No. _____

In The
Supreme Court of the United States

JEREMY W. LANGLEY, *et al.*,

Petitioners,

v.

BRENDAN F. KELLY, in his official capacity as Director of the Illinois State Police, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the State of Illinois' absolute ban of certain commonly owned semi-automatic handguns constitutional in light of the holding in *D.C. v. Heller*, 554 U.S. 570 (2008), that handgun bans are categorially unconstitutional?

2. Is the State of Illinois' absolute ban of all commonly owned semi-automatic handgun magazines over 15 rounds constitutional in light of the holding in *D.C. v. Heller*, 554 U.S. 570 (2008), that handgun bans are categorially unconstitutional?

3. Can the government ban the sale, purchase, possession and carriage of certain commonly owned semi-automatic rifles, pistols, shotguns and standard capacity firearm magazines tens of millions of which are possessed by law-abiding Americans for lawful purposes when there is no analogous historical ban as required by *D.C. v. Heller*, 554 U.S. 570 (2008), and *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

LIST OF PARTIES

The parties in the reviewing Court from which review is sought (i.e. the U.S. Court of Appeals for the Seventh Circuit), and who are the Petitioners who are filing this Petition for a Writ of Certiorari.

Jeremy W. Langley, Timothy B. Jones and Matthew Wilson.

Other Plaintiffs who were represented by other counsel in the underlying reviewing court included:

Robert Bevis, Javier Herrera, Caleb Barnett, Brian Norman, Hood's Guns & More, Pro Gun and Indoor Range, National Shooting Sports Foundations, Inc., National Association for Gun Rights, Law Weapons, Inc., Federal Firearms Licenses of Illinois, Guns Save Life, Gun Owners of America, Gun Owners Foundation, Piasa Armory, Debra Clark, Jasmine Young, Chris Moore, Dane Harrell, C4 Gun Store, LLC, Marengo Guns, Inc., Illinois State Rifle Association, Firearms Policy Coalition, Inc., Second Amendment Foundation, Incorporated.

The Defendants and/or Intervenors in the underlying reviewing court included:

J. Robert Pritzger, Governor of the State of Illinois, Kwame Raoul, Attorney General for the State of Illinois, Brendan F. Kelly, Director of the Illinois State Police, the State of Illinois, Cole Price Shaner, States

LIST OF PARTIES – Continued

Attorney for Crawford County, Illinois, City of Naperville, Illinois, Jason Arres, Cook County, Illinois, Toni Preckwinkle in her official capacity County Board of Commissioners President, and the City of Chicago.

LIST OF PROCEEDINGS

This case was originally filed in the Circuit Court of Crawford County, Illinois, under the title of *Jeremy Langley, et al. v. Brendan Kelly, et al.*, Case No. 2023-CH-02.

This case was removed to the United States District Court, for the Southern District of Illinois, under the title of *Jeremy Langley, et al. v. Brendan Kelly, et al.*, Case No. 3:23-CV-0192.

This case was consolidated in the Southern District of Illinois, into case number 3:23-CV-209-SPM, along with 3:23-CV-141-SPM and 3:23-CV-215-SPM.

The Southern District of Illinois Consolidated Cases included:

Caleb Barnett, et al. v. Kwame Raoul, et al., Case No. 3:23-CV-209, and

Dane Harrell, et al. v. Kwame Raoul, et al., Case No. 3:23-CV-141, and

Federal Firearms Licensees of Illinois, et al. v. Jay Robert "JB" Pritzker, Case No. 3:23-CV-215-SPM.

LIST OF PARTIES – Continued

This case was appealed to the U.S. Court of Appeals for the Seventh Circuit, wherein it was consolidated with two appeals from the Northern District of Illinois.

In the Northern District of Illinois these two cases were styled:

Robert Bevis, et al. v. City of Naperville and Jason Arres, Case No. 1:22-cv-04775, and

Javier Herrarra, et al. v. Kwame Raoul, et al., Case No. 1:23-cv-00532

In the U.S. Court of Appeals, this case was styled:

Robert Bevis, et al. v. City of Naperville and Jason Arres 23-1353, and was consolidated with No. 23-1826, *Harrel v. Raoul* (S.D. Ill. No. 3:23-cv- 00141-SPM); No. 23-1827, *Langley v. Kelly* (S.D. Ill. No. 3:23-cv-00192-SPM); and No. 23-1828, *Federal Firearms Licensees of Illinois, et al. v. Pritzker* (S.D. Ill. No. 3:23-cv-00215-SPM).

The Seventh Circuit entered judgment on November 3, 2023. See Pet. App. 1. A timely filed Petition for Rehearing or in the Alternative for Rehearing *En Banc*, was denied on December 11, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Jeremy W. Langley, Timothy B. Jones and Matthew Wilson, respectfully request the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

DECISION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is published at 85 F.4th 1175 and is reproduced at Pet. App. 1.

