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No. 23-1353

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**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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ROBERT C. BEVIS, et al.,

Plaintiffs-Appellants,

v.

CITY OF NAPERVILLE, et al.

Defendants-Appellees.

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Appeal from the United States District Court  
for the Northern District of Illinois, Eastern Division  
No. 22-CV-04775  
The Honorable Virginia M. Kendall, Judge Presiding

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**BRIEF OF AMICUS CURIAE COOK COUNTY  
IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE**

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## INTEREST OF AMICUS CURIAE<sup>1</sup>

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Cook County, Illinois, is a unit of local government neighboring the city of Naperville. Cook County is home to more than five million residents, thousands of businesses, and many major tourist attractions and events. Every day, Cook County welcomes Naperville residents who come to the County to work, visit family and friends, or enjoy the attractions within the County and the City of Chicago, and Cook County residents visit Naperville for the same purposes. The Cook County State's Attorney's Office is the second largest prosecutor's office in the United States, and is the entity endowed with authority to prosecute misdemeanor and felony criminal activity within Cook County, as well as the authority to represent Cook County in judicial proceedings before this court.

Cook County has a substantial interest in this litigation, having in 2006 passed the Blair Holt Assault Weapons Act prohibiting the possession of assault weapons and large-capacity magazines. Code of Ordinances of Cook Cnty., Ill. §§ 54-210, *et seq.* This court upheld the Act in *Wilson v. Cook County*, 937 F.3d 1028 (7th Cir. 2019), but its constitutionality is currently being challenged in two federal suits, *Viramontes v. Cook County*, No. 21-cv-4595 (N.D. Ill.), and *Herrera v. Raoul*, No. 23-cv-0532 (N.D. Ill.). The latter is currently on appeal to this court from the

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<sup>1</sup> All parties have consented to the filing of this brief. No counsel for a party authored this brief, in whole or in part, and no party or its counsel made a monetary contribution intended to fund its preparation or submission. No person other than amicus curiae and its counsel made a monetary contribution to fund this brief's preparation or submission.

denial of a preliminary injunction, *Herrera v. Raoul*, No. 23-1793, and plaintiffs in both cases have submitted amicus briefs in support of reversal.

## ARGUMENT

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*New York State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022), adopted a two-step approach to Second Amendment challenges to firearm regulations. At the first step, the plaintiff must show that the regulation falls within the plain text of the Second Amendment – specifically, that the regulated weapon is an “arm,” defined as a weapon commonly used for lawful purposes such as self-defense. *Id.* at 2134. If not, the regulation passes scrutiny. If so, the regulation is presumptively invalid unless the government demonstrates its consistency with this nation’s historical traditions. *Id.* at 2129-30.<sup>2</sup>

Purporting to honor this test, and the Framers’ constitutional design, Bevis claims that the Second Amendment immunizes assault weapons from regulation, regardless of the regularity with which they are used to massacre law-abiding citizens and helpless children, leaving to the government to jail mass murderers and bury their victims, but otherwise stand impotently by while “maniacs use semi-automatic

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<sup>2</sup> We use the term “assault weapon” to describe the arms prohibited by the laws at issue here. While Bevis insists this term was coined by anti-gun activists, that is demonstrably false – the term “assault weapon” is derived from *Sturmgewehr* (literally, “attack rifle” or “storm rifle”), the name for a rifle first used by German troops during World War II, which inspired the Soviet AK-47 and was “the progenitor of all the world’s assault rifles” Brandt Heatherington, *WWII Weapons Systems: The German Sturmgewehr*, available at <https://warfarehistorynetwork.com/wwii-weapons-systems-the-german-sturmgewehr>.

rifles to kill.” Bevis Br. 29.<sup>3</sup> The reason for this, Bevis claims, is that there simply have not been *enough* massacres yet – he proposes that assault weapons must kill at least 669 innocents *each year* before they can be considered more dangerous than “hands and feet.” *Id.* at 20.

Common sense and basic human decency alike recoil from the notion that this nation’s founders – despite understanding that government derives its legitimacy from its ability to protect its citizens, Steven J. Heyman, *The First Duty of Government: Protection, Liberty, & the Fourteenth Amendment*, 41 DUKE L.J. 507, 512-24 (1992) – believed the government they created to remedy the impotence of the confederation it replaced was powerless to stop murderous maniacs from accessing their weapons of choice until some arbitrary yearly quota of massacres was met. Unsurprisingly, then, faithful application of each step of *Bruen* only confirms that this is not, nor ever was, the Framers’ constitutional design. At the first step, Bevis mistakenly focuses on common *ownership* of a particular firearm on a *national* level, when the proper analysis of a state or local law concerns the common *use* of a particular firearm on a *community* level. But even were national uses of assault weapons relevant here, Bevis has failed to carry his burden of proof here. And at the second step, assault weapons bans are consistent with this nation’s history, as

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<sup>3</sup> This is not hyperbole – amicus Herrera admits he believes the Second Amendment leaves “the penitentiary and gallows” the only legislative recourse against mass murders committed with assault weapons. *Herrera v. Raoul*, No. 23-cv-00532, Doc.63 at 24 (N.D. Ill.). Given that most mass murderers die while committing their massacres, the practical effect of his interpretation is to strip the legislature of any meaningful recourse.

demonstrated by a careful analysis of historical regulations of gunpowder and spring guns. We address these issues in turn.

