinois corporation,

Plaintiffs-Applicants,

v.

CITY OF NAPERVILLE, ILLINOIS and JASON ARRES,

Defendants-Respondents,

and

THE STATE OF ILLINOIS,

Intervening Party-Respondent

To the Honorable Amy Coney Barrett, Associate Justice of the United States Supreme Court and Circuit Justice for the Seventh Circuit

Reply in Support of Emergency Application for Injunction Pending Appellate Review

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I. Introduction

In its last term, the Court removed the slightest doubt that in Second Amendment cases, the constitutional inquiry begins and ends with the constitutional text as illumined by the Nation's history and tradition. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2129-30 (2022). The Court rejected the then-prevailing approach in which the Courts of Appeals employed a judge empowering interest-balancing inquiry that asked whether the statute burdened a protected interest out of proportion to its perceived salutary effects on other important governmental interests. *Id.*, 142 S. Ct. at 2126.

Unfortunately, the Seventh Circuit appears to be poised to eschew *Bruen's* direction in favor of its own precedent. After Plaintiffs' application to this Court was filed, the district court in *Barnett v. Raoul*, 2023 WL 3160285, at *12 (S.D. Ill. Apr. 28, 2023),[1] entered a preliminary injunction against the same State of Illinois' arms ban at issue in this case. But only days later the Seventh Circuit entered an order staying the injunction. Suppl. App. 2. In conjunction with the stay, the court instructed the parties to brief the relevance of its pre-*Bruen* precedent, *Friedman v. City of Highland Park, Illinois*, 784 F.3d 406 (7th Cir. 2015).

This is unfortunate because the holding in *Friedman* cannot be reconciled with either *Heller* or *Bruen*. In that case, over a vigorous dissent, the

[1] *Barnett* is the lead case in four consolidated cases.

court upheld an arms ban similar to the one at issue in this case. *Id.*, 784 F.3d at 412. It upheld the ban even though it was undisputed that millions of Americans own AR-15-type rifles for lawful purposes. Astoundingly, one of the reasons the court advanced for upholding the ban was that it made people feel better.[2] When has any court held that any other Bill of Rights guarantee must yield because a law burdening it makes people feel good? The obvious answer to that question is "never." Which is why in *Friedman v. City of Highland Park, Ill.*, 577 U.S. 1039 (2015), Justice Thomas, joined by Justice Scalia, subjected the Seventh Circuit's decision to a withering critique, explaining how its "crabbed reading of *Heller*" was completely inconsistent with the principles announced in that case. *Id.* (Thomas, J., dissenting from denial of certiorari).

In this case, the Seventh Circuit denied Plaintiffs' motion for an injunction pending appeal with no explanation. It then stayed an injunction entered by a different court that would have protected Plaintiffs at least from the State's law,[3] and it appears poised to use its own pre-*Bruen* precedent to evaluate the State's law. But as explained in their Application, Plaintiffs have met all of the requirements for the entry of an injunction pending

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[2] *See* 784 F.3d at 412 (ban is beneficial because it makes people feel safer); *See also Kolbe v. Hogan*, 813 F.3d 160, 182 (4th Cir. 2016), *on reh'g en banc*, 849 F.3d 114 (4th Cir. 2017) (Traxler, J., dissenting) (rejecting *Friedman* because under its "view, a significant restriction on a fundamental right might be justified by benefits that are quite literally imagined into existence."); and *Miller v. Bonta*, 542 F. Supp. 3d 1009, 1055 (S.D. Cal. 2021), *vacated and remanded*, 2022 WL 3095986 (9th Cir. Aug. 1, 2022) (*Friedman* upheld the ban because it was "good for the community psyche.").

[3] Though, as noted in the Application, Plaintiffs are fighting on two fronts. They will not have complete relief until both the State's and the City's laws are enjoined.

appeal. Therefore, they respectfully request the Court to enjoin the Illinois and City of Naperville laws challenged in this action pending resolution of the pending appeal.

II. Summary of the Argument

In response to Plaintiffs' Application, the State[4] argues that its arms ban is consistent with the Nation's history and tradition of firearm regulation. But this is obviously wrong. In *Heller*, the Court held that a ban on arms typically possessed by law abiding citizens for lawful purposes was an extreme historical outlier. *Id.*, 554 U.S. at 629. The firearms and magazines banned by the State are possessed in the tens of millions by law-abiding citizens for lawful purposes, and the State's ban of these arms is no less of an extreme outlier than the one struck down in *Heller*. As in *Heller*, none of the historical arms *regulations* identified by the government are analogous to its *categorial ban*.

The State asserts that the banned arms are not covered by the plain text of the Second Amendment. This is obviously wrong because the banned rifles and magazines are bearable arms, and this Court has held that all bearable arms are prima facie covered by the Second Amendment. *Heller*, 554 U.S. at 582.

[4] This brief focuses primarily on replying to the State's Answer. Plaintiffs' arguments are intended to apply also to the largely duplicative arguments raised in the City's Answer. Where the City has raised an issue unique to itself, Plaintiffs will respond to it separately.

