No. _____

In the Supreme Court of the United States

DANE HARREL, *et al.*,

Petitioners,

v.

KWAME RAOUL, *et al.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Constitution allows the government to prohibit law-abiding, responsible citizens from protecting themselves, their families, and their homes with semiautomatic firearms that are in common use for lawful purposes.

(2) Whether the Constitution allows the government to prohibit law-abiding, responsible citizens from protecting themselves, their families, and their homes with ammunition magazines that are in common use for lawful purposes.

(3) Whether enforcement of Illinois's semiautomatic firearm and ammunition magazine bans should be enjoined.

PARTIES TO THE PROCEEDING

Petitioners Dane Harrel, C4 Gun Store, LLC, Marengo Guns, Inc., Illinois State Rifle Association, Firearms Policy Coalition, Inc., and Second Amendment Foundation, Inc., were the plaintiffs before the District Court and the plaintiffs-appellees before the Court of Appeals.

Caleb Barnett, Brian Norman, Hood's Guns & More, Pro Gun & Indoor Range, the National Shooting Sports Foundation, Inc., Federal Firearms Licensees of Illinois, Guns Save Life, Gun Owners of America, Gun Owners Foundation, Piasa Armory, Debra Clark, Jasmine Young, Chris Moore, Jeremy Langley, Timothy Jones, and Matthew Wilson were plaintiffs-appellees below and are filing related petitions.

Robert Bevis, Law Weapons, Inc., the National Association for Gun Rights, and Javier Herrera were appellants below, plaintiffs in the Northern District of Illinois, and are filing related petitions.

Respondents Kwame Raoul, in his official capacity as Attorney General of Illinois, and Brendan Kelly, in his official capacity as Director of the Illinois State Police, were the defendants before the District Court and the defendant-appellants before the Court of Appeals.

The City of Naperville, Jason Arres, in his official capacity as Naperville Police Chief, Cook County, Toni Preckwinkle, in her official capacity as County Board of Commissioners President, and the City of Chicago were defendants-appellees below in the related *Bevis* and *Hererra* proceedings and are respondents in the related petitions.

CORPORATE DISCLOSURE STATEMENT

C4 Gun Store, LLC has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Marengo Guns, Inc. has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Illinois State Rifle Association has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Firearms Policy Coalition, Inc. has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

Second Amendment Foundation, Inc. has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this proceeding:

- *Bevis, et al. v. City of Naperville, et al.*, No. 23-1353; *Hererra v. Raoul, et al.*, No. 23-1792; *Barnett, et al. v. Raoul* and *Kelly*, Nos. 23-1825, 23-1826, 23-1827, and 23-1828 (7th Cir.) (panel opinion, issued November 3, 2023).
- *Barnett, et al., v. Raoul, et al.*, Nos. 23-1985, 23-1826, 23-1827 and 23-1828; *Bevis, et al. v. City of Naperville, et al.*, No. 23-1353; *Herrera v. Raoul, et al.*, No. 23-1792 (7th Cir.) (orders denying petitions for rehearing *en banc*, issued December 11, 2023).
- *Bevis, et al., v. City of Naperville*, *et al.*, No. 23-1353 (7th Cir.) (order denying motion for an injunction pending disposition of a petition for a writ of certiorari, issued November 22, 2023).
- *National Association for Gun Rights, et al. v. City of Naperville, et al.* No. 23A486 (S. Ct.) (the application for a writ of injunction pending certiorari was denied on December 14, 2023).
- *Bevis et al. v. City of Naperville*, *et al.*, No. 1-22-cv-04775-VMK (N.D. Ill.) (memorandum opinion and order denying preliminary injunction, issued February 17, 2023).
- *Herrera v. Raoul et al.*, No. 1-23-cv-00532-LCJ (N.D. Ill.) (memorandum opinion and order denying preliminary injunction, issued April 25, 2023).

- *Barnett et al. v. Raoul et al.*, Nos. 3-23-cv-00209-SPM, 3:23-cv-00141-SPM, 3:23-cv-00192-SPM, 3:23-cv-00215-SPM (S.D. Ill.) (memorandum opinion and order granting preliminary injunction, issued April 28, 2023).
- *Barnett et al. v. Raoul et al.*, Nos. 3-23-cv-00209-SPM, 3:23-cv-00141-SPM, 3:23-cv-00192-SPM, 3:23-cv-00215-SPM (S.D. Ill.) (memorandum opinion and order granting defendants' motion to dismiss due process claims, issued December 22, 2023).

As of the time of this filing, Petitioners are aware of no other proceedings in state or federal court, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

This case presents the question whether the State of Illinois constitutionally may ban scores of semiautomatic firearms, including the most popular type of rifle in the Nation's history, and standard ammunition magazines frequently used with them. Under a straightforward application of this Court's precedents, the answer to that question is no.

In *District of Columbia v. Heller*, this Court posited several reasons why a law-abiding citizen may prefer to use a handgun for self-defense:

> It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police.

554 U.S. 570, 629 (2008). But after hypothesizing reasons why handguns *may* be useful, the Court held that "[*w*]*hatever the reason*," the dispositive fact for constitutional purposes is that handguns are commonly "chosen by Americans" for the lawful purpose of "self-defense in the home." *Id.* (emphasis added). Because handguns are commonly possessed for that lawful purpose, "a complete prohibition of their use is invalid." *Id. Bruen* reaffirmed this central holding of *Heller*, confirming that law-abiding citizens have an absolute right to possess arms that are "in common use today." *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 47 (2022).

In adopting the categorical rule that arms that are in common use for lawful purposes cannot be banned, this Court in *Heller* rejected the United States' suggestion that the case be remanded for fact-finding on issues such as "whether, and to what extent, long guns provide a functionally adequate alternative to handguns for self-defense in the home." Br. for United States as Amicus Curiae at 31 n.9, *District of Columbia v. Heller*, No. 07-290 (U.S. Jan. 11, 2008). Under the constitutional standard established by *Heller*, and reaffirmed in *Bruen*, once it is determined that an arm is of a type in common use for lawful purposes, any other facts about that arm are irrelevant.

The principles established by *Heller* and confirmed by *Bruen* resolve this case. The semiautomatic firearms and the ammunition magazines banned by Illinois are owned by tens of millions of Americans across the country for lawful purposes including self-defense, hunting, and range training. It follows that banning them is "off the table." *Heller*, 554 U.S. at 636. The matter is that simple.