**I. Bevis Has Failed To Show That Assault Weapons Fall Within The Second Amendment’s Text.**

While *Bruen* established that the first step of every Second Amendment analysis begins with a textual inquiry, 142 S. Ct. at 2129-30, and that common lawful uses for a particular weapon were part of that step of the analysis, *id.* at 2134, the Court did not elaborate on the common-use analysis because the parties did not dispute that handguns were commonly used for self-defense, *id.* Despite that, two important contours of that analysis can be discerned.

First, and most importantly, the relevant question is how commonly a particular weapon is *actually used*, not how commonly that weapon is *owned*. This is plain from the language of *Bruen* itself, which repeatedly focuses on the commonality of a weapon’s use. *E.g.*, 142 S. Ct. at 2128 (“the Second Amendment protects the possession and use of weapons that are ‘in common use at the time’”); *id.* at 2138 (“the historical record compiled by respondents does not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms”); *id.* at 2156 (“The Second Amendment guaranteed to ‘all Americans’ the right to bear commonly used arms . . . .”); *id.* (“American governments simply have not broadly prohibited the public carry of commonly used firearms”); *accord, e.g., District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (“the sorts of weapons protected [a]re those ‘in common use at the time.’”). It is also apparent from the fact that the “common use” principle is directly derived from the historical prohibition on “unusual” weapons identified in

Blackstone's writings. *Id.* Indeed, Blackstone would have understood the term "usual" to refer to use, since that term originally meant "accordant with *usage*." <https://www.merriam-webster.com/dictionary/usual> (emphasis added).<sup>4</sup> That original definition persists to this day. *Id.*

An understanding of "use" to mean "use" instead of "ownership" or "possession" also makes good practical sense. Most obviously, it avoids making the Second Amendment's protections circular – that Amendment specifically protects the right to "keep" arms, and *Heller* explains that this term serves to protect the right to "have" such arms. 554 U.S. at 582. But as Bevis sees things, the right to have a particular arm is established by the mere act of having that arm. Moreover, understanding "use" to include mere "ownership" begs the question how one *owns* a weapon for a particular purpose – one might own a weapon with the *intent to use* it for a particular purpose, but it should go without saying that the intention of using something is a far cry from actually using it.<sup>5</sup> Furthermore, conflating ownership with use forgets that the Second Amendment is, at its core, a utilitarian amendment meant to effectuate the exercise of the "central," fundamental right to self-defense. *See id.* at 628. And focusing on ownership of weapons rather than use can drastically overstate the actual utilitarian value of a given weapon; if, for example, an individual owns five

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<sup>4</sup> This is reflected in the etymology of the word "usual" as a direct lineal descendant of the Latin term *usus*, which was itself derived from the Latin term *uti*, which meant "make use of, profit by, take advantage of." Given the frequent use of Latin in his writings, Blackstone would have been well aware of this lineage.

<sup>5</sup> Anyone who has purchased a gym membership after New Year's Eve knows this is a significant difference.

weapons with the intention of using them for hunting, but only ever takes one of them hunting, that would strongly imply that only one of those weapons is of any actual use for hunting, not that all five of them are of equal use and thus entitled to equal constitutional protection, as Bevis asks this court to believe. By contrast, how a particular weapon is actually used is strong evidence that the weapon is suited to that use, and that regulating that weapon will meaningfully impact citizens' ability to act in self-defense, since that use will reflect the experiences of the users themselves, who would be loath to continue using a weapon for a purpose to which it is ill-suited.

Second, the determination whether a particular firearm is commonly used for lawful purposes is not to be determined nationally, but by reference to the practices of the population of the region covered by the challenged regulation. Historically, firearm regulations took into direct account *where* a particular firearm was used – this is reflected by comparing the Statute of Northampton, which specifically prohibited the carrying of arms in “fairs” and “markets,” 2 Edw. 3, ch. 3 (1328), with the subsequent Black Act, which forbade carrying of weapons in forests and on roads if the bearer’s face was “blackened, or being otherwise disguised,” Act 9 Geo. 1. c. 22 (1723). This treatment stemmed from the fact that the English law of self-defense itself treated towns and roads differently, by creating

a Distinction between an Assault in the Highway and an Assault in a Town; for in the first Case it is said, That the Person assaulted may justify killing the other without giving back at all: But that in the second Case, he ought to retreat as far as he can without apparently hazarding his Life, in respect of the Probability of getting Assistance.