The State argues that the banned magazines are mere boxes for storing ammunition, and storage containers are not covered by the plain text of the Second Amendment. Amazingly, using the same analysis, the State also asserts that ammunition is not covered by the plain text. St. Resp. 15. This is wrong because the Second Amendment protects all instruments that facilitate armed self-defense. *Bruen*, 142 S. Ct. 2132. And both ammunition and the magazines that feed it into the firearm are necessary for a semi-automatic rifle to operate. Indeed, magazines are what make semi-automatic fire possible.

The State argues that Plaintiffs have failed to carry their burden under the "plain text" prong of the *Bruen* analysis because they have not demonstrated the arms are in common use for lawful purposes. This argument does not make sense. Again, the plain text of the Second Amendment extends to all bearable arms, and whether a weapon is in common use has no relevance to its status as a bearable arm. The State's argument is an attempt to shirk its burden under the second prong of the *Bruen* test. *Heller* held that under the Nation's history and tradition of firearms regulation, the government may justify banning a weapon only by demonstrating that it falls within one of the following two categories: (1) dangerous and unusual weapons, or (2) sophisticated military arms like machine guns, bombers, and tanks. *Id*. 445 U.S. at 627. It is the State's obligation to justify its arms ban by demonstrating that the banned arms fall into one of these categories. It is

not Plaintiffs' burden to demonstrate the opposite. To be sure, Plaintiffs have submitted overwhelming evidence that the arms are in common use. But they submitted that evidence to show that it is impossible for the government to meet its burden. They did not submit it because "common use" has anything to do with the "plain text" of the Second Amendment.

Unable to rebut the overwhelming evidence that the arms it has banned are "typically possessed by law-abiding citizens for lawful purposes,"[5] the State retreats to the argument that an arm is not protected unless it is in fact frequently *actually* used for self-defense. But the common use test is based on the arms prevalence in society. *Heller* struck down D.C.'s handgun ban because handguns are "overwhelmingly chosen" by American society for a lawful purpose. *Id.*, 554 U.S. at 628. Nothing in *Heller* nor *Bruen* requires Plaintiffs to conduct studies about the use of banned arms. Instead, following *Heller's* lead, most courts have held that common use is established by the choices of the Americans who acquire them in overwhelming numbers.

The State argues that the banned arms are unprotected because they are "militaristic." But the fact that a commonly used arm may be used in war does not preclude it from being protected under the Second Amendment. As Justice Alito wrote in *Caetano v. Massachusetts*, 577 U.S. 411 (2016), "*Miller* and *Heller* [merely] recognized that militia members traditionally reported for duty carrying 'the sorts of lawful weapons that they possessed at home,'

[5] *Heller*, 554 U.S. at 625.

and that the Second Amendment therefore protects such weapons as a class, regardless of any particular weapon's suitability for military use." *Id*,, 577 U.S. at 419 (Alito, J., concurring).

III. The Plain Text of the Second Amendment Covers the Banned Arms

A. The Plain Text Covers the Banned Firearms

The State argues that the banned firearms are not indisputably "arms" within the Second Amendment's plain text. State Ans. 15. This is more than just incorrect; it defies common sense. All fire*arms* are arms. *Heller*, 554 U.S. at 581-82 "[T]he Second Amendment extends, prima facie, to *all* instruments that constitute bearable arms." *Id*., 554 U.S. at 582 (emphasis added). Therefore, the text of the Second Amendment, prima facie, extends to the banned firearms.

The State does not seem to understand the difference between (1) conduct prima facie protected by the text and (2) the subset of that conduct that may be regulated consistent with the Nation's history and traditions. This distinction is not unique to the Second Amendment. For example, on its face, the First Amendment prohibits all laws abridging freedom of speech. But that seemingly absolute guarantee sometimes yields to a regulation that is consistent with the Nation's history and tradition of speech regulation. Thus, "[l]aws punishing libel … are not thought to violate 'the freedom of speech' to which the First Amendment refers because such laws existed in 1791 and have been in place ever since." *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117,

122 (2011). Libel is not protected by the First Amendment, but no one would argue that because it is unprotected it is not "speech" in the first instance.

Similarly, the plain text of the Second Amendment extends to all "arms." Nevertheless, a prohibition on a "dangerous and unusual" weapon (such as a short-barreled shotgun) does not violate the Second Amendment because laws banning such weapons existed in 1791 and have been in place ever since. *Heller*, 554 U.S. at 627. A short-barreled shotgun is not protected by the Second Amendment, but no one would argue that because it is unprotected it is not a bearable arm in the first instance. In this case, the semi-automatic firearms banned by the challenged laws are bearable arms, and the plain text of the Second Amendment extends, prima facie, to protect them. The State is free to argue that its ban of these firearms is consistent with the Nation's history and tradition of firearm regulation. But there is no reasonable argument that they are not "arms" covered by the plain text in the first instance.

B. The Plain Text Covers the Banned Magazines

The State asserts that so-called "large capacity magazines" are not covered by the plain text of the Second Amendment. St. Resp. 15. This too is wrong. The right to keep and bear firearms implies a corresponding right to items necessary to make the right effective. *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) (recognizing right to access to training). *See also Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014) (ammunition protected though it is not an arm per se). Justice Thomas cited both

Jackson and *Ezell* with approval in *Luis v. United States*, 578 U.S. 5 (2016), in which he explained that a constitutional right implicitly protects those closely related items necessary to its exercise. *Id.*, 578 U.S. at 26-27 (Thomas J., concurring). Similarly, in *Bruen* the Court held that the Second Amendments' definition of "arms" covers all instruments that facilitate armed self-defense." *Id.*, 142 S. Ct. 2132.