In reversing an injunction against the Illinois ban, however, the Seventh Circuit has complicated matters needlessly by applying the wrong test and calling for the development of irrelevant information. Rather than acknowledging that the Second Amendment protects the right of law-abiding citizens to possess commonly used arms, the Seventh Circuit instead concluded that "the Arms protected by the Second Amendment do not include weapons that may be reserved for military use." Pet.App.31. And compounding this initial error, the Seventh Circuit concluded that the civilian, semiautomatic arms banned by Illinois are "indistinguishable from" machineguns

used by the military, Pet.App.35, even though semiautomatic firearms, unlike machineguns, "traditionally have been widely accepted as lawful possessions," *Staples v. United States*, 511 U.S. 600, 612 (1994), and all semiauatomatic firearms are, by definition, distinguishable from *automatic* machineguns. The court left open the possibility that evidence such as "[b]etter data on firing rates might change the analysis." Pet.App.36–37. The parties accordingly are preparing for fact-finding proceedings in the district court similar to what the United States proposed and this Court rejected in *Heller*, over matters such as the difference in operation of semiautomatic firearms and machineguns.

None of this is necessary, and this Court should grant certiorari now to cure the irreparable harm that is being inflicted on Petitioners through the violation of their fundamental rights, spare the parties and the judicial system of the needless time and expense of building a record on irrelevant matters, and once again confirm that the common use test established by *Heller* and reaffirmed in *Bruen* governs the resolution of arms ban cases. Unfortunately, it has become apparent that it likely will take this Court's review for the clear teaching of *Heller* to take hold in the lower courts, and this case presents a perfect opportunity for the Court to settle the matter once and for all. This Court should grant certiorari and reverse the judgment of the Seventh Circuit below.

OPINIONS BELOW

The order of the Court of Appeals denying rehearing *en banc* is reproduced at Pet.App.152–53. The order of the Court of Appeals reversing the district court's grant of a preliminary injunction is reported at

85 F.4th 1175 and reproduced at Pet.App.1–108. The order of the District Court granting a preliminary injunction has not yet been published in the Federal Supplement but is reproduced at Pet.App.109–41.

JURISDICTION

The Court of Appeals issued its opinion on November 3, 2023 and denied en banc rehearing on December 11, 2023. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant portions of Amendments II and XIV to the United States Constitution and the Illinois Code are reproduced in the Appendix beginning at Pet.App.154–80.

STATEMENT

I. Illinois bans common firearms.

In the wake of this Court's decision in *Bruen*, Illinois enacted sweeping new legislation banning many of the most common firearms in the country by lumping them together under the misleading and tendentious label "assault weapon[s]." 720 ILCS 5/24-1.9(b), Pet.App.166. Illinois defines "assault weapons" to include any semiautomatic rifle with the capacity to accept a magazine capable of holding more than ten rounds of ammunition and one of the following features:

> (i) a pistol grip or thumbhole stock;
>
> (ii) any feature capable of functioning as a protruding grip that can be held by the non-trigger hand;

> (iii) a folding, telescoping, thumbhole, or detachable stock, or a stock that is otherwise foldable or adjustable in a manner that operates to reduce the length, size, or any other dimension, or otherwise enhances the concealability of, the weapon;
>
> (iv) a flash suppressor;
>
> (v) a grenade launcher;
>
> (vi) a shroud attached to the barrel or that partially or completely encircles the barrel, allowing the bearer to hold the firearm with the non-trigger hand without being burned, but excluding a slide that encloses the barrel.

720 ILCS 5/24-1.9(a)(1)(A), Pet.App.157. The law also prohibits as "assault weapons" semiautomatic rifles with non-detachable magazines with "the capacity to accept more than 10 rounds, except for an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition[,]" 720 ILC 5/24-1.9(a)(1)(B), Pet.App.157–58, an array of semiautomatic pistols or shotguns equipped with one of a list of features, 720 ILCS 5/24-1.9(a)(1)(C)–(D), (F), Pet.App.158–59, and, just to be safe against a charge of incompleteness, over 100 specifically named firearms (which would be banned anyway based on the features they typically are sold with) or any "copies, duplicates, variants, or altered facsimiles with the capability of any such weapon." 720 ILCS 5/24-1.9(a)(1)(J), Pet.App.159–60. Among the rifles included by name on Illinois's list are "all AR types," a group which includes the overwhelmingly popular

AR-15 and related models of rifle. *Id*. It is a crime to manufacture, sell, or purchase any firearm that qualifies as an "assault weapon" under this statute, or to possess such a weapon if it was not acquired prior to the law's enactment. 720 ILCS 5/24-1.9(b)–(c), Pet.App.166.

The banned firearms are common, semiautomatic firearms that possess common features. Labeling them "assault weapons" is nothing more than an argument advanced by a political slogan in the guise of a definition. As even anti-gun partisans have admitted, "assault weapon" is a political term designed to exploit "the public's confusion over fully automatic machine guns versus semi-automatic assault weapons." JOSH SUGARMANN, ASSAULT WEAPONS AND ACCESSORIES IN AMERICA (1988), https://bit.ly/3m5OW5V. In truth, the firearms Illinois calls "assault weapons" are mechanically identical to any other semiautomatic firearm—arms that, no one disputes, are exceedingly common and fully protected by the Second Amendment. Unlike a fully automatic "machine gun," which continues to fire until its magazine is empty so long as its trigger is depressed, *semiautomatic* firearms, including the ones banned by Illinois, fire only a single shot for each pull of the trigger. *See Staples*,511 U.S. at 602 n.1.

These firearms are in common use. They "traditionally have been widely accepted as lawful possessions." *Id*. at 612. To take just one example, the AR-15 is "the best-selling rifle type in the United States." Nicholas J. Johnson, *Supply Restrictions at the Margins of* Heller *and the Abortion Analogue: Stenberg Principles, Assault Weapons, and the Attitudinalist Critique*, 60 HASTINGS L.J. 1285, 1296 (2009).

