No. 23A486

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 REVIEW

BARRY K. ARRINGTON
ARRINGTON LAW FIRM
4195 WADSWORTH BOULEVARD
WHEAT RIDGE, COLORADO 80033
(303) 205-7870
barry@arringtonpc.com
Counsel for Applicants

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A. The Court Grants Relief in Appropriate Interlocutory Cases

The State[1] argues the Court should deny Plaintiffs' application because of the interlocutory posture of this case. Resp. 12, 15. But this Court has never hesitated to grant an injunction pending appeal in an appropriate interlocutory case. For example, in *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), New York's COVID regulations, which effectively barred thousands of citizens from attending religious services, struck at the very heart of the First Amendment's guarantee of religious liberty. *Id.*, at 68. The district court denied the worshipers' motion for preliminary injunction and the Second Circuit affirmed. *Id.*, 141 S. Ct. at 63. But this Court held that the applicants had shown that their constitutional claims were likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest. *Id.*, at 66. Accordingly, the Court granted identical relief as that sought by Plaintiffs here, i.e., an injunction pending disposition of the appeal in the circuit court and the disposition of any follow-on petition for writ of certiorari. *Id.*, at 65. Plaintiffs have made a similar showing. Thus, in a case where the government's regulations strike at the very heart of the Second Amendment's guarantee of the right to keep and bear arms, the interlocutory nature of this matter does not preclude the requested relief.

[1] For ease of reading, Plaintiffs will refer to all Respondents collectively as the "State."

B. The State Cannot Reconcile its Handgun Ban with *Heller*

The State admits that the Act bans certain semi-automatic handguns. Resp. 30. This is fatal to the State's case because *D.C. v. Heller*, 554 U.S. 570, 629 (2008), held that handgun bans are unconstitutional. The State argues its handgun ban should nevertheless survive because "*Heller* did not say anything about semiautomatic handguns in particular." Resp. 30.[2] But "[t]he vast majority of handguns today are semi-automatic." *Heller v. D.C.*, 670 F.3d 1244, 1286 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). And it would be truly astonishing if *Heller's* holding that handgun bans are unconstitutional does not apply to the vast majority of handguns. Nothing in *Heller* even hints that its holding should be cabined in the way the State suggests.

Undeterred, the State argues that its handgun ban is not barred by *Heller* because "many semiautomatic handguns are unaffected by the challenged restrictions," and it has left Plaintiffs with "ample means for self-defense." Resp. 30. This argument is surprising because on the very page on which it held that handgun bans are unconstitutional, *Heller* also rejected an identical argument advanced by the District of Columbia. The Court wrote in response to D.C.'s argument that "it is no answer" to say that it is permissible to ban the possession of handguns so long as possession of other firearms is allowed. *Id.*, 554 U.S. at 629. In this case, it is no answer to say that banning possession of

[2] Indeed, the State appears to assert that it can ban all semi-automatic firearms because semiautomatic fire is employed by the military. Resp. 19 (semi-automatic mode "most often deployed in battle to efficiently target and kill enemy troops").

certain semi-automatic handguns is permissible so long as possession of others is allowed.

C. There is No Limiting Principle to the State's Argument

The State seems to believe it can dispense with pointing to specific Founding-era regulations that were "relevantly similar" to its arms ban because "there is a longstanding and regular course of practice in this country whereby a weapon is introduced into civilian society, proliferates to the point where its use becomes a significant threat to public safety, and is then regulated by the government to curb violence and protect the public." Resp. 5. The problem with this argument should be immediately apparent – it has no limiting principle. According to the State, it can ban any weapon at any time if it believes the weapon is a significant threat to public safety no matter how many millions of law-abiding citizens possess the weapon for lawful purposes. But in *Heller* the District of Columbia also argued it should be able to ban handguns because they are a threat to public safety. The Court rejected this argument, writing:

> 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.*

D.C. v. Heller, 554 U.S. 570, 636, (2008) (emphasis added).

An absolute prohibition of handguns was off the table because such weapons are in common use for lawful purposes by millions of law-abiding citizens, and banning a weapon in common use for lawful purposes is not consistent with this Nation's history and tradition of firearms regulation. *Id.*, 554 U.S. at 629.