Magazines are an essential component of all modern semi-automatic firearms. A magazine feeds cartridges into the firearm after each shot so that another shot can be fired with each pull of the trigger. Thus, for obvious reasons, if there is no magazine from which cartridges are fed into the firearm, semi-automatic fire is impossible.[6] That is why in *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Att'y Gen. New Jersey*, 910 F.3d 106, 116 (3d Cir. 2018) (*abrogated on other grounds by Bruen*), the court held that "[b]ecause magazines feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended, magazines are 'arms' within the meaning of the Second Amendment." Similarly, in *Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015), the court held that magazines are necessary to make semi-automatic firearms work and therefore there is a "right to possess the magazines necessary to render those firearms operable." *Id.* 779 F.3d at 998. *See also Barnett v. Raoul*, 2023 WL 3160285, at *8 (S.D. Ill. Apr. 28, 2023) (not a close call that magazines are arms under the plain text).

[6] Thus, at the very least, magazines are "instruments that facilitate armed self-defense."

The State asserts that magazines are not covered by the plain text because they are just a box in which ammunition is stored. St. Resp. 16. Astoundingly, the State also asserts that ammunition – without which the right to keep and bear a firearm is meaningless – is also not covered by the plain text.[7] *Id.* The State arrives at these dubious conclusions based on the "corpus linguistics" analysis of its expert, Dennis Baron (*see* 7th Cir. Doc. 15 at A519-A570). Baron offered opinions based on this methodology in *Heller*, which opinions this Court described as "worthy of the Mad Hatter." *Heller*, 554 U.S. at 589. Nothing has changed. Baron opines that a modern magazine, like an 18th-century cartridge box, is merely a box in which ammunition is stored, and boxes are not arms. 7th Cir. Doc. 15 at A529-30. Indeed, mere boxes are not arms. But as discussed above, a modern magazine is not merely a box in which ammunition is stored. Magazines are dynamic and integral components of all semi-automatic firearms without which semi-automatic fire is impossible.[8] Thus, to credit the State's argument, the Court would have to implicitly hold that a ban on all semi-automatic fire would be constitutional. Obviously, such a holding would be radically inconsistent with *Heller* and *Bruen*.

IV. The State Has the Burden of Showing that the Banned Weapons Fall into One of the Categories of Weapons that May be Banned

[7] If the State's analysis were correct and ammunition is not protected by the Second Amendment, it could effectively disarm all of its citizens tomorrow. One suspects that such a result would not be consonant with *Heller* or *Bruen*.

[8] The State cites *Ocean State Tactical, LLC v. State of Rhode Island*, 2022 WL 17721175 (D.R.I. 2022), to support its conclusions. The court in that case went astray when it relied on Professor Baron's characterization of a magazine as merely a storage box. *Id.*, *13.

The State is confused about where the burdens lie in this case. It asserts that *Plaintiffs* have failed to meet *their* burden under the "plain text" prong of showing that the banned arms are in common use. St. Resp. 16. But Plaintiffs have no such burden. To meet their "plain text" burden, Plaintiffs need only show that the banned arms are bearable arms.[9] The burden then shifts to the government to justify the ban under the "history and tradition" prong. *Heller* held that the government may justify banning a weapon under the Nation's history and tradition of firearms regulation by demonstrating that it falls within one of the following two categories: (1) dangerous and unusual weapons, or (2) sophisticated military arms like machine guns, bombers, and tanks. *Id*. 445 U.S. at 627.

The State knows it cannot hope to demonstrate that the banned weapons fall within either of these categories, so it pretends that it is Plaintiffs' burden to demonstrate the opposite. But the State's argument fails, because under *Heller* and *Bruen*, the State has the burden of justifying its categorical ban. Plaintiffs do not have the burden of showing the ban is not justified. In other words, justification of a categorical ban falls under the "history and tradition" prong, not the "plain text" prong. *See, e.g. Heller*, at 627 (referring to the "*historical tradition* of prohibiting the carrying of 'dangerous and unusual weapons'") (emphasis added).

[9] Is the State seriously suggesting that a bearable arm loses its status as such if it is not commonly used? One hopes not, because that would be an absurd suggestion.

The Court might ask why Plaintiffs have submitted so much evidence that the banned arms are in common use if they have no obligation to do so to meet their burden under the plain text prong of the *Bruen* test. The answer is that while Plaintiffs are not required to submit such evidence, they may do so to shortcut, as it were, the resolution of the history and tradition prong. As discussed in detail in the Application, an absolute ban of a commonly used firearm is categorically unconstitutional because there is no historical tradition supporting such a ban. That means that if Plaintiffs do show that the banned arms are in common use, it is impossible for the State to meet its burden under the history and tradition prong.

