

No. 25-238

**In the
Supreme Court of the United States**

CUTBERTO VIRAMONTES, *et al.*,

Petitioners,

v.

COOK COUNTY, ILLINOIS, *et al.*,

Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The court below held that a flat ban on “the most popular rifle in the country,” *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280, 297 (2025), *does not even implicate* the right to keep and bear arms, based on an interpretation of the Second Amendment that flagrantly distorts this Court’s precedent and makes a mockery of the Amendment’s text, history, and purposes. Yet the Seventh Circuit is not alone in deeply misunderstanding the application of the Second Amendment in challenges to firearm bans, and the time has come for this Court to “address the AR-15 issue.” *Snope v. Brown*, 605 U.S. ---, 145 S. Ct. 1534, 1534 (2025) (mem.) (Kavanaugh, J., statement respecting denial).

ARGUMENT

I. Three Justices of this Court have recently recognized the conflict and confusion in the lower federal courts over the application of *Bruen*’s text-and-history framework for Second Amendment cases and the urgent need for this Court’s guidance, *see United States v. Rahimi*, 602 U.S. 680, 736 (2024) (Kavanaugh, J., concurring); *id.* at 739 (Barrett, J., concurring); *id.* at 742-43, 747 (Jackson, J., concurring), and Justices Thomas and Kavanaugh have specifically urged that the Court must step in soon to resolve the constitutionality of “outlier” bans on AR-15s and other semi-automatic arms, *Snope*, 145 S. Ct. at 1534 (Kavanaugh, J., statement respecting denial); *see also id.* at 1538-39 (Thomas, J., dissenting from the denial of certiorari). Respondents’ claim that Petitioners have merely “manufacture[d]” the “supposed

inconsistencies between the circuits” over the correct analysis in these cases, BIO.21, is completely unpersuasive.

The lower courts are in conflict, first, over whether the “text” stage of the *Bruen* framework includes “an extensive first-step, arm-or-not inquiry.” *Duncan v. Bonta*, 133 F.4th 852, 916 (9th Cir. 2025) (en banc) (VanDyke, J., dissenting). The Seventh Circuit, in the *Bevis v. City of Naperville* decision the panel adhered to below, insisted that it does, 85 F.4th 1175, 1192-94 (7th Cir. 2023), but the Sixth Circuit disagrees, *United States v. Bridges*, 150 F.4th 517, 524 (6th Cir. 2025). Respondents do not meaningfully contest the existence of confusion over this issue, instead maintaining that “the judgment below would be unaffected” by its resolution because *Bevis* “held that constitutional challenges to assault-weapons bans fail both of *Bruen*’s steps.” BIO.21-22. But that is far from clear, given the extent to which *Bevis*’s history-and-tradition analysis piggybacked on its supposed textual analysis. See 85 F.4th at 1201. And in any event, the fact that the Seventh Circuit erred in applying both of *Bruen*’s stages hardly diminishes the urgency of this Court’s intervention.

The lower courts are also in conflict over whether to apply *Heller*’s “in common use” test at the “text” or the “history” stage of the *Bruen* analysis. See Pet.19-21. Respondents object that this disagreement is “relevant ... only when the result of that inquiry hinges on who bears the burden of proof” and that it is not relevant here because Petitioners purportedly did “not ... compile a fulsome record” in this case. BIO.22-23. The second response defeats the first. For if a challenger’s only burden in an arms-ban case is

demonstrating that the banned instruments are bearable arms, then the burden of compiling a “fulsome record” rests *entirely on the Government*, making the answer to this question potentially quite “relevant to the ultimate outcome of [this] case” indeed.

Finally, the lower federal courts also disagree about what exactly the “common use” analysis entails. *See* Pet.21-22. Respondents argue that the Petition “identifies no conflict amongst the circuits on that issue,” BIO.23, but as the Petition clearly explained, the lower courts are in fact divided over whether an arm must be both dangerous *and* unusual to fall within the historical tradition of regulation recognized in *Heller*, *see Bridges*, 150 F.4th at 528, or whether that tradition justifies banning arms that are in common use but “*unusually dangerous*,” *National Ass’n for Gun Rts. v. Lamont*, 153 F.4th 213, 233 (2d Cir. 2025).

