Nos. 23-1825 (lead case), 23-1826, 23-1827, 23-1828, and 23-1793

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CALEB BARNETT *et al.*,
Plaintiffs-Appellees,
v.
KWAME RAOUL *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Illinois (Nos. 23-cv-209, 23-cv-141, 23-cv-192, 23-cv-215) and the United States District Court for the Northern District of Illinois (No. 23-cv-532)

BRIEF OF AMICI CURIAE SECOND AMENDMENT LAW CENTER, GUN OWNERS OF CALIFORNIA, CALIFORNIA RIFLE & PISTOL ASSOCIATION, STATE LINE RIFLE ASSOCIATION, AND DEWITT COUNTY SPORTSMANS CLUB

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Seventh Circuit Rule 26.1 counsel for *amici curiae* certifies that none of the *amici* has a parent corporation and no publicly held corporation owns 10% or more of the stock of any of the *amici*.

/s/ Stephen P. Halbrook

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INTEREST OF *AMICI CURIAE*[1]

The Second Amendment Law Center is a 501(c)(3) not-for-profit corporation headquartered in Henderson, Nevada. The Center defends the individual right to keep and bear arms, educates the public about the social utility of private firearm ownership, and publishes historical, criminological, and technical information about firearms.

Gun Owners of California is a 501(c)(4) not-for-profit entity founded in 1975 to oppose infringements on Second Amendment rights. Its advocacy efforts include the courts, having filed amicus briefs in numerous cases, including before the U.S. Supreme Court.

The California Rifle & Pistol Association, founded in 1875, is a not-for-profit membership and donor supported organization with tens of thousands of members. It works to defend the constitutional rights of individuals who choose to responsibly own firearms.

State Line Rifle Association is an Illinois nonprofit corporation that monitors legislation that impacts firearm-related and Second Amendment issues, and disseminates that information to its members in Illinois. It focuses on

[1] No party's counsel authored this brief in whole or in part. No party or party's counsel, and no person other than *amici*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief. Because some parties have refused consent to the filing of this brief, it is being submitted with a Motion for Leave to File.

introducing new people to the shooting sports. DeWitt County Sportsmen's Club was established in rural DeWitt County, Illinois, in 1944. It provides facilities for the development of safety and proficiency with firearms, and supports the right to keep and bear arms within Illinois. Both of these groups have members who have been or will be negatively affected by the Illinois bans on "assault weapons" or "large capacity magazines" unless those laws are enjoined.

INTRODUCTION

These consolidated cases present the question of whether *Heller*'s "in common use" test provides the governing rule in arms ban cases, or whether that test may be disregarded by lower courts and a test that allows banning of arms that are "particularly dangerous" should be substituted for the Supreme Court's test.

By applying *Heller*'s "in common use" test, Judge McGlynn got it right in the four consolidated cases arising out of the Southern District of Illinois. Amici agree with the plaintiffs/appellees that that is the proper test. But this brief provides additional clarification on why that is so, and shows how the *Herrera* case, and the *Bevis* case on which it is based, misunderstood the process by which courts should analyze Second Amendment cases after *Bruen.* In brief, the *Herrera* and *Bevis* courts incorrectly followed the *methodology* described in *Bruen* for analyzing novel cases when no governing *test* has yet been established, instead of applying the governing *test* when that test (here, the "in common use" test) has been definitively established by *Heller.*

SUMMARY OF ARGUMENT

This brief presents three major arguments.

First, in arms ban cases, *Heller* established the governing *test*: whether the arms in question are "in common use." Yet rather than following that test, *Bevis* and *Herrera* undertook their own independent analysis of text and history and

arrived at a different test, finding that firearms can be banned if they are "particularly dangerous." The failure to apply *Heller*'s governing test led to further errors, such as invoking *Bruen*'s language about "dramatic technological changes" and "unprecedented societal concerns" to try to justify the "particularly dangerous" test. That language has relevance, if at all, when confronting a novel Second Amendment issue that has not already been decided by binding precedent. And the "particularly dangerous" test turns out to be nothing more than means-end interest balancing, rejected in both *Heller* and *Bruen*, with all the weight placed on one arm of the balance beam.

Regarding what arms are protected, a lower court cannot engage in its own "text and historical tradition" analysis—the *methodology* described in *Bruen*—to disregard *Heller*'s "in common use" test that *resulted from* such an analysis. *Heller* decided that arms that are "in common use" today are protected. All that remains for a lower court to do is to apply that test to the arms at issue in the case before it.

The *Heller* test of "in common use" controls, so there is no need to consider "historical analogues" at all in these cases. Historical analogues are relevant only if a court is establishing a test on a subject where there is no controlling precedent. But there is an established test in arms ban cases: the "in common use" test. Thus, it was also error for the *Herrera* court to base its decision on *Bruen*'s observation

"that 'dramatic technological changes' or 'unprecedented societal concerns' may require a 'more nuanced approach.'" This sentence appears in *Bruen*'s discussion of the methodology to be followed when analogues must be consulted because there is no binding precedent on the subject. But in arms ban cases there is a binding test, so a lower court has no business in consulting analogues anew to come up with a test that contradicts *Heller*'s "in common use" test.