V. The Banned Arms are Commonly Possessed

A. The State's Quibbles do not Amount to a Rebuttal

The State quibbles with Plaintiffs' common use evidence (St. Resp.17-19), but it offers no evidence of its own to refute it. Moreover, it is difficult to understand why the State would quibble with this evidence in the first place. As set forth in the Application, the evidence of common use is overwhelming, and multiple courts (even courts that ultimately denied Second Amendment claims) have held that the banned arms are in common use. Indeed, the evidence is so widely confirmed that the City's expert comes out and admits that it is accurate. *See* Declaration of Louis Klarevas, Doc. 57-7 (acknowledging there are 24.4 million rifles of the type banned). Finally, when even an anti-Second Amendment publication like the Washington Post publishes a study

showing that millions of American possess the banned firearms for lawful purposes, the matter is not reasonably disputable. *See* Emily Guskin, Aadit Tambe, and Jon Gerberg, The Washington Post, *Why do Americans own AR-15s*? (March 27, 2023) (available at bit.ly/3G0vbG9).

B. *Heller* Does Not Require Proof of Actual Use

Unable to rebut the overwhelming evidence that the arms it has banned are "typically possessed for lawful purposes," the State retreats to the specious argument that an arm is not protected unless it is in fact frequently *actually* used for self-defense. St. Resp. 17. The State misinterprets *Heller*. In *Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1276 (N.D. Cal. 2014), *aff'd sub nom. Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015), the court wrote that "Second Amendment rights do not depend on how often [an arm] is actually used." *Id.* The "standard is whether the prohibited [arms] are 'typically possessed by law-abiding citizens for lawful purposes,' not whether the magazines are often used for self-defense." *Id.* Thankfully, most people will never need to defend themselves with a firearm. That should be celebrated, "not seen as a reason to except [an arm] from Second Amendment protection. Evidence that such magazines are 'typically possessed by law-abiding citizens for lawful purposes' is enough." *Id.*

The State's interpretation flies in the face of *Heller's* plain language, as Justice Thomas recognized. *Friedman v. City of Highland Park, Ill.*, 577 U.S. 1039 (2015) (Thomas, J., dissenting from denial of cert.). In discussing the

arms ban at issue in that case, Justice Thomas wrote that Americans own these arms "for lawful purposes like self-defense." *Id*. Justice Thomas reached this conclusion, as the Court did in *Heller*, based on the bare fact that millions of Americans have chosen to acquire the arms. *Id*. Neither Justice Scalia in *Heller* nor Justice Thomas in *Friedman* required an empirical study regarding the "actual use" of the arms to support their conclusions.

Moreover, contrary to the State's argument, in *Heller* the Supreme Court did not focus on "use" in isolation. The Court held that the Second Amendment conferred an individual right to *keep* and bear arms. *Id*., 554 U.S. at 595 (emphasis added). The Court held that "keep arms" means "possessing arms." *Id*., 554 U.S. at 583. And the Court held that banning "the most preferred firearm in the nation to *keep* and use for protection of one's home and family [fails] constitutional muster." *Id*., 554 U.S. at 628–29 (cleaned up; emphasis added). If the State's interpretation of *Heller* were correct, the word "keep" in that sentence would be superfluous. It is not. Thus, the Second Amendment protects those arms "typically *possessed* by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625.

Nowhere in *Heller* did the Court suggest that it is necessary to show that a weapon's actual use in self-defense meets some threshold the State has not identified. *Heller* simply listed some of the reasons why Americans "may prefer" handguns. *Id*., 554 U.S. at 629. But in the end, *Heller* concluded that the reasons people chose handguns is not relevant to the constitutional

analysis. The Court wrote: "*Whatever the reason*, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *Id.* (emphasis added). Whatever the reason, the firearms and magazines banned by the State are chosen in the tens of millions by millions of Americans, and a complete prohibition on their use is invalid.

In *Bruen*, the Court picked up where *Heller* left off. The Court stated that the Second Amendment protects the right to "*possess* and carry weapons *in case of* confrontation." *Bruen*, 142 S. Ct. at 2127 (internal citations and quotation marks omitted; emphasis added). The right encompasses the right to be "*armed and ready* for offensive or defensive action in a case of conflict with another person." *Id.* (internal citations and quotation marks omitted; emphasis added). The right thus encompasses the right to "'keep' firearms … at the ready for self-defense … *beyond moments of actual confrontation*." *Id.*

C. The Common Use Test is Based on Statistics

The State asserts that evidence of the widespread prevalence of an arm does not show whether the arm is in common use.[10] State Ans. 20. This is not accurate. In *Friedman*, Justice Thomas wrote that the bare fact that millions of Americans own AR-style rifles is all that is needed to meet the common use

[10] Even if the State is correct, it would make no difference. Again, Plaintiffs have no obligation to demonstrate common use. It is the State's burden to justify its categorical ban by demonstrating the opposite, i.e., by showing the arms are (1) dangerous and unusual or (2) sophisticated military arms like machine guns, bombers, and tanks. It has not come close to doing so.

test. *Friedman v. City of Highland Park, Ill.*, 577 U.S. 1039 (2015) (Thomas, J., dissenting from denial of certiorari).

Justice Alito's concurrence in *Caetano v. Massachusetts*, 577 U.S. 411 (2016), is instructive on this point as well. He wrote that in determining whether the arms at issue (i.e., stun guns and Tasers) are commonly used, the "*relevant statistic*" is that hundreds of thousands of the arms have been sold to private citizens who may lawfully possess them in 45 States. *Id.*, 577 U.S. at 420 (internal citations and quotation marks omitted; emphasis added).