II.A Certiorari is also justified because the panel’s decision below, and the *Bevis* opinion it applies, are in direct conflict with both *Heller* and *Bruen*. The court below erred, first, in its insistence that the plain text of the Second Amendment does not extend to all arms that are “bearable” or “capable of being held.” *Bevis*, 85 F.4th at 1175. This misapplication of *Bruen*’s initial “text” stage led the Seventh Circuit to the remarkable belief that a flat ban on “the most popular rifle in the country,” *Smith & Wesson*, 605 U.S. at 297, *does not even implicate* the Second Amendment, *Bevis*, 85 F.4th at 1197. The point is not that “the first step of *Bruen* should not exist at all,” BIO.35, it is that the startling conclusion that the most popular rifle in the United States is outside of the Second Amendment’s text entirely should have constituted a

flashing red light warning the court that its analysis had careened dramatically off track.

Bruen and *Heller* make clear as clear can be that the Amendment’s plain text extends to *all* bearable arms. Respondents point to the passage in *Heller*’s textual analysis explaining that the word “Arms” extends “to weapons that were not specifically designed for military use and were not employed in a military capacity.” *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008). But *Heller*’s plain import is that the text *includes* non-military arms—because it includes *all* bearable arms—not that some “additional” semantic “qualification[]” of the word “Arms” *limits* it to weapons “not specifically designed for military use.” BIO.35 (quoting *Heller*, 554 U.S. at 581).

B. In addition to locating the “common use” inquiry at the wrong stage of the analysis, the Seventh Circuit also proceeded to apply it incorrectly, for the semiautomatic arms banned by Respondents are “in common use” by any plausible measure, and thus not “dangerous and unusual.” “The AR-15”—the paradigmatic arm banned by Cook County—“is the most popular rifle in the country” and is “both widely legal and bought by many ordinary consumers.” *Smith & Wesson*, 605 U.S. at 297. Indeed, there are well over 20 million of the banned arms in circulation—and more generally, over 43 million semiautomatic rifles, functionally indistinguishable from the arms banned by Respondents, were sold between 1990 and 2018. Pet.8-9, 32. The County, the panel below, and the Seventh Circuit in *Bevis* do not dispute any of these propositions.

Instead, Respondents attempt to sweep all of this evidence aside by claiming that it is “inadmissible hearsay.” BIO.24. This legalistic gambit fails twice over. First, the evidence that these arms are “in common use” is entirely comprised of *legislative* facts, not *adjudicative* facts. See FED. R. EVID. 201 advisory committee’s note. Legislative facts need not be introduced in discovery or through summary-judgment fact statements.¹ And second, because the “common use” inquiry occurs at *Bruen*’s second stage, the burden lies squarely *on the government* to “justify its regulation,” *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 24 (2022), by coming forward with evidence that the banned arms “are highly unusual in society at large.” *Heller*, 554 U.S. at 627. Respondents never even tried to make this showing, so even if Petitioners presented no evidence of common use *at all*, the challenged ban would still have to be struck down.

Respondents also briefly attempt to defend the Seventh Circuit’s reconceptualization of the “common use” inquiry as necessitating a showing that the type of arm is in fact commonly *fired in self-defense*. See BIO.9. But *Heller* repeatedly referred to the “common use” of firearms as encompassing their lawful *possession*. See 554 U.S. at 625, 627. And given that the text of the Second Amendment itself protects both a right to “keep” and to “bear” weapons, the suggestion that

¹ Respondents suggest that because the Petition did not discuss the distinction between legislative and adjudicative facts, any reliance on this distinction has been forfeited. BIO.25 n.2. Not so. Since the panel decision below did not treat with this distinction at all, it became relevant only once the Brief in Opposition raised the issue, and it accordingly cannot have been forfeited.

possession is not a constitutionally relevant “use” of a firearm is untenable. Respondents insist that such a conclusion follows from “the common-use principle’s origins in the law of affray,” but the very historical materials they cite for this proposition in fact refute it: for if the question under the law of affray was whether a type of arm is “unusual wherewith to be armed and clad,” plainly an arm may be in common use so long as peaceable citizens commonly *possess* it—i.e., are “armed” with it. BIO.32 (cleaned up).

C. The courts below instead embarked on a completely different inquiry: whether the banned arms are “most useful in military service.” *Bevis*, 85 F.4th at 1193. The Seventh Circuit purported to base that standard on a passage it tweezed out of *Heller*, but as the Petition explains (at 27-29) it in fact is completely unsupported by text, history, or precedent, and this Court should intervene now to correct this distortion of its case law.