Second, nothing about the features of a rifle mislabeled as an "assault weapon" makes it more dangerous or removes it from Second Amendment protection. "Assault weapon" is a political term. Neither a pistol grip nor any other feature increases the rate of fire. The firearms banned by name are in common use and remain protected by the Second Amendment. The cartridge fired by most AR-15 riles is far less powerful than typical deer hunting rounds, and is not allowed by Illinois for hunting deer because it is not powerful enough.

Third, if analogues are to be consulted, the relevant time is around 1791 when the Second Amendment was adopted, not 1868 when the Fourteenth Amendment was ratified. Cases from the courts of appeals that suggest otherwise are based on a single error in the *Ezell* case, which was later corrected. Every time the Supreme Court has looked to history to determine original meaning of a provision of the Bill of Rights, it has always looked principally to the Founding, never to 1868.

ARGUMENT

I. THE ILLINOIS BANS ON ORDINARY SEMIAUTOMATIC RIFLES AND STANDARD CAPACITY MAGAZINES ARE UNCONSTITUTIONAL UNDER *HELLER*'S "IN COMMON USE" TEST.

A. *Heller* Provides the Test for Determining Which Arms Are Protected Under the Second Amendment.

These five consolidated cases challenge the constitutionality of the bans by Illinois, Cook County, and the City of Chicago on the sale, purchase, and possession of so-called "assault weapons" and standard capacity (mislabeled "large capacity") magazines. In four of the cases, Judge McGlynn of the Southern District of Illinois correctly struck down the Illinois state bans as violating the Second Amendment's protection of arms that are "in common use," which is the test established by *District of Columbia v. Heller*.[2]

Heller held that the Second Amendment protects all bearable arms that are "in common use" for lawful purposes.[3] *Heller* observed that the "in common use" test is "fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"[4] Only those arms that are "not typically

[2] 554 U.S. 570 (2008).

[3] *Heller*, 554 U.S. at 624.

[4] *Id.* at 627.

possessed by law-abiding citizens for lawful purposes" might not receive Second Amendment protection.[5]

These cases must be decided by a straightforward application of the *Heller* "in common use" test. *Heller* decided that arms "in common use" are protected under the Second Amendment and cannot be banned. There can be no doubt that the semiautomatic rifles banned by Illinois, such as the AR platform, are in common use. Figures showing that such rifles are possessed in the tens of millions, and that "large capacity magazines" are possessed in the hundreds of millions, are provided in Appellees' Opening Brief[6] in *Barnett* and in Judge McGlynn's opinion in *Barnett*.[7] Indeed, Justice Alito's concurrence in the *Caetano* case strongly suggests that possession of an arm in vastly lower numbers suffices to meet the "in common use" test.[8]

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[5] *Id.* at 625.

[6] Appellees' Opening Brief in *Barnett v. Raoul*, No. 23-1825, Doc. 56 at 35-40.

[7] *Barnett v. Raoul*, 2023 WL 3160285, *10 (S.D. Ill. Apr. 28, 2023).

[8] *Caetano v. Massachusetts*, 577 U.S. 411, 420 (2016) (Alito, J., concurring) (observing that approximately "200,000 civilians owned stun guns" in a recent year, and concluding that: "While less popular than handguns, stun guns are widely owned…. Massachusetts' categorical ban of such weapons therefore violates the Second Amendment.").

B. The District Courts in *Herrera* and *Bevis* Misunderstood the Difference Between the *Test* or Rule to be Applied in Arms Ban Cases, and the *Methodology* Used to Arrive at the Test.

In *Herrera v. Raoul*,[9] the district court for the Northern District of Illinois applied a profoundly mistaken approach to determining whether the arms at issue in these cases are protected by the Second Amendment. That court fundamentally misunderstood *New York Rifle & Pistol Ass'n v. Bruen.*[10] It believed that *Bruen* provided a "two-step analysis to determine whether a challenged gun regulation is constitutional." The court believed the test to be that if the plain text covers the conduct at issue, "the Constitution presumptively protects that conduct." For the regulation to be upheld as constitutional "[t]he government must ... justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[11]

But the quoted language does not set forth a legal *test* for deciding arms ban cases. Instead, it is a description of a *methodology* that courts should follow when confronting a novel, unresolved Second Amendment issue, without benefit of a binding precedent from a higher court.

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[9] No. 23-cv-532, 2023 WL 3074799 (N.D. Ill. Apr. 25, 2023).

[10] 142 S.Ct. 2111 (2022).

[11] *Herrera*, at *5 (citations omitted).

Part II of *Bruen* describes the *methodology* courts should employ in non-arms ban cases going forward. That passage sets forth the process by which courts first look to the Second Amendment's plain text, and then to whether a modern restriction "is consistent with this Nation's historical tradition of firearm regulation."[12] Why did the Supreme Court feel compelled to outline this *methodology* for use in future types of Second Amendment cases? Prior to *Bruen* many lower courts had engrafted an "interest balancing test" onto the "text and history" approach in *Heller*. This was done despite the express rejection in *Heller* of Justice Breyer's proposal in his dissent to employ a balancing test. *Heller* stated, "We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach…. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all."[13] Nevertheless, use of a balancing test was widespread in the lower courts. After invalidating that test, *Bruen* apparently felt it advisable to be quite specific regarding the *methodology* that courts should use to evaluate novel questions in the future. That methodology is laid out in detail in Part II, involving text, historical analogues, and the like.