Other courts are in accord. *See Hollis v. Lynch*, 827 F.3d 436, 447 (5th Cir. 2016) (analyzing commonality by reviewing raw number percentages and jurisdiction counting); *Duncan*, 970 F.3d 1133, 1147 (9th Cir. 2020)[11] ("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); *Kolbe v. Hogan*, 849 F.3d 114, 153 (4th Cir. 2017*), abrogated by Bruen* (2022) (Traxler, J. dissenting) (consensus among courts is that the test is an "objective and largely statistical inquiry"); *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 255 (2d Cir. 2015), *abrogated on other grounds by Bruen* ("Even accepting the most conservative estimates cited by the parties

[11] *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*, 142 S. Ct. 2895 (2022), and *vacated and remanded*, 49 F.4th 1228 (9th Cir. 2022).

and by *amici*, the assault weapons and large capacity magazines at issue are 'in common use' as that term was used in *Heller*."); *Heller v. D.C.*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) ("We think it clear enough in the record that semi-automatic rifles . . . are indeed in 'common use.'").

VI. The State's "Militaristic Use" Argument Misunderstands *Heller*

The State asserts that the banned arms are not protected by the Second Amendment because they are "designed for offensive, militaristic use." St. Resp. 19, *citing Heller*, 554 U.S. at 627. But the very passage from *Heller* cited by the State demonstrates why its argument is wrong. In that passage, the Court held that sophisticated military arms like machine guns,[12] bombers and tanks are not protected by the Second Amendment. *Heller*, 554 U.S. at 627. The State argues that *Heller's* reference to arms used by the military means that any arm used in warfare is not protected. But *Heller* said the very opposite. In the same passage it held that weapons in common use brought to militia service by members of the militia are protected by the Second Amendment. *Id*. What do militia members do with those weapons when they bring them to militia service? They fight wars.[13] It would be extremely anomalous, therefore, if *Heller* were interpreted to mean simultaneously that (1) weapons brought for militia service for fighting wars are protected by the Second Amendment, and (2) weapons used for fighting wars are not protected by the Second

[12] Fully automatic weapons like the M-16 are machineguns. *Staples v. United States*, 511 U.S. at 603, n. 1.
[13] *See* U.S. Const. amend. V (referring to "the Militia, when in actual service in time of War").

Amendment. This is obviously not the law. "*Miller* and *Heller* [merely] recognized that militia members traditionally reported for duty carrying 'the sorts of lawful weapons that they possessed at home,' and that the Second Amendment therefore protects such weapons as a class, regardless of any particular weapon's suitability for military use." *Caetano v. Massachusetts*, 577 U.S. 411, 419 (2016) (Alito, J., concurring).

The State also insists that it can ban AR-15s because they are similar in some ways to M-16s. St. Resp. 23. But this argument is precluded by *Staples v. United States*, 511 U.S. 600 (1994). In that case the Court held that the distinction between fully automatic M-16s and semi-automatic weapons like AR-15s is legally significant. The Court stated that it is not lawful for a civilian to possess a machine gun like an M-16, and it contrasted that with semi-automatic weapons (such as the AR-15 at issue in that case) which "*traditionally have been widely accepted as lawful possessions*." *Id*., 511 U.S. at 612 (emphasis added).

VII. The Court Should Disregard the State's Means-End Arguments

Bruen unambiguously rejected the application of means-end scrutiny in the Second Amendment context. *Id*., 142 S. Ct. at 2126. Nevertheless, the State devotes a substantial portion of its response to the argument that the means it has chosen (banning commonly possessed arms) is justified by the end of promoting the governmental interest of increased public safety.[14] Indeed, the

[14] The City's appeal to interest-balancing is even more blatant. *See*, e.g. City Resp. 3 (Plaintiff's' interests do not carry "sufficient weight" as against City's public safety interest); *id*. 5-8

State candidly admits its law should be upheld because it "promote[s] a compelling interest in protecting the public" (St. Resp. 35) and is narrowly "tailored." St. Resp. 29. If that is not a back-door appeal to means-end scrutiny, it is difficult to know what would be.

Naturally, the State does not admit that it is ignoring *Bruen*, but large sections of its brief do exactly that. *See* St. Resp. 19-20; 25-26. The argument in these sections takes the form of classic interest-balancing. According to the State, the banned weapons create a public safety issue. St. Resp. 19-22. On the other hand, the State asserts Plaintiffs do not really need the weapons it has banned because the State's experts assure us the banned weapons are not "suitable" for self-defense. St. Resp. 21-22.

In response, Plaintiffs are tempted to get into the factual weeds, because practically everything the State says in support of its means-end analysis is either wrong or substantially distorted. But Plaintiffs will resist that temptation because almost the whole point of *Bruen* is that it is not "legitimate" for judges to make "empirical judgments" about the "costs and benefits of firearms restrictions." *Id*., 142 S. Ct. at 2130, *quoting McDonald v. City of Chicago, Ill*., 561 U.S. 742, 790-91 (2010). Accordingly, Plaintiffs will ignore the State's means-end red herring and they hope this Court will as well.