1 William Hawkins, A TREATISE OF THE PLEAS OF THE CROWN 73 § 25 (4th ed. 1762). Reflecting that English tradition, firearm regulations in the United States have historically had more lenient application on the open roads and in lesser-populated areas. *Antonyuk v. Hochul*, No. 1:22-CV-0986 (GTS/CFH), 2022 U.S. Dist. LEXIS 201944, at \*200-01 (N.D.N.Y. Nov. 7, 2022) (collecting authority).

Making the legitimacy of firearm regulations dependent on the common uses of those firearms where those regulations will apply not only accords with history, but respects the values protected by the federal system established by the Constitution. Most notably, it must be remembered that the constitutional right to bear arms has roots in the ancient English law of affray, which prohibited the carrying of weapons “as will naturally diffuse a terrour among the people.” *Lectures on Law*, 2 COLLECTED WORKS OF JAMES WILSON 1138 (K. Hall & M. Hall eds. 2007), as shown by the fact that an individual bore arms “attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them,” William Rawle, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 123 (1825).

But the sort of attendant circumstances in which a particular weapon would “naturally” terrify a person will greatly vary from place to place and time to time. For example, a scoped hunting rifle that might seem wholly out of place, and thus deeply disconcerting to the average observer, at a symphony performance in Chicago’s Millennium Park might not get even a passing glance in South Dakota, where nearly a quarter of the population hunts. See U.S. Fish & Wildlife Service, *2020 National Hunting License Data*. In such circumstances, where national standards of conduct

would not accurately reflect a local community's natural reactions to that conduct, reliance on local standards is not only constitutionally appropriate, but constitutionally desirable. *E.g.*, *Miller v. California*, 413 U.S. 15, 24 (1973) (endorsing reliance on “community standards” for purposes of First Amendment).

More importantly, a focus on how a firearm is commonly used in the region to which a particular regulation applies will help ensure that firearms crucial to minority community lifestyles are not given too *little* constitutional protection – a form of the “tyranny of the majority” that the founding generation feared – by ensuring that firearms used infrequently when considered on a national scale, but used quite frequently in a particular community because of that community's particular practical or cultural needs, receive the protection appropriate to their use in that community. Otherwise, a national regulation could theoretically forbid ownership of hunting rifles in a rural Alaskan community in which hunting is a critical part of its lifestyle and culture, merely because the majority of the nation does not share that lifestyle or culture by happenstance of geography. But if community standards are taken into account, such communities could raise as-applied constitutional challenges to the regulation, in defense of their lifestyles and culture, without being forced to futilely deny that the weapons they use are not commonly used elsewhere.

Finally, a focus on the uses of a firearm in the community in which a regulation would apply recognizes that state and local governments are, by their very nature, ill-equipped to stay apprised of activity outside their borders when legislating. While

Naperville's local government, for example, can rightly be expected to keep apprised of its constituents' customs and culture, it would be hard-pressed to stay apprised of the activities of gunowners in California, Texas, or Maine, particularly since those gunowners have no representation in Naperville's government.

Under this standard, Bevis's request for injunctive relief must fail because he focuses his attention solely on national statistics regarding ownership, rather than Illinois or Naperville statistics regarding the commonality of use in those communities. It is thus impossible to determine whether assault weapons are commonly used in either of those communities, and this court should affirm on that ground alone.

That said, even were Bevis correct that national statistics controlled the constitutional analysis of state and local laws, his argument would still fail. Of the uses Bevis identifies, only "self-defense and hunting" were of identifiable concern to the Framers. *See Heller*, 554 U.S. at 599. And of those two, it is beyond dispute that self-defense is the Second Amendment's primary concern – not only was self-defense the "*central component*" of the Second Amendment right, *id.*, but it was the only use justifying the incorporation of the Second Amendment against the States and local governments, *see generally McDonald v. City of Chicago*, 561 U.S. 742 (2010). Thus, the analysis of a particular firearm's commonness of use should focus solely on its use for self-defense and hunting, with the former bearing the lion's share of the weight to

the analysis. Other uses, such as for target practice and sport, should be disregarded altogether.<sup>6</sup>

This is fatal to Bevis' arguments because assault weapons are not commonly used for hunting or the narrow species of lawful self-defense protected by the Second Amendment. Starting with hunting, only 4.6% of Americans hunt, with 32% of those people hunting with bows. U.S. Fish & Wildlife Service, *2016 National Survey of Fishing, Hunting, & Wildlife-Associated Recreation*. That means that only 3.12% of Americans hunt using guns of any kind – a frequency of use that can hardly be considered “common” under any reasonable understanding of that term. See WEBSTER'S II NEW COLLEGE DICTIONARY 226 (2001) (defining “common” as “widespread” or “prevalent,” “occur[s] frequently or habitually,” or “most widely known”) (internal capitalization omitted). And when it is remembered that assault weapons make up only approximately 5% of all firearms in circulation in the United States, R. 57-7 ¶13, that strongly indicates that only a vanishingly small number of