[12] *Bruen*, 142 S. Ct. at 2126–34.

[13] *Heller*, 554 U.S. at 624.

In Part II.B.1, *Bruen* summarized the *methodology* employed in *Heller* to arrive at the "in common use" test.[14] It is remarkably similar to *Bruen's* description of the methodology to be followed in non-arms ban cases,[15] and the Court noted that application of that methodology produced the "in common use" *test* in *Heller*.[16]

As one commentator has stated, "*Bruen* cites *Heller* some eighty times, generally favorably and never negatively."[17] Indeed, *Bruen* expressly reaffirmed the "in common use" test of *Heller*.[18]

Herrera and *Bevis* went astray when they conducted the historical analysis anew by following the methodology described in *Bruen*, even though *Heller* had already conducted that analysis and come up with a governing rule for what firearms are protected by the Second Amendment; namely, those "in common use." By following a description of the *methodology* to be followed in novel, non-

[14] *Bruen*, 142 S.Ct. at 2127-28.

[15] The term "non-arms ban" cases is used as shorthand here. The methodology described in *Bruen* applies to any type of future case in which the Supreme Court has not enunciated a test for a particular issue, such as *Bruen* did when it found that a modern statute must not prevent "law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms" by carrying in public. *Id.* at 2156.

[16] *Bruen*, 142 S.Ct. at 2128.

[17] Mark W. Smith, *What Part of "In Common Use" Don't You Understand?: How Courts Have Defied Heller in Arms-ban Cases—Again* 7 n.26 (2023), available on SSRN, https://ssrn.com/abstract=4483206.

[18] *Bruen*, 142 S.Ct. at 2143.

ban cases, rather than the established *test* for arms ban cases, they came up with conclusions that are contrary to *Heller*.

The error in *Herrera* was introduced when that opinion asserted:

> *Bruen* set out a new framework for lower courts to evaluate gun laws. 142 S. Ct. at 2126–34; see also *United States v. Rahimi*, 61 F.4th 443, 450–51 (5th Cir. 2023) (acknowledging that "*Bruen* clearly fundamentally changed our analysis of laws that implicate the Second Amendment, rending our prior precedent obsolete" (cleaned up and internal citation omitted)). With that history in mind, as the *Bevis* Court succinctly explained, "*Bruen* is now the starting point" for this Court's analysis of a challenged gun regulation. *Bevis*, 2023 WL 2077392, at *9.

This is incorrect. The *Bruen* discussion at 2126-34, cited by *Herrera*, lays out a *methodology* for evaluating modern restrictions by examining plain text and historical tradition, primarily in the form of analogues. But it is not "the starting point" when the Supreme Court has already performed that analysis, as it did in *Heller*. In arms ban cases, the rule laid out by the Supreme Court controls.

Importantly, *Rahimi* was not an arms ban case. Instead, the issue in *Rahimi* was whether 18 U.S.C. § 922(g)(8), which prohibits persons subject to a domestic violence restraining order from possession of firearms, is constitutional under the Second Amendment.[19] Because it considered *who* may possess a firearm, as opposed to *what* firearms are protected, *Heller*'s "in common use" test had no application. Thus, the Fifth Circuit had to engage in the kind of historical analysis

[19] *United States v. Rahimi*, 61 F.4th 443, 448 (5th Cir. 2023).

performed in *Heller* and described more explicitly in *Bruen* to determine whether § 922(g)(8) is "consistent with this Nation's historical tradition of firearm regulation."[20] *Bruen* "rend[ered] our prior precedent obsolete" only because the "means-end" scrutiny balancing test was rejected in *Bruen*. It did not render *Heller*'s "in common use" test obsolete, nor did it make *Bruen* "the starting point" for every "challenged gun regulation," but only for those "other cases" not controlled by *Heller* or *Bruen* itself.

In applying the methodology anew, *Herrera* concluded that arms that are "particularly dangerous" can be banned.[21] *Herrera* based its decision on *Bevis v. City of Naperville.*[22] *Bevis* made the same error as *Herrera*, by disregarding the *Heller* "in common use" test, engaging in its own original historical analysis under the methodology described in *Bruen*. Instead of following *Heller*'s "in common use" test, *Bevis* concluded that "history and tradition demonstrate that particularly 'dangerous' weapons are unprotected;"[23] that the "history of firearm regulation…establishes that "governments enjoy the ability to regulate highly dangerous arms;"[24] and that "assault weapons" may be banned because they "pose

[20] *Bruen*, 142 S.Ct. at 2126.

[21] *Herrera*, at *6.

[22] No. 22-cv-04775, 2023 WL 2077392 (N.D. Ill. Feb. 17, 2023).

[23] *Bevis*, at *9, 12.

[24] *Bevis*, at *14.

an exceptional danger."[25] Obviously, this contradicts the "in common use" test, which is not based on the alleged dangerousness of a particular arm.