According to a comprehensive 2021 survey, approximately 24.6 million Americans have owned an AR-type or similar rifle. William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* at 33 (May 13, 2022), https://bit.ly/3yPfoHw. A recent survey conducted by the Washington Post came to a similar conclusion. *Poll of current gun owners* at 1, WASH. POST-IPSOS (Mar. 27, 2023), https://bit.ly/46CqzRa (20% of current gun owners own an AR-15 or similar style rifle). Industry data shows that from 1990 to 2021 over 28 million such rifles were produced for sale in the United States. *Firearm Production in the United States With Firearm Import and Export Data* at 7, NAT'L SHOOTING SPORTS FOUND. (2023), https://bit.ly/42qYo7k. And in recent years they have been the second-most common type of firearm sold, at approximately 20% of all firearm sales, behind only semiautomatic handguns. *See 2021 Firearms Retailer: Survey Report* at 9, NAT'L SHOOTING SPORTS FOUND. (2021), https://bit.ly/3gWhI8E; *see also* Exhibit 5 at 119, *Miller v. Becerra*, No. 3:19-cv-01537 (S.D. Cal. Dec. 6, 2019), ECF No. 22-13.

Semiautomatic handguns are even more popular. In the period from 1990 to 2018, there were *89 million* semiautomatic handguns sold in the United States, and an additional 12 million semiautomatic shotguns. *See Firearm Production in the United States With Firearm Import and Export Data* at 17, NAT'L SHOOTING SPORTS FOUND. (2020), https://bit.ly/3v5XFvz. Unsurprisingly, given their popularity, the vast majority of states do not ban semiautomatic "assault weapons." *See* Shawna Chen, *10 states with laws restricting assault weapons*, AXIOS, https://bit.ly/3v2N0So (last updated Apr. 28, 2023).

The firearms banned by Illinois are commonly and overwhelmingly possessed by law-abiding citizens for lawful purposes. The 2021 National Firearms Survey found that the most common reason for owning AR-15 or similar style rifles were target shooting (66% of owners), home defense (61.9% of owners), and hunting (50.5% of owners), English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned*, *supra*, at 33–34, and the Washington Post's data again confirms this finding. In that poll 60% of respondents cited target shooting as a "major reason" for owning their AR-15 style rifle, and an additional 30% cited that as a "minor reason." *Poll of current gun owners*, *supra*, at 1. Protection of self, family, and property rated as even more important (65% listed it as a major reason and 26% as a minor reason). Another recent industry survey of over 2,000 owners of such firearms reached similar results, showing again that home-defense and recreational target shooting are the two most important reasons for owning these firearms. *See Modern Sporting Rifle: Comprehensive Consumer Report* at 18, NAT'L SHOOTING SPORTS FOUND. (July 14, 2022), https://bit.ly/3GLmErS; *see also Sport Shooting Participation in the U.S. in 2020* at *iii*, NAT'L SHOOTING SPORTS FOUND. (2021), https://bit.ly/3sPuEQl (noting that in 2020, an estimated 21.3 million Americans participated in sport or target shooting with firearms like those banned by Illinois).

> AR-style rifles are popular with civilians . . . around the world because they're accurate, light, portable, and modular. . . . [The AR-style rifle is] also easy to shoot and has little recoil, making it popular with women. The AR-15 is

> so user-friendly that a group called 'Disabled Americans for Firearms Rights' . . . says the AR-15 makes it possible for people who can't handle a bolt-action or other rifle type to shoot and protect themselves.

FRANK MINITER, THE FUTURE OF THE GUN 46–47 (2014).

Use of these firearms for unlawful purposes, by contrast, is exceedingly rare. Rifles, including the AR-15 and the many others like it that have been designated as assault weapons by Illinois are used in crime very rarely. *Expanded Homicide Data Table 8: Murder Victims by Weapon, 2015-2019*, *Crime in the United States*, FBI, U.S. DEP'T OF JUST. (2019), https://bit.ly/31WmQ1V. In fact, it is ordinary handguns that are the firearm of choice of criminals. "[I]f we are constrained to use [Illinois's] rhetoric, we would have to say that *handguns* are the quintessential 'assault weapons' in today's society[.]" *Heller v. District of Columbia* (*"Heller II"*), 670 F.3d 1244, 1290 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

II. Illinois bans common magazines.

Illinois also bans the sale, manufacture, and purchase of any "large capacity ammunition feeding device," by which it means an ammunition magazine "that has a capacity of . . . more than 10 rounds of ammunition for long guns and more than 15 rounds of ammunition for handguns." 720 ILCS 5/24-1.10(a)(1), (b)–(c), (g), App.174.

Just as with the firearms Illinois has banned, Illinois's terminology is more in the form of an argument than it is an accurate label. The banned

magazines would more aptly be dubbed "standard," since the now forbidden sizes of magazines are overwhelmingly popular and ordinary. That is evident, first, by the overwhelming popularity of the firearms that come standard with magazines capable of accepting more than 10 or 15 rounds. As explained above, the AR-15 is America's "most popular semi-automatic rifle," *Heller II*, 670 F.3d at 1287 (Kavanaugh, J., dissenting). These rifles often come standard with 20- or 30-round ammunition magazines. *See Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1145 (S.D. Cal. 2019); David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 ALB. L. REV. 849, 859 (2015); GUN DIGEST 2022 at 1121 (Philip P. Massaro ed., 76th ed. 2021) (ebook). Indeed, survey data indicates that 52% of recently acquired AR-style and other modern semiautomatic rifles came equipped with 30-round magazines. *Modern Sporting Rifle: Comprehensive Consumer Report*, *supra*, at 31.

According to the 2021 National Firearms Survey, 48% of gun owners have owned magazines that hold more than 10 rounds and 21% have owned handgun magazines that hold more than 15 rounds. William English, *2021 National Firearms Survey: Analysis of Magazine Ownership and Use* 1, 4, 6, 9 (May 4, 2023), https://bit.ly/3SUdKhD. Given the survey's estimate that 81.4 million Americans own firearms, that means that approximately 39 million Americans have owned at least one magazine that holds more than 10 rounds and approximately 18 million have owned at least one handgun magazine that holds more than 15 rounds. *Id.* And that is a conservative estimate since only current gun owners were polled. Those individuals frequently owned more than one such magazine. And the raw numbers are staggering: Professor

English estimates Americans have owned as many as 542 million rifle and handgun magazines capable of holding more than 10 rounds—and approximately 382 million magazines that hold more than 15 rounds. *See* English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned*, *supra*, at 23–25. Industry sources similarly have estimated that there are 79.2 million rifle magazines capable of holding 30 or more rounds in circulation. *See NSSF Releases Most Recent Firearm Production Figures*, NAT'L SHOOTING SPORTS FOUND. (Nov. 16, 2020), http://bit.ly/405lKN9.