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<sup>6</sup> Limiting the uses that may be considered not only accords with the analysis in *Heller* and *McDonald*, but common sense as well. First, while target practice is a literal “use” of a gun, it is properly subsumed within whatever ultimate lawful use that practice seeks to advance – to say otherwise would have the absurd implication that training to fire a weapon used solely or overwhelmingly for unlawful purposes (such as sawed-off shotguns or silenced weapons) makes it harder to regulate that weapon. Indeed, this court has previously recognized that training to use a weapon is of constitutional significance specifically because it implicates an individual's ability to use it for self-defense. *Ezell v. City of Chicago*, 846 F.3d 888, 893 (7th Cir. 2017). Second, the very nature of the Bill of Rights as a document designed to preserve essential rights, see, e.g., *An Old Whig IV* (available at <https://www.loc.gov/item/rbpe.1470030a>); *Brutus II* (available at <https://press-pubs.uchicago.edu/founders/documents/v1ch14s26.html>), makes clear that recreational shooting has no constitutional significance.

Americans – perhaps as few as 0.15% – hunt with assault weapons. Such infrequent use of assault weapons for hunting is so extraordinarily rare that it cannot possibly constitute a common use, whether considered on its own or in conjunction with other lawful uses.

That leaves self-defense, but *Bevis* has failed to take into account the limited circumstances – if any – in which the use of an assault weapon would be compatible with the narrow concept of self-defense recognized at English common law. Those principles bore determinative weight in English law when determining whether to permit the use of certain weapons – as we will explain in greater detail, *infra* at Part II-B, spring guns were extremely popular in the late 18th century but were nevertheless banned specifically because their indiscriminate use was incompatible with self-defense principles. And while the law of self-defense has changed greatly in the intervening centuries, the common law of self-defense as it was understood at the time of the founding is the only relevant definition of self-defense for purposes of the Second Amendment, which merely “codified a *pre-existing* right.” *Heller*, 554 U.S. at 592; *accord*, e.g., *Ezell v. City of Chicago*, 651 F.3d 684, 701 (7th Cir. 2011) (explaining the Second Amendment “requires a textual and historical inquiry into original meaning”). Indeed, it is long settled that the Constitution must be interpreted in the light of the common law, the principles and history of which were familiar to the framers of the Constitution. *South Carolina v. United States*, 199 U.S. 437, 450 (1905); *accord* *United States v. Wong Kim Ark*, 169 U.S. 649, 655 (1898) (“The interpretation of the Constitution of the United States is necessarily influenced by

the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.” (cleaned up)). Otherwise, the Second Amendment’s protections could be narrowed – or even eliminated outright – if future generations were to pass laws narrowing or abrogating the right to self-defense, since such changes in the law would necessarily change what weapons were commonly used for *lawful* self-defense.

To ascertain the English common law of self-defense as it stood at the time of the Framing, one must look to the writings of William Blackstone, which “constituted the preeminent authority on English law for the founding generation.” *Alden v. Maine*, 527 U.S. 706, 715 (1999); see *Heller*, 554 U.S. at 582, 593-95, 597, 605-09, 626-27 (extensively discussing Blackstone’s writings). And Blackstone explains that, at common law, self-defense was divided into two categories: (1) “justified” self-defense, in which “the defendant prevented a felony”; and (2) “excused” self-defense, in which “the defendant was in the midst of a fight.” V.F. Nourse, *Self-Defense & Subjectivity*, 68 U. CHI. L. REV. 1235, 1244 (2001). The doctrine of justified self-defense provided that, “where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting.” 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 182 (1769). The crime to be prevented must be capital in nature, Blackstone continues, because civilized society “will [not] suffer with impunity any crime to be prevented by death, unless the same, if committed, would also be punished by death.” *Id.* at 182-83. If those requirements are met, and “the slayer is in no kind of fault whatsoever, not even in the minutest

degree,” he is “therefore to be totally acquitted and discharged, with commendation rather than blame.” *Id.* at 183.

Excused self-defense “must be distinguished” from justified self-defense, and allowed a defendant who found himself “in the course of a sudden brawl or quarrel” to use lethal force in self-defense. Blackstone, *supra*, at 184-85. Before someone was permitted to use such lethal force, the law “requires, that the person, who kills another in his own defense, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant.” *Id.* at 185-86.

The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment; or as far as the fierceness of the assault will permit him: for it may be so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then in his defense he may kill his assailant instantly.

*Id.* at 186. In short, “it must appear that the slayer had no other possible means of escaping from his assailant.” *Id.* at 185; see Richard Singer, *The Resurgence Of Mens Rea*, 28 B.C. L. REV. 459, 472 (1987) (noting that Blackstone’s contemporaries “all agree[d] on this rule”).