It was also error for *Herrera* to base its decision on *Bruen*'s observation "that 'dramatic technological changes' or 'unprecedented societal concerns' may require a 'more nuanced approach.'"[26] *Herrera* stated that "Such an approach is applicable here…. [The] City Code, County Code, and Illinois Act similarly responded to 'dramatic technological changes' and 'unprecedented societal concerns' of increasing mass shootings by regulating the sale of weapons and magazines used to perpetrate them."[27]

But the language about technological changes and societal concerns does not eliminate the need to engage in a proper historical analysis; it only says that in some instances the analysis must be "more nuanced." Also, it is difficult to see how "dramatic technological changes" *in firearms* could ever justify banning them, because under the "in common use" test the arms that are protected are those that are "in common use *today*."[28] So the "in common use" test automatically protects *today's* firearm technology, and any asserted technological change from an unspecified former time is irrelevant. The same is true for "unprecedented societal

[25] *Bevis*, at *14.

[26] *Herrera*, at *7.

[27] *Id*.

[28] *Bruen*, 142 S.Ct. at 2143 (emphasis added).

concerns" which are alleged to be directly caused by technological changes in arms.

Such changes and concerns might only be applicable when a court is engaged in an original historical analysis using analogues, because there is no binding test on the subject. But in arms ban cases a lower court may not consult analogues anew to devise a test that contradicts *Heller*'s "in common use" test.

II. NOTHING ABOUT THE FEATURES OF A RIFLE DEROGATORILY NAMED AN "ASSAULT WEAPON" MAKES IT MORE DANGEROUS OR REMOVES IT FROM SECOND AMENDMENT PROTECTION.

A. "Assault Weapon" is a Derogatory Term Without Objective Meaning that Does Nothing to Remove Firearms from Second Amendment Protection.

The firearms that Illinois pejoratively calls "assault weapons" are primarily semiautomatic rifles with certain innocuous features that make them safer, not more dangerous. Unlike a machine gun, which is capable of fully-automatic fire, a semiautomatic rifle requires a separate pull of the trigger to fire each shot.[29]

A court should not refer to the subject firearms as "assault weapons," other than in quotation marks, as "no pronouncement of a Legislature can forestall attack

[29] A "rifle" is "intended to be fired from the shoulder," and so has a shoulder stock, and it fires "only a single projectile through a rifled bore for each single pull of the trigger"; and a "semiautomatic rifle" also "requires a separate pull of the trigger to fire each cartridge." 18 U.S.C. §§ 921(a)(7), (29). Illinois does not define these terms.

upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act . . . .”[30] Had the District of Columbia named handguns “murder weapons” when it banned them, the term would have done nothing to save the ban from being declared unconstitutional in *Heller*.

As Justice Thomas has written: “Prior to 1989, the term ‘assault weapon’ did not exist in the lexicon of firearms. It is a political term, developed by anti-gun publicists to expand the category of ‘assault rifles’ so as to allow an attack on as many additional firearms as possible on the basis of undefined ‘evil’ appearance.”[31]

No objective definition exists for “assault weapons,” which are defined in contradictory ways:

• Illinois defines “assault weapon” as a “semiautomatic rifle that has the capacity to accept a detachable magazine” if it has a “a pistol grip.”[32] So a rifle, which has a shoulder stock, is banned if it also has a pistol grip.

• Cook County, Illinois, defines “assault weapon” as a semiautomatic rifle featuring “only a pistol grip *without* a stock attached.”[33] So a rifle with a pistol grip is banned if it *doesn’t* have a shoulder stock.

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[30] *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

[31] *Stenberg v. Carhart*, 530 U.S. 914, 1001 n.16 (2000) (Thomas, J., dissenting) (citation omitted).

[32] 720 ILCS 5/24-1.9(a)(1)(i).

• Maryland defines an "assault weapon" as *not* including either a rifle having a pistol grip and stock *or* a pistol grip and no stock.[34]

In sum, "assault weapon" is a meaningless term unless used in an assault. The State cannot sustain its burden of showing that the firearms it bans lack Second Amendment protection, especially given that the features it bans are completely arbitrary.

B. Nothing About a "Pistol Grip" or Other Features Increases the Rate of Fire.

The Illinois law does not ban semiautomatic firearms as such, but bans them if they have certain features, such as a pistol grip.[35] Neither the pistol grip nor any other listed feature increases the rate of fire. And nothing about these features removes such firearms from Second Amendment protection, because they are in common use by law-abiding citizens for lawful purposes.

Illinois recognizes semiautomatic firearms as having what it calls a "standard rate of fire." Specifically, it bans a device "that is designed to and functions to increase the rate of fire of a semiautomatic firearm above the standard rate of fire for semiautomatic firearms that is [*sic*] not equipped with that device . .

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[33] § 54-211(1)(A), Cook County, Ill., Ordinance No. 06–O–50 (2006).

[34] Md. Code, Criminal Law, §§ 4-301(h)(1) ("copycat weapon"), 4-301(d) (assault weapon" includes "a copycat weapon").

[35] 720 ILCS 5/24-1.9(a)(1)(A).

