No. _____

In the
Supreme Court of the United States

CALEB BARNETT, et al.,
Petitioners,

v.

KWAME RAOUL, Attorney General of Illinois, et al.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2015, a divided Seventh Circuit panel held that "states … should be allowed to decide when civilians can possess" firearms that they deem, in their discretion, to be "military-grade," so long as they leave their citizens with other "adequate means of self-defense." *Friedman v. City of Highland Park*, 784 F.3d 406, 408-10 (7th Cir. 2015). The future author of *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), lambasted that decision as "flout[ing]" this Court's "precedents" and "relegating the Second Amendment to a second-class right." 136 S.Ct. 447, 449-50 (2015) (Thomas, J., dissenting from the denial of certiorari). Yet after *Bruen* seemingly interred the reasoning of decisions like *Friedman* and Illinois responded not by conforming existing law to *Bruen* but with defiance—banning upwards of 1,000 previously lawful rifles, pistols, and shotguns, plus their respective parts and common magazines—a divided panel of the Seventh Circuit (that included *Friedman*'s author) resurrected *Friedman*, declaring its approach not only "basically compatible with," but more "useful" than *Bruen*, which it derided as "slippery," "circular," and not "very helpful." App.19-21, 37-38. The majority then took its disregard of *Bruen* one giant step further, concluding that Illinois' sweeping ban does not even implicate the Second Amendment. Not surprisingly, that decision drew a sharp dissent—and created a circuit split to boot.

The question presented is:

Whether Illinois' sweeping ban on common and long-lawful arms violates the Second Amendment.

PARTIES TO THE PROCEEDING

Petitioners

Caleb Barnett, Brian Norman, Hood's Guns & More, Pro Gun & Indoor Range, and the National Shooting Sports Foundation, Inc. (together, "*Barnett* petitioners"), are petitioners here, were appellees below, and were plaintiffs in S.D. Ill. No. 3:23-cv-209.

Federal Firearms Licensees of Illinois, Guns Save Life, Piasa Armory, Debra Clark, Jasmine Young, and Chris Moore (together, "*FFL* petitioners") are also petitioners here. They were appellees below and plaintiffs in S.D. Ill. No. 3:23-cv-215.

Plaintiff-Respondents

Gun Owners of America and Gun Owners Foundation were appellees below and plaintiffs in S.D. Ill. Case No. 3:23-cv-215.

Dane Harrel, C4 Gun Store, LLC, Marengo Guns, Inc., the Illinois State Rifle Association, the Firearms Policy Coalition, Inc., and the Second Amendment Foundation were appellees below and plaintiffs in S.D. Ill. No. 3:23-cv-141.

Jeremy W. Langley, Timothy B. Jones, and Matthew Wilson were appellees below and plaintiffs in S.D. Ill. No. 3:23-cv-00192.

Robert Bevis, Law Weapons, Inc., and the National Association for Gun Rights were appellants below and plaintiffs in N.D. Ill. No. 1:22-cv-4775.

Javier Herrera was an appellant below and a plaintiff in N.D. Ill. No. 1:23-cv-532.

Defendant-Respondents

Kwame Raoul, in his official capacity as Attorney General of Illinois; Brendan Kelly, in his official capacity as Director of the Illinois State Police; and Jay Robert "J.B." Pritzker, in his official capacity as Attorney General of Illinois, are respondents here and were defendants-appellants below.

James Gomric, in his official capacity as State's Attorney of St. Clair County; Jeremy Walker, in his official capacity as State's Attorney of Randolph County; Patrick D. Kenneally, in his official capacity as State's Attorney of McHenry County; Richard Watson, in his official capacity as Sheriff of St. Clair County; Jarrod Peters, in his official capacity as Sheriff of Randolph County; and Robb Tadelman, in his official capacity as Sheriff of McHenry County, were defendants below in the *Harrel* proceedings.

Cole Price Shaner, in his official capacity as State's Attorney of Crawford County, was a defendant below in the *Langley* proceedings.

The City of Naperville and Jason Arres, in his official capacity as Naperville Police Chief, were defendants-appellees in the *Bevis* proceedings. The State of Illinois was intervenor-appellee as well.

Cook County; Toni Preckwinkle, in her official capacity as County Board of Commissioners President; the City of Chicago; Kimberly M. Foxx, in her official capacity as Cook County State's Attorney; Thomas J. Dart, in his official capacity as Sheriff of Cook County; and David O'Neal Brown, in his official capacity as Superintendent of the Police for the Chicago Police Department, were defendants-appellees below in *Hererra* proceedings.