English common law did not merely strictly limit the *circumstances* in which self-defense could be used, but also the *nature* of force that could be used in self-defense. As Blackstone explains, the acts that constitute excusable homicide end at “the bounds of moderation, either in the manner, *the instrument*, or the quantity,” so an act otherwise permissible by the law becomes “manslaughter at least, and in some cases (according to the circumstances) murder” if a person uses a weapon or

implement unsuited for an otherwise-lawful task – for example, it was excusable to accidentally kill a servant while disciplining him with a wooden rod, but murder to accidentally kill a servant with “a club or stone.” Blackstone, *supra*, at 183-84 (emphasis added). As Blackstone summarized the controlling rule, “immoderate suo jure utatur, tunc reus homicidii sit,” *id.* at 184, meaning if “he use his right beyond the bounds of moderation, then he is guilty of homicide,” J.W. Jones, A TRANSLATION OF ALL THE GREEK, LATIN, ITALIAN & FRENCH QUOTATIONS WHICH APPEAR IN BLACKSTONE’S COMMENTARIES 116 (T. & J.W. Johnson & Co. 1889). Indeed, as Blackstone later explains, such “excessive” actions “could not proceed but from a bad heart” and are thus “equivalent to a deliberate act of slaughter.” Blackstone, *supra*, at 200-201.

This understanding of the limits of self-defense carried over into American criminal law. In fact, one of the earliest reported American decisions regarding self-defense rejected that defense specifically on the ground that it was not “necessary for the prisoner to avail himself of the instrument” – there, a club – “which occasioned the death. On his own confession, much less would have been sufficient,” making his actions “clearly manslaughter.” *State v. Wells*, 1 N.J.L. 486, 493 (N.J. 1790). And to this day, Illinois continues to honor that ancient common-law principle, by making self-defense available only when “the kind and amount of force actually used was necessary,” *People v. Morgan*, 719 N.E.2d 681, 700 (Ill. 1999), not when the defendant “uses force greater than necessary to ward off the imminent danger,” *Fowler v. O’Leary*, No. 87 C 6671, 1993 U.S. Dist. LEXIS 3554, at \*34 (N.D. Ill. Mar. 19, 1993);

*accord, e.g., People v. Nunn*, 541 N.E.2d 182 (Ill. App. 1989) (“if one responds with such excessive force that one is no longer acting in self-defense but in retaliation, said excessive use of force renders one the protagonist; a nonaggressor has a duty not to become the aggressor”).

Bevis does not even acknowledge these significant historical limitations on the narrow right to self-defense protected by the Second Amendment, let alone offer any evidence that assault weapons are commonly used for such self-defense. Indeed, he does not offer evidence of *even a single instance* in which the use of an assault weapon in self-defense was adjudged lawful, and we are aware of only once such instance, during the 2020 Kenosha, Wisconsin riots. That example is no help to Bevis, as it is seriously doubtful that Blackstone would have considered the shooting of an unarmed individual and an individual armed with only a wooden skateboard a moderate, proportional use of force. But even accepting that incident as a lawful exercise of the common-law right of self-defense, it is still just one incident, and it should go without saying that one arguably lawful use of self-defense in the century since assault weapons were first developed is categorically *not* evidence of “common” use, whether locally or writ large across the nation as a whole.

Absent any evidence that assault weapons are commonly used for lawful purposes within the scope of the Second Amendment’s protections, Bevis has not clearly shown a likelihood of success on that issue, requiring affirmance.

## **II. Assault Weapons Bans Are Consistent With This Nation’s Historical Traditions.**

All this said, the assault weapons bans here still survive constitutional scrutiny under *Bruen*’s second step, where a court must ask whether a modern firearm regulation finds support in analogous historic regulations upon consideration of why and how those regulations burden the right to self-defense. 142 S. Ct. at 2132-33. That is because a prohibition on assault weapons is consistent with this nation’s historical tradition of prohibiting access to firearms that have a demonstrated capacity to cause either (1) the rapid, mass loss of human life at the hands of a single individual; or (2) the unintentional loss of innocent lives even when used by law-abiding citizens for their intended purpose. The first is shown by historic regulations of gunpowder storage; the second by historic regulations of spring guns.<sup>7</sup> We address them in turn.