(listing perceived challenges to public safety interest City seeks to further); *id*. 15 (City's public safety interest "far outweighs" Plaintiffs' interest).

VIII. A Categorial Ban on Commonly Possessed Arms is not Consistent with The Nation's History and Tradition of Firearm Regulation

A. Introduction

The State asserts that Plaintiffs' Application should be denied because they have not shown that the State indisputably will be unable to satisfy its burden under the second step of the *Bruen* test. St. Resp. 23. But they have. The banned weapons are commonly possessed by law-abiding Americans for lawful purposes. This is indisputable. The Court should end its analysis based on that fact.

But even if further historical inquiry were necessary, the State has not come close to meeting its burden of demonstrating any historical tradition of prohibiting firearms capable of firing more than ten rounds without reloading. The fact that the banned weapons are perfectly legal in the overwhelming number of states, combined with the fact that millions of Americans have chosen to possess tens of millions of these arms, confirms that to this day (far less 232 years ago) there has never been such a historical tradition.

The State apparently hopes the Court will not examine the historical record it has compiled too closely. Because any such examination would reveal that the State has ignored the important distinction between regulations (such as concealed carry regulations) and absolute prohibitions (such as the firearm ban at issue in *Heller*). *Id*., 651 F.3d at 708. Yes, in the 18th and 19th centuries there were several laws that regulated the *use* of firearms. No one disputes

that. Certainly, *Heller* did not. But those laws did not remotely burden the right to self-defense as much as an absolute ban on a commonly possessed arm. *Id*., 554 U.S. at 632.

Moreover, almost none of the laws cited by the State categorically banned the weapons they regulated. Instead, as *Bruen* explained, the laws 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." *Id*., 142 S.Ct. at 2145; *see id*. at 2142-56. They were never understood to ban the keeping or bearing of commonly owned arms. *See* Brief for Amicus Curiae National Shooting Sports Foundation, Inc., 20-21.

While citing *Bruen* repeatedly, the State seems to have completely missed the main point of the case. None of the restrictions it points to (such as regulation of concealed carry) justified New York's permitting scheme. If those restrictions did not justify a discretionary-issue public carry permitting law, *a fortiori* they do not support an absolute ban on the possession of commonly held arms, especially for self-defense in the home.

Moreover, it is unclear why the State believes regulations of Bowie knives, slungshots, clubs, etc. have any relevance to this matter in the first place. In *Bruen*, the Court considered only historical regulations of carrying handguns in its analysis of New York's carry restriction. It did not consider historical restrictions on carrying other types of weapons. How are Bowie

knives relevantly similar to commonly possessed rifles and magazines? The State does not say.

Finally, it is unclear why the State asserts that 19th-century regulations of Bowie knives were enacted in response to a "dramatic technological shift" that protected the public from "new forms of violence." St. Resp. 30. It's a knife. People have been wielding knives, both long and short, for millennia.

B. Repeating Arms Have Existed for Centuries

The State asserts that its ban should be upheld because it responds to dramatic technological change. St. Resp. 30. But repeating arms predate the Second Amendment by three centuries, and those capable of firing over 10 consecutive rounds predate the Second Amendment by two centuries. "[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).[15] Several such arms pre-dated the Revolution, some by nearly a hundred 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.* As for "cartridge-fed" "repeating" firearms in particular – arguably the most direct forebears of the firearms Illinois has now outlawed – they 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

[15] The panel decision in *Duncan* was vacated when the Ninth Circuit considered it en banc, and the en banc decision was in turn vacated and remanded after *Bruen*.

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, 128 (1984). In contrast to this long history of legal ownership of repeating firearms, the first "assault weapon" ban was not enacted until California did so in 1989, a full 200 years after the founding era.

The State nevertheless asserts that modern semi-automatic rifles represent the sort of technological change contemplated by the Court.
St. Resp. 27. But this conflicts with *Heller* where the Court held that modern semi-automatic handguns are protected by the Second Amendment. Those handguns are the product of exactly the same sort of technological innovation cited by the State, and the Court held that D.C.'s ban on modern semi-automatic handguns was an extreme historical outlier. *Heller*, 554 U.S. at 629. *See also Heller v. D.C.*, 670 F.3d 1244, 1286 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (it makes no sense to conclude that semi-automatic handguns are protected but semi-automatic rifles are not).

C. Urban Violence and Mass Shootings are not Unprecedented Societal Concerns

The State asserts that its ban should be upheld because it was enacted in response to an "unprecedented societal concern." State Ans. 31. This argument is difficult to understand, because the State's own expert acknowledges that mass killings occurred during colonial and revolutionary times. *See*

Declaration of Randolph Roth, A644-45. Moreover, Roth asserts that "from the 1830s into the early twentieth century, mass killings were common." A645.