Like the banned firearms, these magazines are commonly possessed for lawful purposes. According to the National Firearms Survey, the most common reasons cited for owning magazines holding more than ten rounds are target shooting (64.3% of owners), home defense (62.4%), hunting (47%), and defense outside the home (41.7%). English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned*, *supra*, at 23. And such magazines may be lawfully owned in the vast majority of states. *See* Lillian Mongeau Hughes, *Oregon voters approve permit-to-purchase for guns and ban high-capacity magazines*, NPR (Nov. 15, 2022), https://n.pr/3QMJCC1.

III. The ban's effect on Petitioners.

Petitioner Harrel is an ordinary, law-abiding, adult citizen of the United States who resides in Illinois. Compl. ¶ 75, Pet.App.210. He is legally able to purchase and possess firearms and magazines, and he would, if it were not for the Illinois law at issue, purchase both firearms and magazines that are banned in the state. Compl. ¶ 80, Pet.App.210–11. Petitioners

C4 Gun Store and Marengo Guns are both licensed firearm dealers located in Illinois. Compl. ¶¶ 81–82, 85–86, Pet.App.211–12. Both stores sold the banned magazines and firearms prior to Illinois outlawing them and both stores would begin selling them again if it were lawful to do so. Compl. ¶¶ 83, 87, Pet.App.211–13. Petitioners Firearms Policy Coalition, Second Amendment Foundation, and Illinois State Rifle Association are nonprofit membership organizations with members in Illinois—including the other Petitioners—who are otherwise eligible to acquire the banned firearms and magazines and would do so but for the ban. Compl. ¶¶ 15–17, Pet.App.187–88.

IV. Procedural history.

A. Petitioners brought this suit in the Southern District of Illinois on January 17, 2023, a week after Illinois enacted its ban on common firearms and magazines. Petitioners alleged that the categorical ban on common semiautomatic firearms and magazines violated their rights under the Second and Fourteenth Amendments. Compl. ¶¶ 96–98, Pet.App.214–15. Shortly thereafter, Petitioners filed a motion for a preliminary injunction to prevent enforcement of the firearm and magazine bans.

Petitioners were not the only ones to make such claims and their case was consolidated with three others before the district court, which considered four preliminary injunction motions together. Pet.App.111. In a faithful application of this Court's precedents, the district court granted a preliminary injunction. Applying the standard laid out in *Bruen*, the Court concluded that both the banned firearms and magazines constitute "arms," within the Second

Amendment's plain text, noting that with respect to the magazines specifically, it was "not even a close call." Pet.App.129. In so doing, the court rejected the argument that a firearm ceases to be an "arm" just because it may also be "useful in military service." Pet.App.128.

Turning to history, the district court recognized that this Court had already "held the historical tradition supports 'prohibiting the carrying of dangerous and unusual weapons' but that 'the Second Amendment protects the possession and use of weapons that are in common use at the time.' " Pet.App.132 (quoting *Bruen*, 142 S. Ct. at 2128). As such, the district court required the Defendants, to justify the law, to demonstrate that the banned arms are not in common use and "identify a well-established and representative historical analogue." *Id*. (quoting *Bruen*, 142 S. Ct. at 2128). As for common use, the Court found that not only had Illinois failed to show the banned arms *are not* in common use, Plaintiffs had affirmatively shown they *are*, since "recent data show[s] that more than 24 million AR-15 style rifles are currently owned nationwide," and they are among the most popular firearms produced and sold in the United States today. Pet.App.134 (internal quotation marks omitted). Although it considered the "common use" issue to be "dispositive," Pet.App.136, the district court considered the other historical evidence Illinois had assembled and found that the historical evidence was "categorically different than . . . a ban on possession" of common firearms and magazines. Pet.App.137.

B. The Seventh Circuit stayed the injunction pending appeal, Pet.App.146–47, and Petitioners were aligned with other lawsuits raising similar

challenges to the Illinois law. *See* Pet.App.142–45, 148–51. Following expedited briefing, the panel split 2-1, with a majority reversing the decision below (and affirming two contrary decisions below from cases in the Northern District of Illinois).

The panel majority began with *Bruen*'s textual inquiry. *Heller* dispositively stated that "arms" connotes "all instruments that constitute bearable arms, even those that were not in existence at the time of the founding," includes "[w]eapons of offence, or armour of defence," and is not limited to only military arms but also includes "weapons that were not specifically designed for military use and were not employed in a military capacity." 554 U.S. at 581–82 (internal quotation marks omitted). The panel did not faithfully apply that definition. Instead, it considered the phrase "bearable arms" insurmountably opaque, suggesting it must "mean more than [arms that are] 'transportable' or 'capable of being held[,]' " Pet.App.29, and read into it an implied exemption for "weapons that may be reserved for military use." Pet.App.29–33. The majority did not explain *what* made a firearm a weapon that "may be" so "reserved," but it held that all the firearms banned by Illinois fell "on the military side of th[e] line," Pet.App.4, because it adjudged the semiautomatic AR-15 rifle to be "indistinguishable from [the fully automatic M16] machinegun." Pet.App.37. The majority accordingly concluded that the firearms banned by Illinois likely are unprotected by the Second Amendment's plain text.

In a short paragraph that comprised the entirety of the majority's analysis of the banned magazines, the court "conclude[d] that they also can lawfully be reserved for military use" and suggested that

"[a]nyone who wants greater firepower" should simply "purchase several magazines of the permitted size." *Id*.

Though it was unnecessary at this point, the panel nevertheless proceeded to discuss historical tradition. Unlike the district court, the panel did not consider "common use" of the banned firearms and magazines to be dispositive. Far from it. Rather, it assumed for purposes of argument that the banned arms were "in common use" but held that that fact was not dispositive. Pet.App.39–42. In discussing this Court's admonition that, in examining history by comparing "how" and "why" a modern regulation and purported historical analogue burdened the right to keep and bear arms, the Seventh Circuit explicitly endorsed the erroneous claim that this Court had instituted a new balancing test wherein "a broader restriction burden[ing] the Second Amendment right more . . . requires a closer analogical fit between the modern regulation and traditional ones[, while] a narrower restriction with less impact on the constitutional right might survive with a looser fit." Pet.App.42. Having misconstrued the inquiry in this way, the court merely reiterated the opaque distinction that underscored its textual analysis, stating that it found "the distinction between military and civilian weaponry to be useful for *Bruen*'s second step, too," claiming (wrongly) that a long history of state and federal regulation supported "the distinction between the two uses." Pet.App.45–46.