JURISDICTION

The Seventh Circuit entered judgment on November 3, 2023. *See* Pet. App. 1. A timely filed Petition for Rehearing or in the Alternative for Rehearing *En Banc*, was denied on December 11, 2023. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are in the Appendix.

STATEMENT OF THE CASE

Since this Court issued its decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), several states have engaged in a massive resistance to its express dictates. Illinois is one of these states resisting this Court's Second Amendment dictates, for in January, 2023, Illinois passed and enacted, a broad ranging firearm and magazine ban, banning many of the most popular rifles, pistols, shotguns, magazines, and their component parts in both Illinois and the United States generally. This was the so called Protect Illinois Communities Act, IL P.A. 102-1116. The result of the ban was to take multiple entire classes of arms out of the availability to ordinary Illinois citizens, even those with an Illinois firearms license, called a Firearm Owners Identification Card.

The ban itself was, frankly, a rebuke to this Court's recent Second Amendment jurisprudence. For instance, in the legislative history, state Senator Harmon, stated, in the formal legislative history of this Act:

> "I don't know exactly where to begin. First, the Supreme Court's jurisprudence on firearms is a bit muddled. They seem to have completely written out a well-regulated militia from their interpretation of the Second Amendment. Second, as we are all too acutely aware now, the Supreme Court jurisprudence can turn on a dime. So, I wouldn't necessarily believe that the – the mess that is Supreme Court jurisprudence on Second Amendment issues will always be the same. And, finally, I

> can say with confidence, we are not including in our definition of assault weapon, any weapons that existed in 1791."

102nd Ill. Gen. Assem., Senate Proceedings, January 9, 2023, at 27 (statements of Senator Harmon).

Senator Harmon ended his debate with an ominous, "We'll see you in court." *Id.* at 34.

Nearly everything that Senator Harmon said, was either targeted directly to this Court, or completely defies this Court's rulings. For as noted in *Heller* itself, and reaffirmed in *Caetano v. Massachusetts*, 577 U.S. 411 (2016), the argument that the Second Amendment only applies to items in existence in 1791, "borders on the frivolous." Yet, an actual major proponent of the PICA bill justifies this ban noting, in essence, Illinois citizens can keep their literal museum pieces from 1791.

The challenged Protect Illinois Communities Act ("PICA"), which became effective on January 10, 2023, is just one of the post-*Bruen* enactments around the national that defies *Bruen* and its predecessor cases. Again, do not take a litigant's word for it. Recent history shows that no state had banned any semi-automatic firearms since the expiration of the federal assault weapons ban in 2004. That is, until shortly after the *Bruen* decision, on June 30, 2022, when Delaware did. Illinois followed with its own such ban in January, 2023. Washington state banned such firearms on April 25, 2023. Since then, Oregon and Rhode Island have passed magazine bans. *See* How Have State Gun

Laws Changed Since *Bruen*?, April 28, 2023 (visited 2-5-2024 "https://firearmslaw.duke.edu/2023/04/how-have-state-gun-laws-changed-since-bruen"). The short answer is defiance. This kind of defiance to Supreme Court decisions by elected state governments has not been seen since the 1960s.

Nothing in the history or text of the Second Amendment indicates an intent to limit the arms available to inferior, obsolete, or historical arms. If, as this Court has stated, the Second Amendment guarantees the individual right to possess and carry weapons in case of confrontation (*see Heller*), then, *ipso facto*, the individual needing a weapon in case of confrontation must have a weapon with which they can put up a worthwhile fight. Yet, as Senator Harmon points out, nothing from 1791 is banned. Do the guards at Senator Harmon's state senate office provide security for him with original or replica arms from 1791? Of course not. They use the kinds of common defensive arms and magazines banned under this PICA statute.

Likewise, nothing in the Second Amendment "reserves" for exclusive use of the military any arms of any kinds. That language, relied on by the Seventh Circuit, is found not in the United States of America Constitution, but rather in the Mexican constitution. in Title I, Chapter I, Article 10 of the 1910 Constitution of the United States of *Mexico*. *See* https://www.constituteproject.org/constitution/Mexico_2015 (accessed 11-5-2023) ("The inhabitants of the United Mexican States have the right to keep arms at home, for their protection and legitimate defense, with the exception of . . . those

reserved for the exclusive use of the Army, Navy, Air Force and National Guard. . . .").

There is no rifle, pistol or shotgun, which is anywhere near comparable to the destructive power of a W54 tactical nuclear weapon. Yet, a W54 tactical nuclear weapon is precisely what the Seventh Circuit panel compared these firearms to in order to justify their banning. At oral argument, these firearms were compared to surface to air missiles, and other of the most advanced weapons known to humans. Yes, these arms are all the lineal descendants of the Brown Bess muskets and Kentucky rifles that fought our revolution. Improved, yes. Made of different materials, perhaps. But nothing that the drafters of the Constitution would not recognize as a firearm.