In this case, the same thing is true. The State does not dispute that millions of law-abiding Americans possess the banned firearms. Resp. 22. And as noted in *Miller v. Bonta*, 2023 WL 6929336 (S.D. Cal. Oct. 19, 2023) (stayed by 9th Cir.), these weapons are overwhelmingly possessed by law-abiding citizens for lawful purposes. *Id.* at *36 (if Americans own millions of AR-15s and they are not committing millions of crimes with them, the only logical conclusion is that they are overwhelmingly used for lawful purposes). This conclusion is borne out by national crime statistics: "The United States Department of Justice reports that in the year 2021, in the entire country 447 people were killed with rifles (of all types) ... [I]f 447 rifles were used to commit 447 homicides and every rifle-related homicide involved an AR-15, it would mean that of the approximately 24,400,000 AR-15s in the national stock, less than .00001832% were used in homicides." *Id.*, at *3. Even if one uses the lower number advanced by the State,[3] only .006% of "assault weapon" owners (i.e., 447 out of 6.4 million) used them to commit homicides in 2021.

[3] Resp. 22.

Yes, an infinitesimal fraction of AR-15[4] owners use them for unlawful purposes. And as in *Heller*, the State has a variety of tools for combating this problem. But certain policy choices are off the table, including an absolute prohibition of the most popular rifle in America.[5]

D. The State's Argument Amounts to Backdoor Means-End Scrutiny

In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), the Court cautioned that "courts may [not] engage in independent means-end scrutiny under the guise of an analogical inquiry." *Id.*, at 29, n. 7. But that is exactly what the State has done. As noted above, the State argues that the analogical inquiry leads to the conclusion that it has the power to ban any weapon if doing so promotes the important interest of protecting public safety. Resp 5. But this is exactly what *Bruen* held it cannot do. "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." *Id.*, 597 U.S. at 17. To make this demonstration the government must point to specific Founding-era regulations that are "relevantly similar" to the challenged regulation. *Id.*, at 29. It should go without saying that merely asserting its regulation is analogous to historical regulations because both were

[4] Like the Seventh Circuit (App. 134), Plaintiffs use the AR-15 "as the paradigmatic example of the kind of weapon the statute covers."

[5] App. 196, n. 9 (Brennan, J., dissenting) (AR-15 banned by the Act is the most popular rifle in Ameria. (*quoting* David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 ALB. L. REV. 849, 859 (2015)).

intended to protect public safety does not meet this standard. If it were otherwise, *Bruen's* analogical inquiry would be meaningless because the same could be said about any challenged firearm regulation.

E. The State's History and Tradition Analysis Fails

Apparently recognizing the vulnerability of its "advances public safety" argument, the State points to various 19th-century laws[6] regulating carrying clubs and knives. Resp. 25-26. The State's argument implicitly admits that it has been unable to identify any Founding-era law analogous to a complete ban on a commonly possessed firearm. This is not surprising. In *Heller*, the District of Columbia was also unable to point to any early firearm bans, and the historical record has not changed in the intervening 15 years. Indeed, the absence of such regulations is even clearer today. In *Miller*, the court reviewed literally hundreds of historical laws submitted by California in support of its firearms ban. At the conclusion of that review, the court wrote:

> It is remarkable to discover that there were no outright prohibitions on keeping or possessing guns. No laws of any kind. Based on a close review of the State's law list and the Court's own analysis, there are no Founding-era categorical bans on firearms in this nation's history. Though it is the State's burden, even after having been offered a clear opportunity to do so, *the State has not identified any law, anywhere, at any time, between 1791 and 1868* that prohibited simple possession of a gun.

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[6] Like this Court in *Bruen*, Plaintiffs "will not address any of the 20th-century historical evidence brought to bear by respondents." *Id*., 597 U.S. at 66, n. 28. 20th-century evidence does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence. *Id*.

Miller v. Bonta, 2023 WL 6929336, at *13 (S.D. Cal. Oct. 19, 2023) (stayed by the 9th Cir.) (emphasis added).[7]

The State presses on and cites a 1686 East New Jersey law restricting concealed carry of pocket pistols in support of its ban. Resp. 25. But *Bruen* specifically rejected this statute as a historical analogue for restricting firearm use. *Id.*, 597 U.S. at 49, n. 13 ("Even assuming that pocket pistols were, as East Jersey in 1686 deemed them, 'unusual or unlawful,' it appears that they were commonly used at least by the founding."). A fortiori, the law provides no support for a ban on mere possession of a firearm.