Moreover, while mass shootings are undoubtedly horrific, they remain rare. That they do not seem rare results from the psychological phenomenon known as the availability heuristic,[16] not reality. According to *Mother Jones'* comprehensive database of mass shootings, using the FBI's definition, in the 40 years from 1982 to 2022, there were 141 mass shootings with 1,095 fatalities.[17] In a country with a population of 330 million, a phenomenon that, on average, results in just over 27 deaths per year is not the sort of societal concern the Court had in mind. This conclusion is reinforced by *Heller* itself. As discussed in the Application, D.C. brought the then-recent Virginia Tech shooting to the Court's attention. Brief of Petitioners, *D.C. v. Heller*, 2008 WL 102223, 53. And the *Heller* dissenters also protested that handguns "are specially linked to urban gun deaths and injuries" and "are the overwhelmingly favorite weapon of armed criminals." *Heller*, 554 U.S. at 682 (Breyer, J., dissenting). The majority did not dispute any of this. Instead, it wrote in response: "We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised …" *Id.*, 554 U.S. at 636. "But the enshrinement of constitutional rights necessarily takes certain policy choices

[16] The "availability heuristic" is the psychological phenomenon where judgments are heavily biased by dramatic incidents. Louis Klarevas, *Rampage Nation* 61 (2016). An example of the availability heuristic is the fact that many people are afraid to fly because airplanes have crashed, even though airplane crashes are exceedingly rare and airplane travel is very safe.
[17] Mother Jones, *US Mass Shootings, 1982–2023* https://www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data/ (last visited Feb. 20, 2023).

off the table. These include the absolute prohibition of [commonly possessed arms] held and used for self-defense in the home." *Id.*

In summary, a few dozen people have used arms like those banned under the challenged laws to commit horrific mass shootings. But the arms used in these events account for less than one one-hundredth of one percent of the millions owned by law-abiding citizens, who, as Justice Thomas pointed out, overwhelmingly use them for lawful purposes. *Friedman*, 577 U.S. at 1039 (Thomas, J., dissenting from denial of certiorari). The question before the Court is whether these millions of citizens' rights should yield because of the bad acts of dozens. *Heller* answered that question in the negative,[18] and Plaintiffs urge the Court to answer it the same way in this case.

IX. The State Ignores *Bruen's* Mandate Regarding the Relevant Time Period

Bruen held that the founding era is the relevant time period for historical analogues. *Id.*, 142 S. Ct. at 2136. Post-ratification laws may be considered only if they are consistent with the text. *Id.* at 2137. Conversely, post-ratification laws that contradict earlier evidence are irrelevant to the constitutional inquiry. *Id.* New York offered several 20th-century laws as proposed analogues for its licensing law. This Court rejected all of this evidence, writing: "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

[18] Indeed, as then-Judge Kavanagh pointed out in *Heller II*, if anything, the case for banning handguns on public safety grounds was even more compelling in *Heller* than here. *Heller II*, 670 F.3d 1244, 1286

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." *Id.*, 142 S. Ct. 2154, no. 28.

In this case, as discussed in the Application, the district court flat out ignored this passage. Indeed, the majority of the laws it cited in its opinion were from the 20th century. The State follows suit in its Response. St. Resp. 27-28. The State attempts to justify its departure from *Bruen's* guidance by asserting that the Court may consider this later evidence because it responded to dramatic technological changes. But nothing in *Bruen* suggests that the Court closed the door to 20th-century evidence that conflicts with earlier evidence, only to open it back up again if the government claims the later laws were enacted in response to changed circumstances. Presumably all later laws were enacted in response to changed circumstances, and the exception proposed by the State would undoubtedly swallow the rule.

X. The State's "Ample Alternative" Argument Contradicts *Heller*

The State asserts that the arms ban is constitutional because it preserves access to weapons that are not banned. St. Resp. 29. This argument is difficult to understand. In *Heller*, the Court wrote: "It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed." *Id.*, 554 U.S. at

629. How is the State's argument not obviously precluded by this passage? The State does not say.

XI. The State Misreads *Bruen's* Discussion of the Militia

Plaintiffs discussed how the early militia laws requiring male citizens to possess common weapons were inconsistent with the challenged laws. Application 26-27. In response, the State asserts that *Bruen* recognized that the right to keep and bear arms does not depend on service in the militia. St. Ans. 32. This is true but irrelevant to Plaintiffs' point, which was that in the founding era, far from banning commonly used arms, the state and national governments affirmatively required male citizens to possess them. Thus, the State has no hope of identifying any founding era law analogue to its ban on the most commonly possessed rifle in America.

XII. Second Amendment Rights Are Not Second-Class Rights in the Context of the Irreparable Harm Inquiry

The State does not dispute that the loss of First Amendment rights constitutes irreparable harm. St. Resp. 33. But it argues this rule does not apply to the loss of Second Amendment rights. *Id.*, 33-34. Why? The reason is obvious. The State believes Second Amendment rights should be treated as second-class rights. The State's position is, to say the least, inconsistent with *Bruen*. 142 S. Ct. at 2156.

XIII. The City's Absolute Ban on Commercial Sales is Unconstitutional

The City's argues that the Second Amendment does not protect the right to acquire arms in commercial transactions. City Resp. 13. But as even the district court noted, "a right to own a weapon that can never be purchased would be meaningless." App. 20, *citing Ezell*, 651 F.3d at 704 ("The right to possess firearms for protection implies a corresponding right to acquire" them). That is correct. 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). The City's ordinance is not a "regulation" of commercial sales (permissible under *Heller*, 554 U.S. at 627). It is an absolute ban on the sale of commonly possessed firearms. As such, it is unconstitutional.