Since *Bruen*, bans on semi-automatic firearms and magazines have proliferated, with State Legislatures standing in the proverbial doorway, blocking ordinary citizens access to commonly owned, commonly used, modern firearms suitable for defense.

The drafters of the statutes defy this Court's precedent, almost mockingly, stating nothing from 1791 is banned, even though this Court has now twice, rejected that Argument. *See Caetano v. Massachusetts*, 577 U.S. 411 (2016); *citing District of Columbia v. Heller*, 128 S.Ct. 2783, 2971 (2008).

While the trial court, the Southern District of Illinois, found the ban likely to be unconstitutional and preliminarily enjoined it, the appellate court contorted to the point of unrecognizability this Court's statement

of what is meant by a "bearable arm" to exclude the lineal descendants of the Brown Bess and Kentucky rifle, descendants of Revolutionary War fowling pieces, and even pocket size .22 pistols, that happen to have a threaded barrel. The logic of the Appellate Court, taken to its inevitable conclusion, would justify the ban on every rifle, pistol and shotgun that was invented after the Civil War, any many of those invented prior thereto. Not even *Heller's* .22 revolver is safe under the analysis of the Seventh Circuit.

If the Second Amendment, or in fact, any portion of our Constitution is to persist, it must be protected with equal zeal from the inferior courts who cannot accept a given decision of this Court, as it is from any others that would do our Republic harm.

This action concerns the arms bans in the Act that are included in IL P.A. 102-1116. Those sections generally prohibit the purchase and sale of politically labeled "assault weapons" and "large capacity ammunition feeding devices" (defined as magazines accepting more than 10 rounds of ammunition for a long gun or more than 15 rounds of ammunition for handguns). Effective January 1, 2024, the Act also prohibits the mere possession of "assault weapons" and magazines except for those possessed prior to the Act. *Id*. §§ 1.9(c)-(d) & 1.10(c)-(d). The Act provides for substantial criminal penalties for violation of its provisions. 720 ILCS 5/24-1(b) and 1.10(g).

Plaintiffs Jeremy W. Langley, Timothy B. Jones and Matthew Wilson are law-abiding citizens and

residents of Crawford County, Illinois. Plaintiffs desire to exercise their Second Amendment right to acquire, possess, carry and purchase the banned arms for lawful purposes including, but not limited to, the defense of their homes.

Plaintiffs brought this action challenging the Act under the Second Amendment in the Circuit Court of Crawford County, Illinois. Defendant ISP promptly removed this case to federal court, the Southern District of Illinois. On January 24, 2023, Plaintiffs filed a motion requesting the district court to preliminarily enjoin the Act. The district court, following detailed briefing and submission of facts, and oral argument, granted Plaintiffs' motion in an order dated April 28, 2023. Pet. App. 108-141. Defendant ISP appealed, and the Seventh Circuit panel overruled the district court's granting of Plaintiffs' motion for preliminary injunction in an opinion dated November 3, 2023. Pet. App. 1-107. Plaintiffs filed a petition for rehearing *en banc* on November 8, 2023. That petition was summarily denied. Pet. App. 142.

As of this date, ordinary, law-abiding Illinois citizens cannot buy, acquire, carry, use or possess common, ordinary semi-automatic firearms, that, per the record, are owned by tens of millions of Americans, nor the common ordinary capacity magazines for which they were designed and commonly used, in some cases for over 80 years.

REASONS FOR GRANTING THE WRIT

I. Introduction

This Court has, in the past, denied Petitions for a Writ of Certiorari, for similar cases. *See Friedman v. City of Highland Park, Ill.*, 136 S. Ct. 447 (2015). Justice Thomas and the late Justice Scalia dissented from that denial, "Because noncompliance with our Second Amendment precedents warrants this Court's attention as much as any of our precedents, I would grant certiorari in this case.").

Time has not improved the situation. As summarized above and discussed in detail below, the Seventh Circuit's decision is fundamentally at odds with a number of this Court's precedents, particularly *Heller* and *Bruen*, and in fact, the very authors of the statute challenge this court's decisions. In the meantime, Plaintiffs and hundreds of thousands of law-abiding Illinois citizens are suffering irreparable injury because their fundamental right to keep and bear arms is being infringed. Accordingly, for the reasons set forth below, Plaintiffs respectfully urge the Court to take up this case and grant the requested injunctive relief.

II. Plaintiffs Will Prevail on the Merits

A. The *Heller/Bruen* Framework for Second Amendment Analysis

This is an appeal of a preliminary injunction. The trial court granted this preliminary injunction. The

Seventh Circuit Court of Appeals reversed, in a split panel decision. Pet. App. 1.