Respondents, for their part, attempt to contrive a backup historical tradition supporting the “military use” test: a purported “longstanding” common-law “principle of moderate self-defense and its focus on proportionality and avoidance of excessive force.” BIO.32-33. The Seventh Circuit never purported to rely on any such tradition, and with good reason. The chief difficulty is that, as Respondents’ own discussion establishes, the “longstanding principles” they identify, *id.* at 32, do not constitute a “historical tradition of firearm regulation” at all, *Bruen*, 597 U.S. at 24. Rather, what they cite is a limitation on the law of excusable homicide (such as by mistake or self-defense): a killing that might otherwise be excusable nonetheless could constitute manslaughter where the

perpetrator “exceeds the bounds of moderation” (as when “an officer punishing a criminal ... occasion[s] his death” through excessive force). 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 182 (4th ed. 1770). *Bruen* requires the government to come forward with a “historical tradition of firearm regulation,” 597 U.S. 24, not a historical tradition of homicide law that sometimes may have applied in cases involving people who used firearms.

In all events, the common-law homicide rule is not remotely analogous to Respondents’ flat arms ban. It had a completely different justification: encouraging the moderate use of force in self-defense or corporal punishment, as opposed to ameliorating the problem of mass shootings. See BIO.1-11. And the “burden on the right of armed self-defense” is also not remotely analogous, *Bruen*, 597 U.S. at 29-30, given that the common-law principle did not ban, restrict, or regulate the possession of firearms in any way.

Finally, even if Respondents *could* establish a historical tradition justifying a ban on “military-grade weaponry,” BIO.31, the challenged ban would still be unconstitutional, because the banned arms are not “military-grade” in any meaningful way. The County initially attempts to impugn the lineage of AR-15s, deceptively suggesting that they are somehow traceable back to Nazi Germany, but the only thing it succeeds in demonstrating is that the militaries of the world have long preferred firearms “capable of producing automatic fire,” *id.* at 4-5 (cleaned up), a capability that all of the arms banned by Respondents *conspicuously* lack, see *Staples v. United States*, 511 U.S. 600, 602 n.1 (1994).

The same fundamental problem pervades Respondents' attempt to show that the arms have "military-grade" functionality. BIO.31. Again, the key functional difference between the banned arms and *actual* "weapon[s] of war," *id.* at 5, is that the former are semiautomatic rather than fully automatic; that is why semiautomatic arms like the AR-15 "traditionally have been widely accepted as lawful possessions," *Staples*, 511 U.S. at 612. Yet Respondents simply never come to grips with this critical distinction. It is comically absent from their table of firearm "performance capacit[ies]," and indeed the only time they mention the difference between full- and semi-automatic fire is in relating *Petitioners'* argument below. BIO.6-7, 16.

In other places, Respondents' discussion of the functionality of the banned arms borders on science fiction. They claim that a shot from one of the arms can "decapitate[]" someone or cause their body parts to "explode." *Id.* at 8. But these are ordinary rifles, not phasers from Star Trek, and while their muzzle velocity is generally somewhat higher than other rifles, the bullets they shoot are smaller, leading to an overall kinetic energy significantly lower than most hunting rifles. See E. Gregory Wallace, "Assault Weapon" *Lethality*, 88 TENN. L. REV. 1, 44-45 tbl. (2020); Jacob Sullum, *Neither 'Capacity' nor 'Power' Distinguishes 'Assault Weapons' From Other Firearms*, REASON (Oct. 31, 2018), <https://perma.cc/Q77D-ZHUG>.

D. Ultimately, Respondents' defense of the result below does nothing so much as demonstrate the perilousness of the Seventh Circuit's amorphous test. *Bevis*, 85 F.4th at 1194. Large portions of the Brief in Opposition read as though *Bruen* had never been

decided and are evident attempts to smuggle public-policy balancing back into the analysis. Respondents spend the first 11 pages of their brief recounting the carnage of recent mass shootings in gruesome, gratuitous detail, ending with a barely disguised plea that this Court should interpret the Second Amendment in a way that would curb the “trauma [of] assault weapon massacres.” BIO.11. Respondents’ policy arguments are all hotly contested, of course, which is precisely why this Court has taken the federal judiciary out of the business of making “difficult empirical judgments regarding firearm regulations.” *Bruen*, 597 U.S. at 26.