The State suggests that 19th-century concealed carry laws support its ban. Resp. 26. In *Bruen*, the Court acknowledged the existence of prohibitions on concealed carry. But it held that none of these historical limitations on the manner of use was analogous to even a law prohibiting public carry. 142 S. Ct. at 2150. Far less are they analogous to a law prohibiting possession altogether. It should be obvious that the burden imposed by a regulation of public carry is not, as the State contends, relevantly similar to an absolute prohibition of possession even for the purpose of self-defense in the home. *See Heller*, 554 U.S. at 626 (noting that concealed carry regulations are proper while at the same time holding absolute bans on possession are not).

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[7] Space limitations preclude a detailed look at *Miller's* extremely detailed historical analysis, but Plaintiffs respectfully commend Judge Benitez's exhaustive analysis to the Court's attention.

In summary, as in *Heller*, the State's arms ban amounts to a prohibition of two classes of arms that are chosen by millions of Americans for lawful purposes. *See Id*., 554 U.S. at 628. And as in *Heller*, the prohibition extends to the home, where the need for self-defense is most acute. *Id.* "Few laws in the history of our Nation have come close to [such a] severe restriction." *Id*., at 629. Accordingly, the ban is not consistent with the Nation's history and tradition of firearms regulation and fails constitutional muster.

F. Common Use is Not Part of the Plain Text Analysis

The State argues that Plaintiffs must show that the banned arms are in common use as part of the plain text analysis because the Second Amendment protects only arms in common use. Resp. 17. The State is confusing the plain text step with the history and tradition step. It is true that *Heller* held that the Second Amendment protects only weapons in common use. *Id.*, 554 U.S. at 627). But *Heller* reached this conclusion because under the Nation's "*historical tradition"* of firearms regulation, weapons in common use are protected. *Id*. Accordingly, whether an arm is in common use is addressed at the second *Bruen* step (history and tradition). As Judge Brennan wrote, the term "Arms" "should be read as 'Arms' – not 'Arms in common use at the time.'" App. 183. In *Heller*, the Court "did not say that dangerous and unusual weapons are not arms." *Id*. At least two reasons support this reading of *Bruen*. App. 185. First, as noted, the "in common use" test in *Bruen* is drawn from the "historical tradition" of restrictions on "dangerous and unusual weapons."

Id., at 2143. The test is *not* drawn from a historical understanding of what an "Arm" is. *Id*., *citing Bruen* at 2132. Second, if a weapon is an "Arm," it is only prima facie protected by the Second Amendment. *Id., citing Bruen*, 142 S. Ct. at 2132. Whether it is actually protected is determined in the second step. In summary, "'in common use' is a sufficient condition for finding arms protected under the history and tradition test in *Bruen*, not a necessary condition to find them 'Arms'" in the first place. App. 184 (internal citation and quotation marks omitted).

G. This is Not a "Nuanced" Case

The State argues that its ban on arms in common use is constitutional because this is a "nuanced" case that involves unprecedented societal concerns or dramatic technological changes. Resp. 28. This is a misreading of *Heller* and *Bruen*. As Professor Smith explained in his recent article, under *Heller* and *Bruen*, Second Amendment cases are divided into two categories: (1) laws that ban weapons in common use; and (2) laws that otherwise regulate the sale or use of arms. Mark W. Smith, *What Part of "In Common Use" Don't You Understand?: How Courts Have Defied Heller in Arms-Ban Cases-Again*, 2023 Harv. J.L. & Pub. Pol'y Per Curiam 2 (2023). In its discussion of how to apply its historical analogue approach, *Bruen* noted that unlike the relatively straightforward case presented by *Heller*, "other cases," involving unprecedented societal concerns or dramatic technological changes may require a more nuanced approach. *Id*. "But this consideration comes into play

only when a court is engaged in examining analogues in non-arms-ban cases for which *Heller* does not provide the binding rule of decision." *Id*. This is such a case. The State's ban of arms in common use implicates *Heller's* "straightforward" rule. This is not a non-arms ban case that might call for a more "nuanced" approach.