. .”[36] There is nothing about a pistol grip or any other “assault weapon” feature that increases the firearm’s rate of fire.

How slowly or rapidly a semiautomatic firearm fires according to its “standard rate of fire” depends on how slowly or rapidly the user pulls the trigger. Yet the State argues that the pistol grip “helps the shooter stabilize the weapon and reduce [*sic*] muzzle rise during rapid fire . . . .”[37] That was the only reason given for banning rifles with a pistol grip. But slow or rapid fire has nothing to do with the pistol grip or any other banned feature.

The suggestion that pistol grips are associated with “rapid fire” is belied by the fact that identical pistol grips are found on single-shot rifles (which hold only

[36] 720 ILCS 5/24-1(a)(14).

[37] Opening Brief of the State Parties 6.

one round),[38] bolt-action rifles (which require manual reloading for each round),[39] and even on air guns used in Olympic competition.[40]

C. The Firearms that Are Banned by Name Are in Common Use and Have No Features Excluding Them from Second Amendment Protection.

"Assault weapon" is defined to include a long list of makes and models, including: "All of the following rifles, copies, duplicates, variants, or altered facsimiles with the capability of any such weapon," such as "(ii) all AR types, including the following: . . . (XIV) Colt Match Target rifles." [41] The State argues: "This list, which is almost entirely duplicative of the features-based definition, allows buyers and sellers to easily discern whether a particular firearm is within the

[38] "'Single shot' means a gun that is either manufactured or modified to only be capable of holding a total of one round in the magazine and chamber combined." 520 ILCS 5/1.2bb. See video of use of Feinwerkbau Model 2800 .22 cal. single-shot rifle with protruding pistol grip at https://www.youtube.com/watch?v=Day8IASvfMQ.

[39] "Action, bolt. A firearm, typically a rifle, that is manually loaded, cocked and unloaded by pulling a bolt mechanism up and back to eject a spent cartridge and load another." "The Writer's Guide to Firearms & Ammunition," The National Shooting Sports Foundation, 6 (2017), http://www3.nssf.org/share/PDF/WritersGuide2017.pdf. See Ruger Precision Rimfire bolt-action rifle with protruding pistol grip at https://ruger.com/products/precisionRimfire/models.html.

[40] See a single-shot air rifle with a protruding pistol grip at https://www.feinwerkbau.de/en/Sporting-Weapons/Air-Rifles/Model-800-Evolution.

[41] 720 ILCS 5/24-1.9(a)(1)(J).

Act's purview."[42] But as discussed above, nothing about these features warrants banning them or removes them from Second Amendment protection.

No basis exists for the State's assertion that persons may "easily discern" whether a firearm is banned. The ban includes not just the listed rifles, but also "copies" and "variants," but sets forth no criteria to make that determination. "Ordinary consumers cannot be expected to know the developmental history of a particular weapon."[43] Further, "the average gun owner knows very little about how his gun operates or its design features."[44] Such a ban of commonly-possessed firearms of such a sweeping, unknown scope only exacerbates its violation of the Second Amendment.

Heller referred to the possible lack of protection of "weapons that are most useful in military service—M-16 rifles and the like . . . ."[45] The State argues that "the most commercially successful weapons regulated by the Act—AR-15 rifles—are M16s in every way except one: the ability to toggle between semiautomatic and

[42] Opening Brief of the State Parties 7.

[43] *Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250, 253 (6th Cir. 1994) (declaring "assault weapon" ban unconstitutionally vague).

[44] *Id.*

[45] *Heller*, 554 U.S. at 627.

automatic fire."[46] It goes on to argue that the semiautomatic feature is more important in military service than the automatic feature.

In *Staples*, the Supreme Court rejected the kind of reasoning that the State advances. "The AR-15 is the civilian version of the military's M-16 rifle, and is, unless modified, a semiautomatic weapon. The M-16, in contrast, is a selective fire rifle that allows the operator, by rotating a selector switch, to choose semiautomatic or automatic fire."[47] "Automatic" fire means that "once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted," and that is the definition of a "machinegun"; a "semiautomatic," by contrast, "fires only one shot with each pull of the trigger…."[48]

In the context of the AR-15 rifle involved in that case, *Staples* acknowledged "a long tradition of widespread lawful gun ownership by private individuals in this country" and found such firearms to be "commonplace and generally available."[49] Ordinary firearms like the AR-15 rifle were contrasted with "machineguns, sawed-

[46] Opening Brief of the State Parties 32.

[47] *Staples v. United States*, 511 U.S. 600, 603 (1994).

[48] *Id*. at 602 n.1.

[49] *Id*. at 610-11.

off shotguns, and artillery pieces," and "guns falling outside those [latter] categories traditionally have been widely accepted as lawful possessions . . . ."[50]

Machineguns have been restricted federally since enactment of the National Firearms Act of 1934 and have been long restricted in Illinois.[51] The State's attempt to demonize semiautomatics ignores that Illinois does not ban all semiautomatics, but only the most commonly-possessed semiautomatics that have certain features and names. And there is nothing about the banned firearms that makes them more dangerous or that removes them from Second Amendment protection. And to repeat the obvious, *Heller* held that handguns are protected by the Second Amendment because they are in common use, rejecting the argument that handguns are too "dangerous."