In *Heller*, the Supreme Court held (a) the Second Amendment protects an individual right to keep and bear arms that is not tied to militia membership; and (b) a *per se* absolute prohibition of a weapon in common use for lawful purposes is a violation of that right. 554 U.S. at 592, 628. In *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010), the Court held that the right to keep and bear arms is among the fundamental rights necessary to our system of ordered liberty, and therefore the Second Amendment is applicable to the states through the Fourteenth Amendment. *Id.*, 561 U.S. at 778 (*reversing NRA v. Chicago*, 567 F.3d 856 (7th Cir. 2009) (Easterbrook, J.)).

The Supreme Court has also, unequivocally held that modern devices are also protected under the Second Amendment. *Caetano v. Massachusetts*, 577 U.S. 411 (2016). But not apparently in Illinois.

In *Bruen*, the Court articulated the following general framework for resolving such challenges: "We reiterate that the standard for applying the Second Amendment is as follows: [1] When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. [2] The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.*, 142 S. Ct. at 2129-30. These steps have come to be known as the "plain text" step and the "history and tradition" step.

Neither the drafters of the statute, nor the Appellate Court, seemed interested in following this court's dictates.

B. *Bruen* Step 1: The Plain Text Covers Plaintiffs' Conduct

The "textual analysis focuse[s] on the normal and ordinary meaning of the Second Amendment's language." *Bruen*, 142 S. Ct. at 2127 (*citing Heller*, 554 U.S. at 576–77, 578) (internal quotation marks omitted). Plaintiffs desire to acquire and possess the banned "assault weapons" and magazines. Thus, the first issue is whether the plain text of the Second Amendment covers this conduct. The plain text provides: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *Heller*, the Court held that a handgun is an "arm" within the meaning of the Second Amendment. 554 U.S. at 581, 628–29.

This Court noted that "all firearms constitute 'arms'" within the then-understood meaning of that term. *Id*. (internal citation and quotation marks omitted). And, just as the scope of protection afforded by other constitutional rights extends to modern variants, so too the Second Amendment "extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id*. at 582.

Thus, the banned firearms are obviously "arms" covered by the plain text and therefore *prima facie* protected. (Whether they are actually protected is a matter resolved at the second step.) This is the first misstep of the Seventh Circuit, who conflated ordinary, commonly owned rifles, pistols and shotguns, with, literally, a W54 Davy Crocket tactical nuclear warhead, and the legislature, some of whose members stressed they were banning nothing from 1791. 102nd Ill. Gen. Assem., Senate Proceedings, January 9, 2023, at 27 (statements of Senator Harmon).

In addition to the obvious case of firearms, rifles, pistols and shotguns, the general definition of "arms" in the Second Amendment, "covers modern instruments that facilitate armed self-defense." *Bruen*, 142 S. Ct. at 2132. The magazines banned by the State fit neatly within this definition because they are essential to the operation of modern semi-automatic firearms. *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* (Because 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.).

In summary, the Plaintiffs' conduct in seeking to acquire and possess the banned "assault weapons" and magazines is covered by the plain text of the Second Amendment. Their conduct is, therefore, presumptively protected by the Constitution. Not according to

the Seventh Circuit, who held these rifles, pistols and shotguns were not "arms." Pet. App. 28.

C. *Bruen* Step 2: Because the Banned Arms are in Common Use, the State Cannot Meet its Burden

The panel used the AR-15 pattern semi-automatic rifle as the typical example of the kind of weapon banned by the Act, even though the Act also bans pocket pistols, hunting shotguns, as well as AR15 types. Pet. App. 7. The State's own expert, Dr. Klarevas, acknowledged that Americans own tens of millions of AR-15 and similar rifles. In fact, the pistols and shotguns banned were and are common as well. The overwhelming majority of those weapons are used for lawful purposes, and in fact, under the statute, apparently can still be used for hunting, somehow.

Under the Supreme Court's precedents, particularly *Heller*, "*that 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) (emphasis added). The same is true for the so-called "large capacity magazines" banned by the Act. *Duncan v. Bonta*, 83 F.4th 803, 816 (9th Cir. 2023) (Bumatay, J., dissenting from order granting stay) (*quoting* Justice Thomas's dissent in *Friedman*).

Indeed, this is *Heller's* central holding. This Court performed an exhaustive search of the historical

record and concluded that no Founding-era regulation "remotely burden[ed] the right of self-defense as much as an absolute ban" on a weapon in common use. *Id*., 554 U.S. at 632. Thus, laws that ban weapons in common use for lawful purposes are categorically unconstitutional. *Id*., at 628. There is no need to revisit this issue in each arms ban case.