### **A. Gunpowder Regulations Demonstrate A Longstanding Tradition Of Regulating Arms Responsible For Mass Casualty Events.**

As for gunpowder, it is an uncontroversial proposition that the Second Amendment covers not only firearms themselves, but also the items “necessary to use” those firearms. *E.g.*, *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (citing *Ezell*, 651 F.3d at 704). Otherwise, the Second Amendment right could be effectively repealed by simply denying the populace access to materials

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<sup>7</sup> These regulations – both of which specifically applied to homes – also conclusively refute the frivolous notion, advanced by Bevis and his amicus Herrera, that the Second Amendment categorically prohibits regulations of firearms in the home. In making this argument, they forget that nuisance applies to terrors stemming from actions within one’s home, while affray applies to those stemming from without.

necessary to use their arms. *See id.* (“[W]ithout bullets, the right to bear arms would be meaningless.”). And once the analogical net is cast wide enough to include items “necessary to use” a firearm, an analogy can easily be drawn to historical regulations of gunpowder. Those regulations can be traced back to at least 1580, when London outright prohibited gunpowder storage in houses inside city limits, before later modifying that rule to allow storage of 2 pounds of gunpowder so long as it was not stored near a street frontage. Stephen Porter, *Accidental Explosions: Gunpowder in Tudor & Stuart London*.<sup>8</sup> In addition, the English law of nuisance also placed severe limits on individuals’ ability to store gunpowder in their homes. By the 1700s, it was settled in the English courts that the storage of large amounts of gunpowder in one’s home constituted an indictable offense against the crown, even if the activity was longstanding, and even “though gunpowder be a necessary thing, and for defence of the kingdom.” *Anonymous*, 12 Mod. 342 (King’s Bench); *accord, e.g., Dominus Rex. v. Taylor*, 2 Str. 1167 (King’s Bench). Notably, these restrictions were not limited to individuals with a history of unsafe practices or violations of the law – rather, they applied to all citizens equally, law-abiders and lawbreakers alike, *see* Porter, *supra*, without regard to the fact that the defendant’s activities had never injured others, *see Anonymous, supra*.

This regulatory tradition carried over to the United States, where the use of gunpowder quickly proliferated due to its “obvious importance for public defense,

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<sup>8</sup> <https://www.historyextra.com/period/tudor/accidental-explosions-gunpowder-in-tudor-and-stuart-london>

frontier security, and hunting,” and the “demand for a host of developmental projects in a labor-scarce economy, including mining, canal building, and road building.” William J. Novak, *The People’s Welfare: Law & Regulation In Nineteenth-Century America* 63 (U.N.C. Press 2000). Despite the extraordinary popularity and usefulness of gunpowder, it was “particularly susceptible” to the law of nuisance, *id.*, and the courts recognized that “the keeping of gunpowder . . . in large quantities in the vicinity of one’s dwelling-house or place of business, is a nuisance *per se*, and may be abated as such by action at law, or by injunction,” H.G. Wood, A PRACTICAL TREATISE ON THE LAW OF NUISANCES 142 § 142 (1875). Early American cities were incorporated with the express authority to regulate gunpowder, *e.g.*, *An Act to Incorporate the City of Key West*, ch. 58, § 8, 1838 Fla. Laws 70, and multiple states limited the amount of gunpowder a person could possess, Saul Cornell & Nathaniel DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 510-12 (2004) (describing numerous gunpowder storage laws). Such regulations persist to this day, despite the advent of modern explosives for construction work and ammunition cartridges making it generally unnecessary for the average person to possess freestanding gunpowder. *E.g.*, 720 ILCS 5/47-5(7).

This history of gunpowder regulation is analogous to assault weapons bans in both “why” and “how” they burden the right to armed self-defense. As for “why” gunpowder was historically regulated, the historical record shows that – unlike cannons or similar military weapons of mass destruction that existed at the time of the founding – gunpowder could be acquired and stored by average citizens, who could

theoretically stockpile large amounts of gunpowder in their homes or places of business. *See* Porter, *supra*. Possession of large amounts of gunpowder thus gave even a single, ordinary, law-abiding citizen (including, in at least one particularly catastrophic event, a child) the extraordinary ability to kill great numbers of people quickly – in London alone, a gunpowder explosion at Tower Hill in 1552 killed seven, an explosion at Crooked Lane in 1560 killed eleven, another at Fetter Lane in 1583 killed three, another at Tower Street in 1650 killed 67 and destroyed fifteen houses, and in 1715 over a hundred houses on Thames Street were destroyed in a fire caused by a gunpowder explosion that leveled a house. *Id.*<sup>9</sup> These dangers were not limited to mere accidental killings, of course, as demonstrated by the famed Gunpowder Plot of 1605, in which Guy Fawkes and his coconspirators amassed gunpowder in a failed attempt to level the House of Lords (and, collaterally, much of London). *See generally*, Alan Haynes, *THE GUNPOWDER PLOT* (History Press 1994).

The rationale behind these regulations was thus self-apparent: a “deposit of a large quantity of gunpowder in the midst of a populous city” could lead to an explosion, “and such would be the terrible and wide-spread destruction from it that the whole population would live in dread of some horrible catastrophe.” *Cheatham v. Shearon*, 31 Tenn. 213, 216 (1851). This fear supported legislation because “the dangers would be real, and all men of reflection and prudence would feel them to be so, and therefore their apprehensions would be well founded.” *Id.* at 216-17.