Finally, the State fails to explain why, if AR-15 rifles are so useful in military service, not a single military force in the world issues them as their standard service rifles. Every nation issues selective-fire rifles that can fire in fully automatic mode. By contrast, the AR-15 is a civilian rifle which is commonly possessed throughout the United States.

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[50] *Id*. at 612. "The Nation's legislators chose to place under a registration requirement only a very limited class of firearms, those they considered especially dangerous." *Id*. at 622 (Ginsburg, J., concurring).

[51] See 26 U.S.C. § 5801 et seq.; 720 ILCS 5/24-1(a)(7).

D. The Cartridge Fired from Most AR-15 Rifles is Far Less Powerful than Typical Deer Hunting Rounds.

Due to the relatively small caliber of most "assault weapons," such rifles are typically less powerful than hunting rifles routinely used across the nation to shoot deer and other medium-sized game. Most AR-15s fire .223 caliber cartridges, which are exceptionally *less lethal* than cartridges like the .30 caliber round typically used by deer hunters.

In Illinois, for deer hunting "the only legal ammunition for a centerfire . . . rifle is a . . . centerfire cartridge of .30 caliber or larger . . . ."[52] The Department of Natural Resources (DNR) maintains a list of such cartridges that are authorized for deer hunting. Among many other powerful cartridges, it includes the .450 Nitro Express, which fires a bullet weighing 480 grains and producing 4,927 foot pounds of energy at the muzzle.[53] (Muzzle energy is the basic measure of the power of a bullet (projectile) and is expressed in foot-pounds. Muzzle energy is calculated by a formula based on the bullet's weight and velocity.) By contrast, the typical .223 Remington bullet weighs 55 grains and produces only 1,282 foot pounds of muzzle

[52] 520 ILCS 5/2.25.

[53] See DNR tables at https://dnr.illinois.gov/content/dam/soi/en/web/dnr/hunting/documents/ilsingleshotrifle.pdf.

energy.[54] The .223 is not on DNR's list because it is not powerful enough to use for deer hunting.

The ballistics of a cartridge such as a .223 has no relation to the external features of a firearm, such as whether it is an AR-15 or has a pistol grip. Yet the State argues that, "as compared with handguns, assault weapons produce much larger cavities in the body . . . ."[55] Ignoring that "assault weapon" is defined to include some handguns *and* that handguns cannot be compared to rifles, the size of a cavity depends on factors like the power of the cartridge. Firing the same cartridge out of a rifle defined as an "assault weapon" does nothing to increase its power than when fired from a single-shot rifle.

In sum, nothing about the commonly-possessed firearms here makes them more dangerous or removes them from Second Amendment protection. Features like the pistol grip do nothing to increase the rate of fire. The very feature of being semiautomatic – of firing only once per trigger pull – distinguishes them from military weapons. The cartridges that most of the banned rifles fire are not even lethal enough for deer hunting.

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[54] "223 Remington Ballistics Chart**,"** http://www.ballistics101.com/223_remington.php.

[55] Opening Brief of the State Parties 30.

III. THE APPROPRIATE TIME PERIOD TO DETERMINE ORIGINAL PUBLIC UNDERSTANDING OF THE SECOND AMENDMENT IS 1791, WHEN THE BILL OF RIGHTS WAS ADOPTED.

A. The Time to Determine the Original Meaning of the Bill of Rights is *Not* When the Fourteenth Amendment Was Ratified.

"Constitutional rights are enshrined with the scope they were understood to have when the people adopted them," *Bruen*, 142 S.Ct. 2136 (quoting *Heller*, 554 U.S. 570, 634–635 (2008)). The Bill of Rights, including the Second Amendment, was ratified by the people in 1791. *Heller* and *Bruen* held that the scope of the Second Amendment is determined by the meaning it had in 1791.

The time of ratification of the Fourteenth Amendment has nothing to do with the original public understanding of the Second Amendment in 1791 and tells us nothing important about the tradition of firearms regulation in this country. Yet, amicus briefs filed by Everytown for Gun Safety in the district court in *Barnett*[56] and in the related *Bevis* case on appeal to this court,[57] contend that 1868, and not 1791, is the "most relevant" time period for the historical inquiry because that is "when the Fourteenth Amendment was ratified and made the Second Amendment applicable to the states."[58]

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[56] *Barnett v. Raoul*, No. 23-cv-209, Doc. No. 54 (S.D. Ill. 2023).

[57] *Bevis*, Doc. No. 89.

[58] Everytown Br. at 6. All citations to Everytown are to the brief filed in the district court in *Barnett*.

The court of appeals cases that the Everytown briefs rely on reveals that claim to be baseless. The claim is illogical and barred by principles that are firmly established in the Supreme Court's Bill of Rights jurisprudence. Most conclusively, it is contrary to the Court's universal practice of looking at the time of the Founding, not the Reconstruction period, to determine the meaning of the substantive provisions of the Bill of Rights, including the Second Amendment.