This necessarily means that the State cannot carry its burden under *Bruen's* second step (history and tradition). Following an exhaustive search, *Heller* concluded that it is impossible to demonstrate that a ban of a weapon in common use is consistent with the Nation's history and tradition of firearms regulation, even firearms useful for militia service or self-defense, like the arms at issue in this case. It follows that the State's ban on weapons in common use for lawful purposes, like the ban at issue in *Heller*, is categorially unconstitutional, as it bans the exact type of firearms that ordinary citizens do actually keep, in large numbers, for lawful purposes, and that they would be expected to bring to a militia summons, or use for self defense should the need arise.

D. Summary: The Act is Unconstitutional

The Second Amendment's plain text covers Plaintiff's proposed conduct of acquiring, keeping, and bearing bearable arms. The Constitution thus presumptively protects that conduct. These arms are bearable rifles, pistols and shotguns. We are not dealing with howitzers, poison gas or nuclear warheads. The

State has not (indeed cannot) rebut that presumption, because under *Heller*, its ban of arms in common use is not consistent with the Nation's history and tradition of firearms regulation, even if it is used by a military, or even if it is based on a military arm, or the military currently or formerly uses a similar arm, like the similarity between a Winchester Model 70 bolt action hunting rifle, and the classic M1903 bolt action Springfield military rifle.

III. The Panel Majority Opinion Manifestly Conflicts with *Heller* and *Bruen* in Several Respects

A. The State's Handgun Ban is Clearly Unconstitutional

The ordinance challenged in *Heller* banned the possession of handguns even for self-defense in the home. The Court invalidated the ordinance, writing "banning from the home the most preferred firearm in the nation to keep and use for protection of one's home and family [fails] constitutional muster." 554 U.S. at 628-29.

Applying this rule to the present case, there cannot be doubt that laws absolutely banning handguns are unconstitutional. Indeed, the panel majority acknowledged that "everyone can agree" that handgun bans are unconstitutional. Pet. App. 3. Yet the "Illinois Act bans certain . . . pistols." Many of them in fact. Having acknowledged that the Act bans certain handguns, one would expect the majority to address the

issue further and demonstrate how the State's handgun ban is somehow distinguishable from the handgun ban invalidated in *Heller*. Such an expectation would be in vain. Indeed, other than acknowledging that the State's handgun ban exists, the majority never mentioned it again, much less demonstrate how the handgun ban could be reconciled with *Heller*, which of course it cannot. Thus, the opinion manifestly conflicts with *Heller*.

B. The Panel's Holding that a Fire*arm* is not an *Arm* Conflicts with *Heller*

As noted, *Heller* stated that the textual analysis focuses on the normal and ordinary meaning of the words in the constitutional text. *Heller*, 554 U.S. at 576. The plain and ordinary meaning of "*arm*" would seem to include all fire*arms*. This is what *Heller* said. *Id*., at 581 (citing a source that said that all firearms constituted arms). Granted, it is conceivable that a given kind of firearm may be dangerous and unusual, but that does not make it any less an arm. Thus, it follows that the firearms banned by the State are arms within the meaning of the text.

The Seventh Circuit disagreed. Per the majority panel opinion, the word "arms" in the text includes some firearms but not others. And how does one discern the difference? The ordinary meaning of the text is no help according to the panel majority because the word "arms" in the Second Amendment has an esoteric meaning, and in the context of firearms it means

"firearms that are not too 'militaristic.'" Of course, the panel seems to have drawn this line between firearms covered by the text and those that are not in an effort to cabin *Heller* as much as possible to its specific facts. But as then-Judge Kavanaugh once wrote, a line based on a desire to restrict *Heller* is "not a sensible or principled constitutional line for a lower court to draw." *Heller v. D.C.* ("*Heller II*"), 670 F.3d 1244, 1286 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). Justice Kavanaugh was and is correct, and the panel majority's approach to the text cannot be reconciled with *Heller's* "plain and ordinary meaning" mandate.

C. The Common Use Test is Not Circular

As discussed above, *Heller* held that a firearm in common use for lawful purposes may not be absolutely banned. 554 U.S. at 628-29. This has become known as the "common use" test.

The Seventh Circuit made clear it is not a fan of the common use test. Like Justice Breyer, the Seventh Circuit believes the test is the product of faulty circular reasoning. Accordingly, the court rejected the common use test and implicitly, if not expressly, adopted Justice Bryer's dissent in its stead, instead of following the controlling law.

In his dissent in the court below, Judge Brennan took his colleagues to task on this point. First, he explained how the common use test, properly understood, is not circular at all. And then he observed that no matter how he and his colleagues feel about this Court's

reasoning, "[w]e are not free to ignore the Court's instruction as to the role of 'in common use' in the Second Amendment analysis."

Judge Brennan was surely correct. The panel majority ignored the common use test and it is obvious why they did so. As Justice Thomas observed, AR-15s are in common use for lawful purposes and that is all that is needed for citizens to have a Second Amendment right to keep them. *Friedman, supra*. Therefore, to avoid reaching the result that citizens have a right to keep these firearm, it was necessary to jettison the test. This was plain error and shows a need for this Court to exercise its supervisory jurisdiction over inferior courts to make them comply with this Court's precedent, no matter how much some inferior court judges may not wish to.