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<sup>9</sup> The problem was not limited to London – more than twenty major gunpowder explosions rocked European cities and towns between 1400 and 1850. *Id.*

The “why” behind assault weapon bans is virtually identical. Like stockpiles of gunpowder, assault weapons give a single individual the extraordinary ability to kill great numbers of people quickly. And as with gunpowder in the 1500s through the 1700s, that fatal potential has been repeatedly realized:

- 2022 Robb Elementary School, 21 dead, mostly small children;
- 2022 Highland Park parade, 7 dead;
- 2022 Buffalo supermarket, 10 dead;
- 2019 El Paso Wal-Mart, 23 dead;
- 2018 Marjory Stoneman Douglas High School, 17 dead;
- 2018 Pittsburgh Tree of Life Synagogue, 11 dead;
- 2017 Las Vegas Strip, 58 dead;
- 2017 Sutherland Springs Church, 26 dead;
- 2016 Pulse Nightclub, 49 dead;
- 2014 San Bernadino Regional Building, 14 dead;
- 2012 Sandy Hook Elementary, 27 dead, mostly small children;
- 2012 Aurora, Colorado, 12 dead;
- 2009 Geneva County, Alabama, 10 dead; and
- 1984 San Ysidro McDonald’s, 22 dead.

Just as was the case with gunpowder, the innocent, law-abiding people of Illinois now live in dread of the next horrible catastrophe that will be committed using assault weapons absent government action. And those fears are even more well-founded than the fears that justified strict historical regulation of gunpowder – where gunpowder

was strictly regulated in London after its misuse caused only *two* local explosions that resulted in a grand total of 18 deaths, the misuse of assault weapons has resulted in at least 14 mass shootings and 307 deaths, several of which were helpless children. Only further demonstrating how well-founded those fears are, in the short time while this brief was being drafted, a lone man in Cleveland, Texas, used an assault weapon to murder five of his neighbors, one of whom was a small child, and another lone man in a mall in Allen, Texas, used an assault weapon to murder eight, three of whom were small children, instantly orphaning a young boy celebrating his birthday.

Gunpowder regulations and assault weapons bans are also relevantly similar in “how” they affect law-abiding citizens’ right to armed self-defense. Certainly, laws imposing restrictions on the storage of gunpowder imposed some burden on the ability of an individual to engage in armed self-defense, because they “would at the very least have made it difficult to reload the gun to fire a second shot unless the homeowner happened to be . . . where the extra gunpowder was required to be kept.” *Heller*, 554 U.S. at 685 (Breyer, J. dissenting). But as the *Heller* majority recognized, this burden was minimal, particularly in comparison to “an absolute ban on handguns.” *Id.* at 632. Assault weapons bans also impose a comparably minimal burden on the ability of an individual to engage in armed self-defense. Like the historic English regulations of gunpowder, which allowed a small amount of gunpowder with significantly lesser destructive potential to be stored in homes, assault weapons bans allow individuals to retain possession of a host of weapons and ammunition extremely well-suited for that purpose – most obviously, the handguns

“overwhelmingly chosen” for self-defense, *id.* at 628 – and merely forbids possession of a narrow category of weapons with a demonstrated potential for misuse to inflict mass casualties.

**B. Spring Gun Regulations Demonstrate A Longstanding Tradition Of Regulating Firearms That Cause Innocent Deaths And Are Incompatible With Lawful Self-Defense.**

As Naperville notes, historical regulations of spring guns are also analogous to assault weapons bans, in that they demonstrate a longstanding tradition of regulating guns – even guns used in the home – that endanger innocent bystanders when used as designed. The use of trap guns dates back to England in the latter half of the eighteenth century, when the practical impossibility of personally guarding large tracts of land against poachers made the use of spring guns “especially in vogue” from 1770 to 1825. Miller Christy, *Man Traps & Spring-Guns*, OUTING, vol. XLI, issue 6, at 729 (1903); accord Ed Tangen, *Spring Guns*, 1 AM. J. POLICE SCI. 307, 307 (1930) (noting that spring guns “were much used in England against poachers and trespassers”). Despite the popularity of spring guns, Parliament in 1827 banned the use of spring guns, with a limited exception for defense of one’s home between sunset and sunrise. Spring Gun Act 1827, 7 & 8 Geo. 4, ch. 18.<sup>10</sup> American law followed suit – to this day, states criminalize spring guns, *e.g.*, 720 ILCS 5/24-1(a)(5); Mich. Comp. Laws § 750.236, and the rule against their use is so well-settled in American law that

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<sup>10</sup> The Spring Gun Act’s substantive provisions are now incorporated in the Offenses Against the Person Act 1861, 24 & 25 Vict., ch. 100, § 31.

first-year tort students study the famed spring gun case, *Katko v. Briney*, 183 N.W.2d 657 (Iowa 1971).