III. That leaves the contention that this case is purportedly “an exceedingly poor vehicle.” BIO.20. Respondents’ argument on this score largely amounts to a question-begging complaint that Petitioners did not embrace all of their flawed assumptions about the *Bruen* framework in litigating this case.

Respondents’ principal charge is that Petitioners “did not bother to compile a record sufficient to support [their] constitutional challenge.” *Id.* at 17-18, 25. This argument is entirely predicated on Respondents’ assumption that the “common use” inquiry is part of the initial “text” stage of the *Bruen* framework, rather than the “history” stage, where “the Government bears the burden.” 597 U.S. at 24 (cleaned up). Because the burden in fact lies on *Respondents* to establish that the banned arms are *not* in common use the onus was not on Petitioners to “compile” any sort of “record” at all, BIO.25.

In any event, the assertion that Petitioners did not “compile a record” below, *id.*, is patently false:

Petitioners submitted *over two thousand pages* of “factual materials,” *id.* at 18, in response to Respondents’ summary-judgment statement of facts, *see* N.D. Ill. Doc. 98. Respondents argue that these materials “rested on inadmissible evidence,” BIO.14, but again, the rules of evidence *explicitly do not apply* to legislative facts like these. *See* FED. R. EVID. 201 advisory committee’s note. That is why this Court was able to decide *Heller* and *Bruen* even though those cases arose from motions to dismiss—and thus came to the Court with *no factual record at all*. The absence of a “fulsome record” in those cases, BIO.23, did not impede this Court’s review in the slightest, since it was able to determine that the handguns in *Heller* were in common use, 554 U.S. at 629, and that the may-issue regime in *Bruen* was unsupported by historical tradition, 597 U.S. at 70, by freely relying on the abundant legislative facts presented by the parties and their amici. So too here.

Respondents also assert that “the record in this matter is bereft of evidence” that the banned arms are commonly “*used* in lawful self-defense,” but once again, this argument is premised on the assumption that the Seventh Circuit’s interpretation of the “common use” test—demanding a showing that an arm is commonly fired for the specific purpose of self-defense—is correct and somehow “controls” in this Court. BIO.9, 31 (emphasis added). To state the obvious, this Court’s Second Amendment precedent controls *Bevis*, not the other way around.

Respondents’ charge on this score comes with particularly poor grace in light of the procedural history of the case. When Petitioners filed suit, the Seventh Circuit’s precedent in *Friedman v. Highland*

Park controlled, 784 F.3d 406 (7th Cir. 2015), and the district court’s only option was to rule against the challenge on the basis of binding circuit precedent so that this Court would ultimately have the chance to address the issue—precisely as happened in *Bruen*. Once *Bruen* was handed down, undermining *Friedman*, Petitioners took the earliest opportunity to compile a significant volume of legislative facts relevant to the text-and-history framework that *Bruen* established. Between the close of summary judgment briefing and the district court’s decision, however, the Seventh Circuit doubled down on *Friedman* in *Bevis*, hamstringing Petitioners’ challenge as a matter of circuit precedent once again. Petitioners can scarcely be faulted for “eschew[ing] basic principles of adversarial and appellate litigation,” BIO.25-26, when our challenge has been impeded by circuit precedent at nearly every relevant stage, and we submitted substantial factual material during the one brief window when it was not.

Even if this Court were to harbor doubts about the completeness of the record—and it should not—at a minimum it should grant review for the purpose of clarifying the standard that applies in cases challenging flat bans on whole categories of arms. Indeed, given the degree to which the Seventh Circuit’s test blatantly contradicts *Heller* and *Bruen*, the Court would be warranted in summarily reversing and then remanding to the lower courts to try again under the correct framework, as it has done before in similar circumstances. See *Caetano v. Massachusetts*, 577 U.S. 411, 411-12 (2016). But in light of the urgent need for “this Court ... [to] address the AR-15 issue soon,” *Snope*, 145 S. Ct. at 1534 (Kavanaugh, J., statement

respecting denial), Petitioners respectfully submit that by far the better course is to grant review, set the case for plenary briefing and argument, and resolve the issue once and for all.

CONCLUSION

The Court should grant the writ.

November 12, 2025

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