D. The Seventh Circuit's History and Tradition Analysis was a Flawed

The panel majority in the court below did not engage in a robust examination of the historical record to determine if there were any Founding-era regulations analogous to the State's arms ban. At least, if it did, it did not mention doing same. Instead, the court held that the burden of the State's arms ban (i.e., the "how" of the regulation) is comparable to historical regulations merely because it has a grandfather clause and law enforcement and military personnel are exempt. The problem with this is that the lower court did not bother to identify any state laws from the Founding-era (or even from prior to the late 20th

Century) that were absolute bans of commonly held weapons but had grandfather provisions and exempted law enforcement and military personnel.[1]

Indeed, the lower court did not seem to understand the point of the "how" analysis. We know this because the dissent performed an analysis of the "how" question, about which the panel majority ridiculed: "[The dissent's analysis] "relies only on the fact that the particulars of those regulations varied from place to place, and that some were more absolute than others." But surely the point of the "how" question is to examine particulars of the historical regulations to discern whether they imposed a comparable burden. The lower court's "how" analysis fails on its face.

The lower court's analysis of the "why" question fares no better. The court literally held that the "why" of the State's arms ban can be conclusively determined from the title of the Act, writing "we find the best indication of its purpose in its name: 'Protect Illinois Communities Act.'" *Id*. But this Court held that in asking "why," the issue to be determined is whether the historical regulation was "comparably justified" to the modern one. 142 S. Ct. at 2133. The Court cautioned lower courts that in making this determination they must review the justification at an appropriate level of generality, because in one sense "everything is similar in infinite ways to everything else." 142 S. Ct. at 2132

[1] The court pointed to some municipal laws, but *Bruen* held that such laws covered too few people and are therefore not useful in the analysis. 142 S. Ct. at 2154.

(internal quotation marks and citation omitted). The Seventh Circuit failed to heed this warning. For the lower court, literally any justification, no matter how general, is good enough. Indeed, the court went so far as to say that a recital that the purpose of the regulation is to exercise the police power demonstrates a sufficiently comparable justification. (purpose of Ordinance was to protect health, safety and welfare). Under the Seventh Circuit's analysis, the "why" question becomes meaningless, because at the level of generality employed by the panel majority, *all* historical regulations are comparably justified to *all* modern regulations. After all, by definition, the exercise of the police power is the purpose of all firearms regulations. *Bruen* did not mean to establish a meaningless metric, so the lower court surely erred.

E. Arms May Not be Banned Because a Court Thinks they are "Especially Dangerous"

The panel majority held that the State's arms ban satisfies *Bruen* step two (history and tradition), because there is a long-standing tradition of regulating "especially dangerous" weapons. *Id*. Thus, the circuit court also misapprehended *Heller's* "dangerous and unusual" test.

In *Bruen*, the court reiterated this same concept as stated in *Heller*:

> [In *Heller*], we found it 'fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons' 'that the

> Second Amendment protects the possession and use of weapons that are 'in common use at the time.' *Id*., at 627, 128 S.Ct. 2783 (first *citing* 4 W. Blackstone, Commentaries on the Laws of England 148–49 (1769).

Id., 142 S. Ct. at 2128.

Nothing in *Heller* nor *Bruen* even hints that the Second Amendment does not protect a weapon merely because in a reviewing court's view it is "especially dangerous." In *Caetano v. Massachusetts*, 577 U.S. 411 (2016), Justice Alito made poignant observation when he wrote that the "dangerous and unusual" test is "a conjunctive test: A weapon may not be banned unless it is *both* dangerous *and* unusual." *Id*, 577 U.S. at 418 (Alito, J. concurring) (emphasis in the original). The panel did not care.

In summary, an arm cannot be subjected to a categorical ban unless it is *both* dangerous and unusual. *Heller*, 554 U.S. at 627; *Bruen*, 142 S. Ct. at 2128. An arm that is commonly possessed by law-abiding citizens for lawful purposes is, by definition, not unusual. It follows, that "the relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes." *Caetano*, 577 U.S. at 418 (Alito, J., concurring). Therefore, the Seventh Circuit's holding that the State's ban of commonly possessed firearms and magazines is constitutional merely because, in its view, the arms are "especially dangerous" is clearly erroneous.

F. The Seventh Circuit Actually Engaged Interest Balancing

While the majority panel opinion denied it, it is clear that the Seventh Circuit majority panel protests to much on the topic. The Seventh Circuit's decision obviously rests on a foundation of hidden interest balancing. The Seventh Circuit states that a "weapon such as the AR-15, which is capable of inflicting the grisly damage described in some of the briefs." The problem with this is that all firearms are capable of inflicting grisly damage, even muskets from 1791. This fact has not changed in 500 years. The rifles, muskets, pistols and fowling pieces carried in our Revolution were not carried to be stylish, they were carried and used for battle.