H. The State's "Military Weaponry" Argument is Meritless

The State argues that the distinction between civilian and military weapons is relevant to the history and tradition analysis because military weapons are especially dangerous. Resp. 29. This is a misreading of *Heller*. *Heller* held that sophisticated military "arms that are highly unusual in society at large" may be banned. *Id*., 554 U.S. at 627. Weapons in common use are, by definition, not highly unusual in society at large. Thus, contrary to the State's argument, the relevant distinction between military weapons that may be banned and civilian weapons that may not is not their relative dangerousness. Rather, the relevant distinction is the fact that the former are highly unusual in society at large and the latter are in common use for lawful purposes. *See also Caetano v. Massachusetts*, 577 U.S. 411, 419 (2016) (Alito, J., concurring) (weapons in common use are protected regardless of their suitability for military); *Kolbe v. Hogan*, 849 F.3d 114, 156 (4th Cir. 2017) (Traxler, J., dissenting) (same).

I. Magazines Are "Arms" Covered by the Second Amendment

The State argues that magazines are mere "containers which hold ammunition" and are therefore not arms. Resp. 23. This is not remotely accurate. Instead, magazines are dynamic components of all semi-automatic firearms without which such arms would not exist. As Judge Brennan noted in his dissent, "magazines – ammunition feeding devices without which semiautomatic firearms cannot operate as intended – are 'Arms.' Such devices are required as part of the firing process." App. 183. Every circuit court that has considered the matter has come to the same conclusion. *See 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* ("magazines feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended"); *Kolbe v. Hogan*, 813 F.3d 160, 175 (4th Cir. 2016), *on reh'g en banc*, 849 F.3d 114 (4th Cir. 2017), *abrogated on other grounds by Bruen* ("there must also be an ancillary right to possess the magazines necessary to render those firearms operable"); and *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015) (magazines necessary for many firearms to operate). *See also Duncan v. Bonta*, 83 F.4th 803, 813 (9th Cir. 2023) (Bumatay, J., dissenting from order granting stay) (same, *citing Fyock*).

J. The Banned Magazines are Possessed in Overwhelming Numbers

The State argues that Plaintiffs did not address whether the banned magazines are in common use. Resp. 22. That is not accurate. Plaintiffs cited

Duncan v. Bonta, 83 F.4th 803, 816 (9th Cir. 2023) (Bumatay, J., dissenting from order granting stay), where Judge Bumatay recounted that millions of such magazines are used by law-abiding citizens and that that is all that is necessary for them to be protected by the Second Amendment. Application 10. This is hardly in dispute. As Judge Brennan noted in his dissent, the record shows that there are over 160 million such magazines in circulation. App. 194. The State has never attempted to show otherwise.

K. The State's "Suitability" Argument is Stealth Interest Balancing

The State argues that its ban should be upheld because in its view the banned firearms and magazines are not as "suitable" as other weapons for self-defense. Resp. 19. But as Professor Smith has explained, this "suitability" argument "acts as an open invitation to courts to assess whether individuals really need the banned firearms, or whether their features are, in the judgment of experts and the courts, well-suited to the self-defense needs of Americans. But *Heller* made clear that such questions are not for expert or even court decision. Rather, it is the judgment of the American people that matters and 'whatever the reason' that they choose certain weapons, that they choose them is enough." Smith, *supra*, 12. Interest-balancing of this kind is expressly forbidden by *Bruen*. 142 S. Ct. at 2130

L. The State's "Shifting Status" Argument Fails

The State argues that the common use test cannot be based on, well, common use, because that would mean that a weapon could change status

from unprotected to protected over time as its use becomes more common. Resp. 21. The State's argument runs headlong into *Bruen*, which held precisely that. "Whatever the likelihood that handguns were considered 'dangerous and unusual' during the colonial period, they are today 'the quintessential self-defense weapon.'" *Id.*, 597 U.S. at 47. Thus, even assuming[8] for the sake of argument AR-15s were unprotected at some time in the past, they are protected now because they are "in common use today." *Id.*

M. "Common Use" is Not Limited to "Commonly Fired"

The State argues that the banned arms are unprotected because they are "rarely" used in actual self-defense situations. Resp. 6. Plaintiffs dispute this, but even assuming this is the case, the State's argument fails because it is an "overly cramped" reading of the word "use." *Duncan v. Bonta*, 83 F.4th 803, 815 (9th Cir. 2023) (Bumatay, J., dissenting). While "use" will encompass the number of times the firearm is discharged, it is not limited to that. *Id.* Consider a police officer who has been on the job for 40 years and never had to discharge his weapon in the line of duty. It would be absurd to suggest that the officer never "used" his weapon. He used it every day. *Cf. Bailey v. United States*, 516 U.S. 137, 143 (1995) (acknowledging that use draws meaning from its context, such that someone can "use" a gun to protect his house while never having to "use" it (cleaned up)). Thus, a firearm can be used for

[8] This assumption is suspect because the State's argument that AR-15s were not in common use prior to 2004 conflicts with *Staples*, which stated in 1994 that guns like the AR-15 were "widely accepted as lawful possessions" in 1994. *Staples v. United States*, 511 U.S. 600 (1994).

self-defense even if it is never discharged, and as Judge Bumatay noted, "we are glad that most law-abiding citizens never have to discharge their firearms in self-defense."