B. The Case Law and Quotations Relied on to Establish 1868 as the Pertinent Year Are Illusory.

To try to support its contention that 1868 is the pertinent year, Everytown argues that several courts of appeals have reached this conclusion. It first cites a panel decision in the case of *National Rifle Association v. Bondi*.[59] However, the mandate was withheld in that case on the day it was decided,[60] and a petition for rehearing en banc was later filed.[61] If rehearing en banc is granted, the panel decision will be vacated. Thus, it would be prudent not to give much weight to this panel opinion before the case is concluded.

Everytown next quotes *Ezell v. City of Chicago*, 651 F.3d 684, 702 (7th Cir. 2011), as stating that "*McDonald* [*v. City of Chicago*, 561 U.S. 742 (2010),] confirms that if the claim concerns a state or local law, the 'scope' question asks

[59] 61 F.4th 1317 (11th Cir. 2023) ("*Bondi*").

[60] *Bondi*, Case No. 21-12314, Doc. No. 67 (11th Cir. Mar. 9, 2023).

[61] *Bondi*, Doc. No. 68 (11th Cir. Mar. 30, 2023).

how the right was publicly understood when the Fourteenth Amendment was proposed and ratified."[62] Everytown omits *Ezell*'s citation to *McDonald*, which was "*McDonald*, 130 S.Ct. at 3038–47." But the *McDonald* opinion in that page range merely examines history after the Civil War to determine whether the Second Amendment should be held to be incorporated. It does not say that 1868 is the principal time period for determining the meaning or scope of the Second Amendment.

Ezell simply made a mistake. It corrected that mistake the next year in *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012). There, it held that "1791, the year the Second Amendment was ratified" was "the critical year for determining the amendment's historical meaning, according to *McDonald v. City of Chicago*, *supra*, 130 S.Ct. at 3035 and n. 14."

The other court of appeals cases cited by Everytown for the proposition that 1868 is the proper year all ultimately rely on the error in *Ezell*.[63]

What does the Everytown brief *not* cite for the proposition that the 1868 time of ratification ought to be controlling? It does not cite a single Supreme Court

[62] Everytown Br. at 6.

[63] *Gould v. Morgan*, 907 F.3d 659, 668 (1st Cir. 2018) (relies on *Greeno*); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (relies on *Ezell*); *Drummond v. Robinson Twp.*, 9 F.4th 217, 227 (3d Cir. 2021) (cryptic remark that did not hold that 1868 is the proper date and did not attempt to ascertain the scope of the right).

case that has ever held that 1868 is the principal relevant time for determining the original public understanding of the Second Amendment or of any of the first eight provisions of the Bill of Rights. That is because the Supreme Court has always looked to the Founding era as the principal focus.

Everytown mentions *Bruen* but tries to transmute a passing remark in *Bruen* into a holding that 1868 is the key year. *Bruen* merely noted the unexceptionable principle that:

> Strictly speaking, New York is bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second….[citation omitted] Nonetheless, we have made clear that individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government. [multiple citations omitted] And we have generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791. [citing three Court cases from the past twenty years holding that 1791 is the proper period for determining public understanding of the First, Fourth, and Sixth Amendments].[64]

Bruen then acknowledged an "ongoing scholarly debate" on whether courts should primarily rely on the prevailing understanding in 1868.[65] It concluded that "We need not address this issue today because . . . the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes,

[64] *Bruen*, 142 S.Ct. at 2137-38.

[65] *Id.* at 2138 (citing A. AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION xiv, 223, 243 (1998); K. Lash, *Re-Speaking the Bill of Rights: A New Doctrine of Incorporation* [now published at 97 Ind. L.J. 1439 (2022)].

the same with respect to public carry."[66]

C. Key Constitutional Principles Make It Nearly Impossible to Substitute 1868 for 1791.

Bruen held that the Constitution's "meaning is fixed according to the understandings of those who ratified it," although "the Constitution can, and must, apply to circumstances beyond those *the Founders* specifically anticipated."[67] And *Heller* said that the "normal meaning of the Constitution" "excludes secret or technical meanings that would not have been known to ordinary citizens *in the founding generation*."[68] So, *Heller* and *Bruen* agree that the Constitution, including the Bill of Rights and Second Amendment, had an ascertainable, fixed meaning at the time it was adopted at the Founding.

Bruen itself made it clear that "individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government."[69] The Second Amendment therefore cannot have one meaning when applied against the federal government and a different meaning when incorporated against the states. That

[66] *Bruen*, 142 S.Ct. at 2138.

[67] *Bruen*, 142 S.Ct. 2132 (citing *United States v. Jones*, 565 U.S. 400, 404–405 (2012) (installation of a tracking device "would have been considered a 'search' within the meaning of the Fourth Amendment *when it was adopted*")(emphasis added).

[68] *Heller*, 554 U.S. at 576-77 (emphasis added).

[69] *Bruen*, 142 S.Ct. at 2137.

principle was conclusively established in *Malloy v. Hogan*[70] and has been adhered to by the Court ever since. *McDonald* concluded that *Malloy* "decisively held that incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'"[71]

If the Second Amendment meant something in 1791 regarding the restraints placed on the federal government, then it meant the identical thing when applied to restrain the states in 1868 and thereafter.