Judge Brennan dissented. Unlike the majority, Judge Brennan recognized that the banned firearms and magazines are "arms" and that the history and tradition analysis in this case turned on whether they

are in common use. Pet.App.65–66. He concluded that the ban was not consistent with the tradition of banning dangerous and unusual weapons, Pet.App.75–76, and that Illinois had not presented any other "relevantly similar" historical analogues that could justify the ban, Pet.App.86–87.

C. The court asserted in its opinion that its decision was "just a preliminary look at the subject," and it purported to not "rule out the possibility that the plaintiffs will find other evidence that shows a sharper distinction between AR-15s and M16s (and each one's relatives) than the present record reveals." Pet.App.38. As a result, Petitioners are now busy preparing to present their case to the district court under the Seventh Circuit's "like" a "weapon[] that may be essentially reserved to the military" standard. Pet.App.33–34 & n.8. This will involve the creation of a significant record, as Petitioners must demonstrate that each category and type of firearm banned by Illinois is less of a military arm than it is a civilian arm, all while working out what, exactly, the Seventh Circuit meant by those terms. *See* Pet.App.98–99 (Brennan, J., dissenting) (criticizing the overbreadth of the majority's "military weapon" standard). All, of course, wholly unnecessary under this Court's precedent.

REASONS FOR GRANTING THE PETITION

I. This case requires only the straightforward application of *Heller* and *Bruen*.

A. *Heller* speaks directly to this issue and requires judgment in Petitioners' favor.

1. Before this Court decided *Bruen*, the circuit courts were divided over *how* to assess bans on certain types of bearable arms, though they broadly agreed that such bans should be permitted one way or another. The D.C., First, Second, Third, and Ninth Circuits had all, prior to *Bruen*, upheld bans on so-called "assault weapons" or "large capacity magazines"—despite acknowledging, in several cases, that the banned items were in common use for lawful purposes—by applying "intermediate" scrutiny which was, in application, little more than a rubber stamp on the judgment of state legislatures. *See Heller II*, 670 F.3d at 1261–62; *Worman v. Healey*, 922 F.3d 26, 38 (1st Cir. 2019); *New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 255, 260 (2d Cir. 2015); *Ass'n of New Jersey Rifle & Pistol Clubs v. Att'y Gen., New Jersey* ("*ANJRPC*"), 910 F.3d 106, 119 (3d Cir. 2018); *Duncan v. Bonta*, 19 F.4th 1087, 1104 (9th Cir. 2021) (en banc).

The Seventh Circuit pursued a divergent approach that nevertheless reached the same result. Rather than resorting to scrutiny analysis, that court thought "it better to ask whether a regulation bans weapons that were common at the time of ratification or those that have some reasonable relationship to the preservation or efficiency of a well regulated militia,

and whether law-abiding citizens retain adequate means of self-defense." *Friedman v. City of Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015) (cleaned up); *see also Wilson v. Cook Cnty.*, 937 F.3d 1028, 1033–36 (7th Cir. 2019). And the Fourth Circuit took the novel approach of asking whether the banned firearms "are 'like' M16 rifles" in that they "are clearly most useful in military service," and, if they were judged to be like an M16, then they could be banned. *Kolbe v. Hogan*, 849 F.3d 114, 126, 136–37 (4th Cir. 2017) (en banc).

These approaches were clearly wrong before *Bruen*, and they are entirely indefensible after *Bruen*. As this Court has now made clear, *Heller* directed courts to resolve Second Amendment claims by analyzing the text of the Amendment and our country's history and tradition of firearms regulation. It never supported the use of means-ends scrutiny to counterbalance the right to keep and bear arms.

The Seventh Circuit's old test was even less rooted in this Court's precedent than interest balancing. Indeed, *every element* of the Seventh Circuit's three-part test directly conflicts with *Heller*. *See* 554 U.S. at 582 (rejecting "the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment."); *id.* at 581 (concluding that "arms" includes "weapons that were not specifically designed for military use and were not employed in a military capacity"); *id.* at 629 (explaining that "[i]t is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms . . . is allowed").

And the Fourth Circuit's test wrenched language from *Heller* out of its context to reach a rule that

ironically would sever entirely the protection afforded by the Second Amendment's operative clause from the purpose announced by its prefatory clause. After interpreting the text, *Heller* consulted history to, among other things, determine the limits on this textually grounded right. At the conclusion of this analysis, the Court explained that that there was one "important limitation on the right to keep and carry arms" that would permit the government to ban a firearm even though it fell within the plain text meaning of "arms." *Id.* at 627. Specifically, *Heller* explained that the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons[,]' " permitted certain arms to be banned. *Id.* But, the Court made clear, arms "in common use" are "protected" and therefore cannot be banned. *Id.* This was a rule developed from "*the historical understanding* of the scope of the right," *id.* at 625 (emphasis added), and it was consistent with another historical tradition: as the prefatory clause of the Second Amendment notes, the explicit purpose for which the right to keep and bear arms was included in the Constitution was to ensure the preservation of the militia, and "[t]he traditional militia was formed from a pool of men bringing arms 'in common use at the time' for lawful purposes like self-defense." *Id.* at 624.

This interpretation did have one difficulty, which this Court confronted directly. "It may be objected," *Heller* noted, that if some of the "weapons that are most useful in military service—M-16 rifles and the like" are "highly unusual in society at large" and therefore "may be banned, then the Second Amendment right is completely detached from the prefatory clause." *Id.* at 627. This was the passage that the Fourth Circuit, in *Kolbe*, misinterpreted to create its

rule that firearms that are " 'like' M-16 rifles" in that they "are most useful in military service" fall outside the protection of the Second Amendment. 849 F.3d at 136. But that position is almost precisely the opposite of what *Heller* said. Rather, *Heller* was, in this passage, addressing the tension between the stated purpose of the Amendment to protect the militia and the fact that its protections may not extend to all military firearms. The reason for that tension, the Court explained, was that "the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty"; in other words, they would be armed with those weapons that were "in common use" as opposed to those "that are highly unusual in society at large." *Heller*, 554 U.S. at 627. Today, of course, some arms that are used by the military *are not* in common use, thus introducing a degree of disconnect between the Second Amendment's stated purpose and the scope of its protection. But *Heller* did not, of course, hold that merely because a firearm is used by the military (or is like a firearm used by the military), it could not *also* be in common use for lawful purposes by civilians. In other words, *Heller* was explaining that certain arms could be banned *despite* their utility in military service, not because of it.