Importantly, *Heller* never demanded statistical studies of actual handgun use in self-defense situations to hold that they are commonly used for self-defense. Rather than going down this statistical rabbit hole, *Heller* looked to Americans' overall firearm choices. *Duncan*, 83 F.4th at 815. And it was sufficient that the handgun was "overwhelmingly chosen by American society for th[e] lawful purpose" of self-defense. *Heller*, 554 U.S. at 628. In this case, it is sufficient that the banned arms are chosen by millions of law-abiding citizens for lawful purposes. As in *Heller*, it is not necessary to conduct studies of the number of times the weapons have been actually fired in self-defense situations to establish common use.

N. Plaintiffs Are Suffering Irreparable Harm

As noted above, in *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020), the Court granted injunctive relief pending appeal in an interlocutory case. In doing so, the Court quoted *Elrod v. Burns*, 427 U.S. 347, 373 (1976), for the proposition that the loss of constitutional freedoms even for minimal periods of time "unquestionably constitutes irreparable injury." *Id.*, 141 S. Ct. at 67. The State acknowledges the rule in *Elrod* but asserts that it is applicable only in First Amendment cases. Resp. 36. There are two problems with the State's argument. First, *Bruen* held that "[t]he

constitutional right to bear arms in public for self-defense is not a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Id.*, 597 U.S. at 70. The Court specifically held that Second Amendment protections of the right to keep and bear arms are consistent with First Amendment protections of unpopular speech and the free exercise of religion. *Id*. The State's argument conflicts with this passage. Secondly, the State is simply wrong. In both *Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011), and *Baird v. Bonta*, 81 F.4th 1036, 1042 (9th Cir. 2023), the courts held that the *Elrod* rule is applicable in Second Amendment cases. The State's efforts to distinguish these cases fails.[9] Plaintiffs have demonstrated that they have been deprived of their constitutional freedoms, and they respectfully request the Court to apply the *Elrod* principle in this case as it did in *Roman Cath. Diocese of Brooklyn*.

O. An Injunction Would Not be Contrary to the Public Interest

Roman Cath. Diocese of Brooklyn is instructive on the public interest issue as well. The Court held that New York had not shown that granting the application would harm the public. 141 S. Ct. at 68. This obviously did not mean that New York had failed to show there was a risk that the COVID virus could spread in religious gatherings. Rather, the Court held that New York had failed to show that "public health would be imperiled if less restrictive measures were imposed." *Id*.

[9] The State basically said the cases are distinguishable because they arose under different factual circumstances. This hardly demonstrates why the principle is not applicable.

Similarly, in this case, Illinois has failed to show that it cannot pursue its public safety goals by imposing less restrictive measures. Indeed, as noted above, *Heller's* central holding is that it is required to do so. *Heller* acknowledged that firearm violence is a serious problem, and it noted that the Constitution leaves the government "a variety of tools for combating that problem." *Id.*, 554 U.S. at 636. But depriving law-abiding citizens of their constitutional right to keep and bear arms in common use is not one of them. *Id.* Thus, the public interest will not be harmed if the State is required to address the problems it has identified through constitutional means.

P. Conclusion

For the reasons set forth in the application and this reply, Plaintiffs respectfully request the Court to enjoin the State's Act and Naperville's ordinance pending disposition of the appeal in the Seventh Circuit and the disposition of any follow-on petition for writ of certiorari.

Respectfully submitted this 7th day of December 2023.

Barry K. Arrington
Arrington Law Firm
4195 Wadsworth Boulevard
Wheat Ridge, Colorado 80033
(303) 205-7870
barry@arringtonpc.com
Counsel for Applicants

CERTIFICATE OF COMPLIANCE

I certify that foregoing reply contains **4,168** words, excluding the parts of the application that are exempted by Rule 33.1(d).

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Barry K. Arrington