This history of spring gun regulation is analogous to assault weapons bans in both “why” and “how” they burden the right to armed self-defense. Starting with the “why,” spring guns were banned for two primary reasons. First, they risked injuring innocents; among the unintended victims of spring guns were a boy who entered a garden to cut a stick, a boy gathering nuts, a boy “in pursuit of a straying peacock,” a maid killed by a spring gun her employer set to guard his house, and a gardener killed by his employer’s spring gun. Christy, *supra*, at 729-30. The problem, it was realized, was that spring guns – while effective deterrents against criminals – “did not possess the power to discriminate between a depredator and the owner of the property they were intended to protect” and “maimed or killed him just as promptly and impartially as it would have killed a trespasser and a thief.” *Id.* at 730. Indeed, the debates over the 1827 statute banning spring guns confirmed that Parliament was deeply concerned with unintended injury to innocents, with one member comparing the use of a spring gun to firing “a cannon” in the middle of a street to rid it of criminals. House of Commons Debates, March 23, 1827, vol. 17, cc19-34 (comments of William Smith). The concerns about unintended harm to innocent victims remains a driving force behind the rule against spring guns that persists in American law. *See Katko*, 183 N.W.2d at 661 (noting instances in which innocent policeman and small boy were killed by spring guns); *see also Calvillo-Silva v. Home Grocery*, 19 Cal. 4th 714, 733 (1998) (noting “indiscriminate violence” spring guns inflict).

Second, spring guns were incompatible with English principles of self-defense, under which a landowner was guilty of murder if he “uses more force than is absolutely necessary” in his defense, due to “the sacred regard which our law every where exhibits for the life and safety of man—its tardiness and reluctance to proceed to extreme violence.” Rev. Sydney Smith, *Man Traps & Spring Guns*, THE EDINBURGH REVIEW, Vol. 35, Issue 70, at 417 (1821); *accord id.* at 414 (“You cannot shoot a man that comes on your land, because you may turn him off by means less hurtful of him . . .”); *id.* at 412-13 (also noting limits of English law). As Smith memorably summarized it: “If the Legislature enacts fine and imprisonment as the punishment for stealing turnips, it is not to be endured that the proprietor should award to this crime the punishment of death.” *Id.* at 418. This fear was echoed by Parliament when banning spring guns, with one proponent noting the “anxious caution the law surrounds the life of man, even where the person slain has been the original aggressor; how minutely it exacts, that the object of attack shall not have exceeded the limits of a just and necessary defence.” House of Commons Debates, *supra* (comments of Sir Edmund Carrington). This concern, too, underlies American laws against spring guns, which are outlawed specifically because their use is inconsistent with background principles of lawful self-defense. *See Katko*, 183 N.W.2d at 660.

The “why” behind assault weapons bans stems directly from these same concerns. Like spring guns, assault weapons pose significant danger to innocent victims when used in self-defense – when used in one’s home, particularly in densely

populated urban area like the bulk of Cook County, the penetrative power of assault weapons makes it extremely likely that a stray bullet will pass through walls, ceilings, or floors and strike innocent individuals in neighboring houses or apartments. And like spring guns, assault weapons are indiscriminate in the injuries they inflict on innocents, due to their ability to fire at such a rapid rate – when an individual defending himself with an assault weapon misses his assailant, he is more likely to miss several times, each time increasing the chance that stray rounds will strike innocent bystanders. Moreover, given the extraordinary lethality of each round fired by an assault weapon, *see* R. 57-4 ¶34, the use of an assault weapon will often far exceed what a reasonable person would think necessary to defend himself from an attack.

Bans on assault weapons and bans on spring guns are also similar in “how” they burden the right to armed self-defense. As the English recognized when banning spring guns, those bans necessarily contemplated that guns could be seized by the government, depriving their owners of their use in self-defense. *See* Smith, *supra*, at 410-11 (noting that banning spring guns necessarily required “entering into enclosed lands to take away guns”). But those burdens were minimal because banning spring guns only required property owners to rely on the ordinary, commonplace weapons that were already available for lawful use in self-defense, like rifles and pistols. Bans on assault weapons have the *exact* same effect on individuals’ right to armed self-defense, because they leave the individuals a host of lawful options for self-defense, whether they be handguns, rifles, or shotguns.

### III. Conclusion.

In sum, Bevis failed to show that assault weapons are “arms,” and bans on assault weapons are consistent with this nation’s history and traditions. This court should affirm.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 29**

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In accordance with Fed. R. App. P. 32(g), I certify that this brief complies with the type-volume limitation set forth in Seventh Circuit Rule 29 because it contains 6,986 words, beginning with the words “INTEREST OF AMICUS CURIAE” and ending with “respectfully submitted” on page 26. In preparing this certificate, I relied on the word count of the word-processing system used to prepare the brief, which was Microsoft Word.

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**CERTIFICATE OF SERVICE**

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I certify that on May 10, 2023, I electronically filed the attached Brief of Amicus Curiae Cook County with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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