Indeed, the reasons why the Founders valued the militia make nonsensical any argument that an amendment meant to preserve that institution would fail to protect arms *because* they could be useful for military purposes. As *Heller* explains, the militia was "useful in repelling invasions and suppressing insurrections[,]" "render[ed] large standing armies

unnecessary," and enabled the people to be "better able to resist tyranny." *Id.* at 597–98. It would be counterintuitive, to say the least, that an amendment designed to preserve the militia would categorically exclude the types of arms most suited to the militia's purposes.

2. Proper application of *Heller* demonstrates that Illinois's ban on common semiautomatic firearms and ammunition magazines is unconstitutional. *Heller*'s discussion of the textual meaning of "arms" was expansive, and it included, at a minimum, all firearms within its scope. *Id.* at 581–82. Indeed, *Heller* said that the term encompassed all "[w]eapons of offence, or armour of defence" and protected "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." *Id.* at 581 (internal quotation marks omitted). This language obviously covers the banned firearms. And it applies equally to the banned magazines. After all, the Amendment commands the right "shall not be infringed." U.S. CONST. amend. II, Pet.App.152. The same Founding-era sources the Supreme Court has used to interpret the other words in the Second Amendment make clear that anything that in any way hinders the exercise of the Second Amendment right, "infringe[s]" that right. *See Md. Shall Issue, Inc. v. Moore*, 86 F.4th 1038, 1044 n.8 (4th Cir. 2023), *reh'g en banc granted*, No. 21-2017(L), 2024 WL 124290 (4th Cir. Jan. 11, 2024); *see also Nunn v. State*, 1 Ga. 243, 251 (Ga. 1846) ("The right of the whole people . . . to keep and bear *arms* . . . shall not be *infringed*, curtailed, or broken in upon, in the smallest degree[.]" (emphasis in original)); *Heller*, 554 U.S. at 612–13 (citing *Nunn* approvingly). Therefore, by artificially limiting the magazine capacity of semiautomatic

firearms, the challenged law here necessarily "infringes" the Second Amendment right. Indeed, the effect of the magazine restriction is to ban rifles capable of shooting more than ten rounds without reloading and handguns capable of shooting more than fifteen rounds without reloading.

There is nothing controversial about this conclusion. After all, it is not the gun, but the bullets *fed by the magazine* that "strike another." *See id.* at 581 (internal quotation marks omitted). Citizens carry firearms equipped with magazines and other ammunition feeding devices for the same reason they carry firearms loaded with ammunition: "[W]ithout bullets, the right to bear arms would be meaningless." *Jackson v. City & Cnty. of S.F.*, 746 F.3d 953, 967 (9th Cir. 2014), *abrogated on other grounds by Bruen*, 597 U.S. 1 (2022). A magazine is, in fact, a part of the firearm to which it is equipped, and just as the First Amendment would not permit the government to ban the ink used to print newspapers, the Second Amendment would be a dead letter if it protected "arms" but permitted the government to ban parts like triggers, barrels, sights, or magazines. As the Third Circuit recognized before *Bruen*: "magazines feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended, [so] magazines are 'arms' within the meaning of the Second Amendment." *ANJRPC*, 910 F.3d at 116 (quoting *Jackson*, 746 F.3d at 967).

Under *Heller* then, all of the banned magazines and firearms are protected by the Second Amendment's plain text, and the ban is unconstitutional unless the State can show they are dangerous *and* unusual. Arms in common use for lawful purposes are, by

definition, neither. That makes this case a very straightforward one.

There can be absolutely no debate that the semiautomatic firearms banned by Illinois are "in common use" today by law-abiding citizens. Semiautomatic firearms "traditionally have been widely accepted as lawful possessions." *Staples*, 511 U.S. at 612. Such firearms have been commercially available for well over a century. *See Heller II*, 670 F.3d at 1287 (Kavanaugh, J., dissenting); David B. Kopel, *Rational Basis Analysis of "Assault Weapon" Prohibition*, 20 J. CONTEMP. L. 381, 413 (1994). According to industry estimates, there were over 89 million semiautomatic handguns, 43 million semiautomatic rifles, and 12 million semiautomatic shotguns sold in the United States between 1990 and 2018. *See Firearm Production in the United States With Firearm Import and Export Data* (2020), *supra*, at 17. Apart from the now-expired ten-year federal assault weapons ban, the federal government has not banned them and, currently, the vast majority of states do not ban semiautomatic "assault weapons" either. *See* Chen, *supra*. Because the State's ban makes it illegal to possess certain semiautomatic firearms, and semiautomatic firearms are indisputably in common use, it follows that the ban is invalid under the Second Amendment.

Even if the Court accepts the artificial "assault weapon" framing created by Illinois's law, then the banned firearms *still* easily satisfy the common use test. The dispositive point under *Heller* and *Bruen* is that millions of law-abiding citizens choose to possess firearms in this category. *See Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting) (reasoning that "citizens . . . have a

right under the Second Amendment to keep" "AR-style semiautomatic rifles" because "[r]oughly five million Americans own" them and "[t]he overwhelming majority . . . do so for lawful purposes[.]"); *ANJRPC*, 910 F.3d at 116 (finding an "arm" is commonly owned because "[t]he record shows that millions . . . are owned"); *Cuomo*, 804 F.3d at 255 ("Even accepting the most conservative estimates cited by the parties and by amici, the assault weapons . . . at issue are 'in common use' as that term was used in *Heller*."); *Heller II*, 670 F.3d at 1261 ("We think it clear enough in the record that semi-automatic rifles . . . are indeed in 'common use[.]' ").