Although both *Heller* and *Bruen* examined a small amount of evidence from the mid- to late-nineteenth century, they clearly did so only to confirm the original understanding from the time of the ratification of the Second Amendment in 1791. *Bruen* relied on *Gamble v. United States* to make that point concisely.[72] *Bruen* noted that "we made clear in *Gamble* that *Heller's* interest in mid- to late-19th-century commentary was secondary. *Heller* considered this evidence 'only after surveying what it regarded as a wealth of authority for its reading—including the text of the Second Amendment and state constitutions.'"[73] Any evidence from the mid- to late-nineteenth century was treated as "mere confirmation of what the

[70] 378 U.S. 1 (1964).

[71] *McDonald*, 561 U.S. at 765-66 (citing cases).

[72] 139 S.Ct. 1960 (2019).

[73] *Bruen*, 142 S.Ct. at 2137 (quoting *Gamble*, 139 S.Ct. at 1975–76).

Court thought had already been established."[74]

Furthermore, both *Heller* and *Bruen* noted that little weight should be given to such nineteenth century evidence under any circumstances. *Bruen* expressly cautioned "against giving postenactment history more weight than it can rightly bear."[75] *Bruen* also quoted *Heller* regarding post-Civil War discussions of the right to keep and bear arms, observing that because they "took place 75 years after the *ratification of the Second Amendment*, they do not provide as much insight into its original meaning as earlier sources."[76] *Bruen* refused even to consider "any of the 20th-century historical evidence brought to bear by respondents or their amici."[77] The Court's reason: "As with their late-19th-century evidence, the 20th century evidence presented by respondents and their amici does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence."[78]

The reason that Illinois offers historical analogues from after the Civil War is precisely *because* they contradict earlier evidence. The tradition at the time of the Founding, and up until a smattering of short-lived laws in the 1920s and 1930s, was that the government could not ban the sale or possession of arms.

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[74] *Id.*

[75] *Bruen*, 142 S.Ct. at 2136.

[76] *Id*. at 2137 (emphasis added).

[77] *Id*. at 2154 n.28.

[78] *Id*.

D. The Position That 1868 is the Proper Year is Contrary to the Supreme Court's Prior Holdings and Will Not Be Adopted by the Court.

When it has employed history to determine the original meaning of a provision of the Bill of Rights, the Supreme Court has always considered the Founding to be the principal or exclusive period that is determinative. Following is a partial list of such cases using history from the Founding:[79]

First Amendment: *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1894–912 (2021) (Free Exercise Clause) (concurrence by Justices Alito, Thomas, and Gorsuch); *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 182–84 (2012) (Establishment Clause and Free Exercise Clause); *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 122–125 (2011) (freedom of speech); *Lynch v. Donnelly*, 465 U.S. 668, 673–74 (1984) (Establishment Clause); *Near v. Minnesota*, 283 U.S. 697, 713–17 (1931) (freedom of the press); *Reynolds v. United States*, 98 U.S. 145, 163 (1878) (Free Exercise Clause).

Second Amendment: *Heller* and *Bruen*.

Fourth Amendment: *Virginia v. Moore*, 553 U.S. 164, 168–169 (2008); *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999); *Wilson v. Arkansas*, 514 U.S.

[79] This list is based in part on a list contained in Mark Smith, *Attention Originalists: The Second Amendment Was Adopted in 1791, not 1868*, Harvard Journal of Law & Public Policy Per Curiam 7 n.35 (Fall 2022) https://www.harvard-jlpp.com/wp-content/uploads/sites/21/2022/12/Smith-1791-vF1.pdf.

927, 931 (1995).

Fifth Amendment: *Gamble v. United States*, 139 S. Ct. 1960, 1965 (2019) (Double Jeopardy Clause); *Benton v. Maryland*, 395 U.S. 784, 795–96 (1969) (Double Jeopardy Clause).

Sixth Amendment: *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395–96 (2020) (Jury Trial); *Crawford v. Washington*, 541 U.S. 36, 42–50 (2004) (Confrontation Clause); *Duncan v. Louisiana*, 391 U.S. 145, 151–54 (1968) (jury trial in state cases); *Klopfer v. North Carolina*, 386 U.S. 213, 223–25 (1967) (speedy trial); *Washington v. Texas*, 388 U.S. 14, 20, 23 (1967) (Compulsory Process Clause); *In re Oliver*, 333 U.S. 257, 266–268 (1948) (public trial); *Powell v. Alabama*, 287 U.S. 45, 60–67 (1932) (Right to Counsel).

Eighth Amendment: *Timbs v. Indiana*, 139 S. Ct. 682, 687–99 (2019) (Excessive Fines).

In sum, when the Court looks at history, the period around 1791, not 1868, has been the central time period that it has examined to determine original public understanding of the Bill of Rights.

CONCLUSION

For the reasons stated above, the decisions in Nos. 23-1825, 23-1826, 23-1827, and 23-1828 should be affirmed, and the decision in No. 23-1793 should be reversed.

Respectfully submitted,

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I hereby certify that on June 26, 2023, an electronic PDF of the foregoing Brief *Amici Curiae* of Second Amendment Law Center *et al*. was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

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