XIV. There is No Procedural Barrier to Granting the Application

A. Plaintiffs' Rights are Indisputably Clear

The State argues that the application should be denied because Plaintiffs' rights are not indisputably clear. St. Resp. 9. But, as Plaintiffs have pointed out, this is an exceedingly simple case. Application 1. Tens of millions of firearms of the type banned under the challenged laws and over 150 million magazines of the type banned by the challenged laws are possessed by law-abiding citizens for lawful purposes. "[T]hat is all that is needed for citizens to have a right under the Second Amendment to keep such weapons."

Friedman v. City of Highland Park, Ill., 577 U.S. 1039 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari). It is difficult to imagine a case in which Plaintiffs' rights are more indisputably clear.

B. The Challenged Laws are Not Presumptively Valid

The State argues that the challenged laws are presumptively valid and Plaintiffs must demonstrate exigent circumstances before they will be enjoined. St. Resp. 10. This is not accurate. "[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Bruen*, 142 S. Ct. at 2126. The reverse must also be true. When the Second Amendment's plain text covers an individual's conduct, a law burdening that conduct is presumptively unconstitutional. To be sure, under *Bruen's* second prong, the government has an opportunity to rebut that presumption by demonstrating that the law is consistent with the Nation's history and tradition of firearms regulation. *Id*. But that does not mean the presumption of unconstitutionality does not arise in the first instance. The plain text of the Second Amendment "extends, prima facie, to all instruments that constitute bearable arms." *Id.*, 142 S. Ct. at 2132 (internal quotation marks omitted). Therefore, the Constitution presumptively protects Plaintiffs' right to keep and bear the arms banned under the challenged laws.

Moreover, exigent circumstances do exist. Illinois has a population of over 12.8 million people.[19] Thus, until it is enjoined, the obviously unconstitutional statute challenged in this action will deprive literally millions of people of the opportunity to exercise their constitutional rights.

C. Grounds Exist to Grant Review of the Lower Courts' Manifest Errors

The State argues that this is not a case in which the Court would exercise discretionary review under U.S. Sup. Ct. R. 10. St Resp. 10. This too is not accurate. Under Rule 10, the Court will grant review in cases where (1) a court of appeals has acted in such a way as to "call for an exercise of this Court's supervisory power" or (2) "decided an important federal question in a way that conflicts with relevant decisions of this Court." Both of these considerations are applicable. As discussed above, the Seventh Circuit appears poised to continue treating the right to keep and bear arms as a second-class right. Plaintiffs respectfully suggest that this Court should exercise its supervisory power to correct this error. Moreover, as demonstrated in the Application and this Reply, the district court decided an important Second Amendment question in a way that manifestly conflicts with *Heller* and *Bruen*, and the Seventh Circuit in a one-sentence ruling allowed that error to stand.

The State points out that since *Bruen,* the lower courts have almost uniformly denied relief as to the Illinois law and similar laws in other states.

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[19] U.S. Census Bureau (available at https://bit.ly/3HRSFOJ).

St. Resp. 11. It is unfortunate but hardly surprising that the lower courts have been upholding plainly unconstitutional laws burdening Second Amendment rights. In *Bruen*, this court noted that if the history of Second Amendment litigation had taught it anything, it is that in the Second Amendment context, lower courts are far too willing to defer to the government. *Id.*, 142 S. Ct. at 2131. For example, in the Ninth Circuit the government was 50-0 in post-*Heller* Second Amendment challenges. See *Duncan v. Bonta*, 19 F.4th 1087, 1165 (9th Cir. 2021).[20] Old habits die hard, and despite this Court's clear mandate in *Bruen*, lower courts continue to defer to the government when Second Amendment rights are abridged. The State believes this is a reason to deny the Application. Plaintiffs respectfully suggest that this is perhaps the best reason to grant it.

D. The Record is Sufficient

The State argues that the record is insufficiently developed at this stage to grant the Application. St. Resp. 12. Far from being insufficiently developed, the record is sufficient to grant final judgment to Plaintiffs. After all, they have already demonstrated "all that is needed for [them] to have a right under the Second Amendment to keep [the banned weapons]." *Friedman*, *supra*.

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[20] *cert. granted, judgment vacated*, 142 S. Ct. 2895 (2022), *and vacated and remanded*, 49 F.4th 1228 (9th Cir. 2022) (Vandyke, J., dissenting).

E. This Case is Controlled by *Heller*

The State asserts that the Application should be denied because this Court has never had an opportunity to address the validity of laws like the arms bans challenged here. St. Resp. 14. This is wrong. The challenged laws are absolute bans on arms commonly possessed by law-abiding citizens for lawful purposes. A straightforward application of *Heller* dictates that the bans are unconstitutional. *Id.*, 554 U.S. at 628.

F. Plaintiffs' Evidence Was Before the District Court

The State asserts that much of Plaintiffs' common use evidence was not before the district court. St. Resp. 16. This is not accurate. Indeed, the very evidence the State points to in support of its assertion is from the district court record. (App. 150-56; Docs 50-1 through 50-3.).

XV. Conclusion

For the reasons set forth in the Application and this Reply, Plaintiffs respectfully request the Court to grant the Application.

Respectfully submitted this 9th day of May 2023.

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