What is the dividing line between an ordinarily dangerous firearm and one that is "especially dangerous"? The court below held that in making this determination a court must examine the record to determine whether there is an "important difference" between the banned weapon and other (unidentified) weapons in terms of lethality. Pet. App. 47, n. 12. In other words, the lower court made an empirical judgment about the relative dangerousness of the banned weapons and based on that judgment determined that the State's interest in banning these "especially dangerous" weapons outweighs citizens' rights to use them for self-defense in their home. In other words, only inferior arms are allowed. This is precisely the sort of interest balancing precluded by *Bruen*. 142 S. Ct. at 2129. Yet the Seventh Circuit did so.

G. The Panel Misconstrued *Heller's* "Useful for Military Service" Passage

The panel majority held that to prevail on the merits Plaintiffs have the burden of showing that the banned arms are not "predominantly useful in military service." Pet. App. 31. As noted, the panel used the AR-15 as the paradigmatic example of the kind of weapon the statute covers, not even discussing pistols or shotguns. The panel then held that AR-15s are similar to the M-16s that were once used in the military and are therefore not protected by the Second Amendment. (*citing Heller*, 554 U.S. at 627 (weapons "most useful in military service" may be banned)).

There are two problems with this, one factual and one legal. First, as Judge Brennan accurately noted, the semi-automatic AR-15 is a civilian, not military, weapon, and no army in the world currently uses a primary service rifle that is only semiautomatic. More importantly, even assuming for the sake of argument that the AR-15 might be used by the military, the panel majority still misconstrued *Heller*, as the very passage they cited demonstrates. In that passage, the Court 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? Presumably, it is either to fight an enemy in battle, or to prepare to do same.[2] It would be extremely

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[2] *See* U.S. Const. amend. V (referring to "the Militia, when in actual service in time of War").

anomalous, therefore, if *Heller* were interpreted to mean at the exact same time that (1) firearms brought by militia members for militia service are protected by the Second Amendment, and (2) all weapons used for military service are not protected by the Second Amendment. This is obviously not the law.

The second part of the problem is that many common ordinary firearms, both historically, and currently, crossed over from civilian to military use. The caplock was invented to hunt waterfowl in 1803. But increased the rate of fire and reliability of military rifles through the Civil War. Bolt action rifles, like the M1903 Springfield, were state of the art military weapons for 60 years, and for decades thereafter remained common hunting rifles, with many a million surplus Mauser or Springfield military rifle modified for perceived better hunting purposes. The AR15 pattern, has become the standard in coyote and wild pig hunting, with formal competitive matches taking place every year in nearly every state; and this is on top of its top choice as a self-defense rifle.

Rather, "*Heller* 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). *See also Kolbe v. Hogan*, 849 F.3d 114, 156 (4th Cir. 2017) (Traxler, J., dissenting) (calling an arm a "weapon of war" is irrelevant, because under *Heller* "weapons that

are most useful for military service" does not include "weapons typically possessed by law-abiding citizens"). While standardized reasonably technologically current firearm are clearly preferable, a double barrel fowling gun, when needed for defense, is better than no gun at all. But the Second Amendment does not only protect obsolete or semi-obsolete arms any more than the First Amendment only protects newspapers and handbills and not online news services and e-mail.

H. The Seventh Circuit Failed to Apply *Bruen* to the Magazine Ban

As to the Act's ban of "large capacity magazines," the Seventh Circuit panel below wrote:

> Turning now to large-capacity magazines, we conclude that they also can lawfully be reserved for military use. Recall that these are defined by the Act as feeding devices that have in excess of 10 rounds for a rifle and 15 rounds for a handgun. Anyone who wants greater firepower is free under these laws to purchase several magazines of the permitted size. Thus, the person who might have preferred buying a magazine that loads 30 rounds can buy three 10-round magazines instead.

Pet. App. 38.

In case this Court might wonder what other justification the panel had to justify its decision to uphold the magazine ban, in sum, there was none, nothing.

The panel, in one paragraph just declared it to be so, citing to nothing. Perhaps there was no authority or reasoning that the majority panel could actually write with a straight face and uphold the ban under existing precedent. Regardless, this is not judicial analysis or application of precedent. Rather, this is judicial fiat, an inferior court imposing its will on a given topic that it does not like, knowing that simply playing the odds, that will be the last word for a while. It should not be allowed to do so.

As the panel basis its decision on its own will, the panel's outcome conflicts with *Heller*, *Bruen*, and every other Second Amendment case this court has issued in recent years. As discussed above, the fact that a weapon may be used by the military does not mean that the State can ban it if the weapon is in common use for lawful purposes. If it did, the Second Amendment would be literally meaningless, as nearly every improvement in firearms technology has, at one time or another, been used by some military force.