The popularity of these firearms can be demonstrated by looking at the AR-15 and similar modern semiautomatic rifles that epitomize the firearms the State lumps together in this category. The AR-15 is America's "most popular semi-automatic rifle," *id.* at 1287 (Kavanaugh, J., dissenting), and in recent years it has been "the best-selling rifle type in the United States," Johnson, *supra*, at 1296. Today, the number of AR-rifles and other similar rifles in circulation in the United States exceeds *twenty-four million*. *Commonly Owned: NSSF Announces Over 24 Million MSRs in Circulation*, NAT'L SHOOTING SPORTS FOUND. (July 20, 2022), https://bit.ly/3QBXiyv; *see also Poll of current gun owners*, *supra*, at 1; English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned*, *supra*, at 1–2 (finding that an estimated 24.6 million American gun owners have owned AR-15s or similar rifles). In recent years they have been the second-most common type of firearm sold, at approximately 20% of all firearm sales, behind only semiautomatic handguns. *See 2021 Firearms Retailer: Survey Report*, *supra*, at 9.

Even more than the firearms, magazines capable of holding more than 10 (in the case of rifles) or 15 (in the case of handguns) rounds are overwhelmingly popular. They come standard with many semiautomatic firearms, and close to half of all American gun owners have owned magazines holding more than 10 rounds. English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned*, *supra*, at 22. Professor English estimates that Americans have owned as many as 382 million magazines capable of holding more than 15 rounds. *Id.* at 23–25. And that finding is consistent with industry estimates that suggest that there are 79.2 million rifle magazines alone capable of holding at least 30 rounds. *See NSSF Releases Most Recent Firearm Production Figures*, *supra*.

Notably, the same arguments that were made against the District of Columbia's handgun ban in *Heller* have been repurposed now to combat these so-called "assault weapons" and magazines, and they are equally invalid in this context. Take, for example, the District of Columbia's assertion in *Heller* that "some gun rights' proponents contend" that "shotguns and rifles . . . are actually the weapons of choice for home defense[,]" Br. for Pet'rs, *Heller*, No. 07-290, 2008 WL 102223, at *54 (U.S. Jan. 4, 2008), citing an article "preferring rifles." *Id.* at *55. The very same argument was raised in reverse below, with the state extolling the virtues of "respected and effective self-defense firearms, like the Model 1911 and Sig P938, [which] are handguns built to function with magazines that hold 15 or fewer rounds" while decrying "features" of the banned firearms and magazines which it believed "make [them] poorly suited for civilian self-defense." Opening Br. of the State Parties at 31, *Barnett v.*

Raoul, No. 23-1825 (7th Cir. June 5, 2023), ECF No. 47 (internal quotation marks omitted). But again, *Heller* has settled this issue, since the only "feature" that matters under *Heller* is whether a particular type of firearm is commonly possessed for lawful purposes. *Heller* held that handguns were protected because Americans used them for the lawful purpose of self-defense, "[w]hatever the reason" was for them making that choice. *See* 554 U.S. at 629. The same is indisputably true here, and so *Heller* requires judgment in Petitioners' favor.

B. *Bruen* merely underscores that *Heller*'s analysis is dispositive here.

Bruen removed any uncertainty after *Heller* whether firearms in common use are protected by the Second Amendment. *Bruen* made *Heller*'s text-and-history standard explicit, explaining that it was applying the same "test that we set forth in *Heller*," and reaffirmed that *Heller* announced the rule of decision that governs arms ban cases. 597 U.S. at 26. In directing lower courts how to analyze the Second Amendment, *Bruen* noted that in some cases they will need to account for "technological changes," and explained that *Heller* demonstrated "at least one way in which the Second Amendment's historically fixed meaning applies to new circumstances: Its reference to 'arms' does not apply 'only [to] those arms in existence in the 18th century.' " *Id.* at 27–28 (quoting *Heller*, 554 U.S. at 582). Instead, the Second Amendment's "general definition" of "arms" "covers modern instruments that facilitate armed self-defense." *Id.* at 28.

And in characterizing the historical analysis, *Bruen* once again pointed to *Heller*, noting that *Heller* used the "historical understanding of the Amendment

to demark the limits on the exercise of th[e] right," and it was on this basis that it had found that "the Second Amendment protects the possession and use of weapons that are 'in common use at the time.' " *Id.* at 21 (quoting *Heller*, 554 U.S. at 627). Indeed, because it was conceded that handguns are in common use for lawful purposes, no further analysis was required to determine that the type of arm at issue in the case was protected. *Id.* at 32. In short, *Bruen* both elaborated upon *Heller*'s text-and-history approach and reaffirmed that law-abiding citizens have an absolute right to possess firearms that are in common use. *See* Mark W. Smith, *What Part of "In Common Use" Don't You Understand?: How Courts Have Defied* Heller *in Arms-Ban-Cases—Again*, PER CURIAM, HARV. J.L. & PUB. POL'Y (Sept. 27, 2023), https://bit.ly/3PWhqwH.

II. This Court's intervention is required to correct the misapplication of *Heller* and *Bruen* below before it becomes widespread.

Although this case should be straightforward under *Heller*, and although *Bruen* eradicated the erroneous interest-balancing analysis most courts of appeals had previously used to uphold bans like Illinois's, the Seventh Circuit below misapplied this Court's binding precedent. In doing so, it revived several pre-*Bruen* errors that had circulated among the lower courts but had not (given the availability of interest balancing) been widely endorsed. As the cascading adoption of interest balancing under *Heller* demonstrates, failure to catch an error early is likely to lead to its wide adoption by the other courts of appeals in short order. And given that the Seventh Circuit's errors are old errors, not new, there is nothing to be gained by permitting

additional percolation before granting certiorari to resolve these issues; no good would come from delay, and in the meantime, Americans would experience significant curtailment of the Second Amendment rights.

As to the Seventh Circuit's textual analysis, nothing in this Court's precedents supports reading into the term "arms" an implicit limitation that the Second Amendment does not protect any "weapons that may be reserved for military use," Pet.App.31, by which the panel meant any firearm that is, in its judgment "more like machineguns and military-grade weaponry than they are like the many different types of firearms that are used for individual self-defense," Pet.App.33–34. This limitation, the panel explained, was based on *Heller* singling out " 'weapons that are most useful in military service—M16 rifles and the like,' which 'may be banned,' " Pet.App.29 (quoting *Heller*, 554 U.S. at 627). This is the same misreading of *Heller* that infected *Kolbe* pre-*Bruen*. As already discussed, as a matter of plain text, the Second Amendment's protection extends to *all firearms*; permissible restrictions on those firearms must come from history. And, as explained above, it is getting things precisely backwards to conclude that *Heller* held that weapons could be banned *because* of their utility in military service. This was, nevertheless, the critical point for the Seventh Circuit, as it announced a new rule that "the Arms protected by the Second Amendment do not include weapons that *may be reserved for military use*." Pet.App.31 (emphasis added). The court held that it believed the banned semiautomatic firearms were likely to be of the type that could be so "reserved" because they are "much more like machineguns and military-grade weaponry than they are

like the many different types of firearms that are used for individual self-defense (or so the legislature was entitled to conclude)." Pet.App.33–34. As the dissent pointed out, however, "no army in the world uses a service rifle that is only semiautomatic[,]" Pet.App.94 (Brennan, J., dissenting), and AR-15s and similar semiautomatics indisputably are "civilian" firearms, *Staples*, 511 U.S. at 603, not military ones.

The Seventh Circuit's analysis of history, though ultimately irrelevant in light of its textual finding, similarly rested upon errors imported into its analysis from pre-*Bruen* caselaw. For instance, the panel—which saw "*Friedman* as basically compatible with *Bruen*," Pet.App.21—specifically declined to rest its historical analysis on the question of whether the banned firearms and magazines are "in common use," because it did "not find this factor to be very helpful," for reasons that it had originally put forward in *Friedman*. Pet.App.39. Specifically, the panel lamented that "common use" was a "slippery concept" which would have rendered the federal assault weapons ban "constitutional before 2004, but unconstitutional thereafter" because while the panel granted that AR-15s are popular today, it suggested (without citation) that few civilians owned them *before* the federal ban was put in place. This is wrong as a factual matter: *Staples* recognized in 1994, the year the federal ban went into effect, that an AR-15 was a firearm of a type that traditionally has been accepted as a lawful possession and was already in common use for lawful purposes, *see Heller II*, 670 F.3d at 1288 (Kavanaugh, J., dissenting). More fundamentally, it is also wrong as a doctrinal matter: there is nothing inconsistent or surprising about the possibility that a firearm could go from being "dangerous and unusual" to being "in

common use," even if the Seventh Circuit chose a bad example. After all, this Court in *Bruen* recognized the possibility that the handgun, today the "quintessential self-defense" weapon, *Heller*, 554 U.S. at 629, may have, at one point, been the sort of "dangerous and unusual" weapon that could permissibly have been banned, *Bruen*, 597 U.S. at 47. There is no problem with the constancy of the constitutional standard being applied in this case because while the *application* may look different at different times as the preferences of the American people change, the *principle* being applied is always the same: whether a firearm is in common use among law-abiding Americans for lawful purposes. Since the firearms in question are, even as the Seventh Circuit conceives of the issue, "in common use," it was wrong to hold that history nevertheless permits them to be banned for being too similar to military firearms.

The Seventh Circuit's approach conflicts with the Ninth Circuit's approach in *Teter v. Lopez*, 76 F.4th 938 (9th Cir. 2023), which addressed Hawaii's ban on butterfly knives. The Ninth Circuit held that "it is irrelevant whether the particular type of firearm at issue has military value," because the only thing that matters, under the Second Amendment's plain text, is whether it "fit[s] the general definition of 'arms.' " *Id.* at 949. *Teter* furthermore held, consistent with *Heller*, that since there is no tradition of "categorically ban[ning] the possession of" arms in common use, no historical analogues could justify a ban on butterfly knives, which are commonly owned today. *Id.* at 951. Unfortunately, there is reason to doubt that *Teter* will remain good law. The Ninth Circuit is still considering a petition to rehear *Teter* en banc and, regardless of whether that request is ultimately granted, an en

banc panel of that court will decide a case involving California's limit on magazine capacity. The same en banc panel, writing before *Bruen*, endorsed a strikingly similar view to the one that the Seventh Circuit has put forward after *Bruen*, suggesting that magazines capable of holding more than ten rounds may not be protected precisely because they are useful in military service. *Duncan*, 19 F.4th at 1102. If that view carries the day again, then the correct side of this emerging division among the circuits will be pruned and the circuits will again—just as they were before *Bruen*—be united in their refusal to recognize the validity of these challenges.

In contrast to both the Seventh and Ninth Circuits, which have reached divergent results, the Fourth Circuit has reached no result at all, despite having had a case raising these issues pending before it since just after *Bruen* was decided. After this Court granted, vacated, and remanded the Fourth Circuit's prior opinion in *Bianchi v. Frosh*, 142 S. Ct. 2898 (2022) (Mem.), the Fourth Circuit set a schedule for supplemental briefing and oral argument, and in fact did hold oral argument in December 2022. *See* Order, *Bianchi v. Frosh*, No. 21-1255 (4th Cir. Aug. 1, 2022), ECF No. 34. And yet, after over a year of silence, without ever issuing a panel opinion and providing no explanation for its actions, the court sua sponte ordered en banc rehearing earlier this year. *See* Order, *Bianchi v. Frosh*, No. 21-1255 (4th Cir. Jan. 12, 2024), ECF No. 76. It appears that the court took these actions to prevent a panel opinion—with which a majority of the court apparently disagreed—from seeing the light of day. *See Wise v. Circosta*, 978 F.3d 93 (4th Cir. 2020) (en banc) (Niemeyer, J., dissenting) (describing a similar procedural irregularity in that case). That the

court should go to such lengths to *not* decide the case in a timely fashion—indeed, to bring the *Bianchi* plaintiffs back to where they were shortly after *Bruen* was decided, some 18 months later—provides further proof, if any is necessary, of the continued hostility of the circuit courts to claims like those Petitioners have brought in this case.

Although Petitioners are coming to the Court on an interlocutory basis, the current state of the courts of appeals on this issue and the patently erroneous nature of the decision below provide good reasons for this Court to take this case now and settle these issues once and for all. Indeed, the Seventh Circuit's opinion virtually guarantees that nothing will be gained by waiting for final judgment. Absent certiorari, Petitioners, alongside the other plaintiffs in the cases below, will try to prove their case by presenting evidence and expert testimony aimed at satisfying the Seventh Circuit's misguided and opaque "military weapon" standard. But this Court has already settled that arms bans are unlawful to the extent they prohibit arms "in common use"; whether the banned arms are useful to the military is an entirely irrelevant consideration and none of the record that is likely to develop in this case will have any impact on this Court's analysis. Rather than waiting for the development of a record that will be irrelevant under the *Heller* standard, the Court should grant certiorari now.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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Respectfully submitted,

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