Moreover, the panel seems to be under the impression that the State can ban some magazines (even though they are not only in common use, they are downright ubiquitous) so long as it continues to allow its citizens to acquire other lesser magazines. But there is no limiting principle to the panel's reasoning. Can the State also ban magazines with a capacity in excess of one or two rounds because anyone who wants greater firepower is free to purchase several magazines of the permitted size? It would seem so under the panel's truncated analysis, i.e., a person who might

have preferred buying a magazine that loads 30 rounds can buy 15 two-round magazines instead (except for a rifle he cannot buy a 15 round magazine, as has been standard for the M1 carbine for the past 80+ years). This conclusion obviously conflicts with *Heller*. Indeed, *Heller* rejected the exact same argument advanced by the panel when it held that it is "no answer" to say that banning a commonly possessed arm is permitted so long as other arms are allowed. *Heller*, 554 U.S. at 629.

I. The Panel Majority's Continued Reliance on *Friedman* Cannot be Reconciled with *Bruen* or *Caetano*

The panel continued to rely on its own pre-*Bruen* decision, of *Friedman v. City of Highland Park, Illinois*, 784 F.3d 406 (7th Cir. 2015), in which the Seventh Circuit announced a novel test to determine Second Amendment questions. Under this *Friedman* test, a court asks: "whether a regulation [1] bans weapons that were common at the time of ratification or [2] those that have 'some reasonable relationship to the preservation or efficiency of a well regulated militia' . . . and [3] whether law-abiding citizens retain adequate means of self-defense." *Id*., 784 F.3d at 410. To be blunt not one of these three legs of this test are allowed by Supreme Court precedent:

[1] The Second Amendment's "reference to 'arms' does not apply only to those arms in existence in the 18th century." *Bruen*, 142 S. Ct. at 2132.

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

[3] "[T]he right to bear other weapons is 'no answer' to a ban on the possession of protected arms." *Caetano v. Massachusetts*, 577 U.S. 411, 421 (2016) (*per curiam*), *quoting Heller*, 554 U.S. at 629.

But for some sort of resistance to this Court's dictates, it is a mystery why the panel majority believes *Friedman* has any continuing relevance at all when all three legs of the stool upon which it is propped have been knocked out by this Court, in some cases more than once. It is even more confusing why, other than raw pride, the panel would base its holding in part on the obviously abrogated *Friedman* test, and doing so obviously conflicts with this Court's decisions that knocked out *Friedman's* three legs. What is truly mystifying is why the entire Seventh Circuit Court of Appeals, when faced with this, chose to deny rehearing, and let this travesty stand, except presumably, to speed a decision from this Court.

VI. Plaintiffs Are Suffering Irreparable Harm

Of course the procedural posture of this case is that of a Motion For Preliminary Injunction. As noted by the trial court in this case, Plaintiffs have established that they are likely to prevail on the merits of their claim that the Act violates the Second Amendment. Violation of constitutional rights per se constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347,

373-74 (1976) (loss of constitutional freedom "for even minimal periods of time" unquestionably constitutes irreparable injury). Recently, the Ninth Circuit applied the *Elrod* principle in the Second Amendment context. *Baird v. Bonta*, 81 F.4th 1036, 1040 (9th Cir. 2023). *See also Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) (also applying principle in Second Amendment context).

Moreover, Plaintiffs are applying for preliminary relief because they are suffering much more than intangible harm to constitutional rights, they are being forced to have only available for defense, obsolete and inferior arms, as Plaintiffs are not even allowed to carry, even with licenses, the arms and magazines they already had, much less update or acquire additional or better arms or magazines, or replace those that might wear out or break. Even parts, like pistol grips and stocks are prohibited as "assault weapon accessories" cutting off the supply of spare parts for what might be "grandfathered" a term evoking a time in which voting rights were restricted by so called "literacy tests" unless a persons grandfather had voted, with obvious exclusionary purpose. Here, the Court should enter an injunction to prevent further irreparable harm.

VII. An Injunction Would Not Harm the Public Interest

However strong Respondents' asserted public safety policy may be, like all unconstitutional enactments, the public has no interest in furthering that policy by unconstitutional means. As this Court stated in

Heller in response to an identical argument, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of [arms commonly] held and used for self-defense in the home." *Id*., 554 U.S. at 636. And as this Court stated in *Bruen*, the interest-balancing inherent in the district court's public interest analysis has no place in resolving questions under the Second Amendment. *Id*., 142 S. Ct. at 2126. It is always in the public interest to enjoin an unconstitutional law. *See N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013).

CONCLUSION

Plaintiffs have established all of the elements required to demonstrate that they are entitled to preliminary injunctive relief. Therefore, they respectfully request that this Court GRANT this Petition for a Writ of Certiorari.

Respectfully submitted this 23rd day of February 2024.

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