CORPORATE DISCLOSURE STATEMENT

Petitioners Caleb Barnett, Brian Norman, Debra Clark, Jasmine Young, and Chris Moore are individuals. Petitioners Hood's Guns & More, Pro Gun & Indoor Range, the National Shooting Sports Foundation, Inc., Federal Firearms Licensees of Illinois, Guns Save Life, and Piasa Armory each certifies that it has no parent corporation and no publicly held company owns 10% or more of its respective stock.

STATEMENT OF RELATED PROCEEDINGS

Bevis, et al. v. City of Naperville, Illinois and *Arres*, and *Illinois* as intervening-appellee, No. 23-1352; *Hererra v. Raoul, et al.*, No. 23-1792; *Barnett, et al. v. Raoul* and *Kelly*, Nos. 23-1825, 23-1826, 23-1827, and 23-1828 (7th Cir.) (consolidating cases for disposition) (panel opinion, issued November 3, 2023).

Barnett, et al., v. Raoul and *Kelly*, Nos. 23-1985, 23-1826, 23-1827 and 23-1828 (7th Cir.) (order denying petition for rehearing *en banc*, issued December 11, 2023).

Bevis, et al., v. City of Naperville and *Arres*, No. 23-1353 (7th Cir.) (order denying petition for rehearing and rehearing *en banc*, issued December 11, 2023).

Hererra v. Raoul, et al., No. 23-1792 (7th Cir.) (order denying petition for rehearing and rehearing *en banc*, issued December 11, 2023).

Bevis, et al., v. City of Naperville and *Arres*, No. 23-1353 (7th Cir.) (order denying motion for an injunction pending disposition of a petition for a writ of certiorari. issued November 22, 2023).

National Association for Gun Rights, et al. v. City of Naperville, et al. No. 23A486 (S.Ct.) (the application for a writ of injunction pending certiorari was denied on December 14, 2023).

Bevis et al. v. City of Naperville and *Arres*, No. 1-22-cv-04775-VMK (N.D. Ill.) (memorandum opinion and order denying preliminary injunction. issued February 17, 2023).

Herrera v. Raoul et al., No. 1-23-cv-00532-LCJ (N.D. Ill.) (memorandum opinion and order denying preliminary injunction, issued April 25, 2023).

Barnett et al. v. Raoul et al., Nos. 3-23-cv-00209-SPM, 3:23-cv-00141-SPM, 3:23-cv-00192-SPM, 3:23-cv-00215-SPM (S.D. Ill.) (memorandum opinion and order granting preliminary injunction, issued April 28, 2023).

Barnett et al. v. Raoul et al., Nos. 3-23-cv-00209-SPM, 3:23-cv-00141-SPM, 3:23-cv-00192-SPM, 3:23-cv-00215-SPM (S.D. Ill.) (memorandum opinion and order denying *Langley* Plaintiffs' motion for partial summary judgment issued, December 14, 2023).

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

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PETITION FOR WRIT OF CERTIORARI

When this Court discarded the approach that nearly every court of appeals had been applying to Second Amendment challenges as incompatible with *District of Columbia v. Heller*, 554 U.S. 570 (2008), and insufficiently protective of a fundamental right, one would have thought that everyone would finally get that emphatic message. Unfortunately, Illinois responded to this Court's seminal decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), with defiance. Rather than trim back existing restrictions on constitutionally protected rights to comply with *Bruen*, Illinois promptly enacted the most restrictive firearms law in the state's 200-year history, banning the possession of more than 1,000 previously lawful semiautomatic rifles, pistols, and shotguns, including many of the most popular models in the country, along with their component parts, plus ubiquitous ammunition feeding devices. More remarkable still, a divided panel of the Seventh Circuit vindicated that massive resistance by resurrecting pre-*Bruen* caselaw and embracing the novel theory that Illinois' law does not even implicate the Second Amendment and trigger the state's burden to prove that it is "consistent with this Nation's historical tradition of firearm regulation." *Id.* at 17.

The Seventh Circuit's decision cannot begin to be reconciled with this Court's precedents. Indeed, rather than faithfully follow *Heller* and *Bruen*, the majority castigated and cast them aside at every turn. It expressly rejected what this Court has repeatedly instructed is the Second Amendment's "definition" of "Arms." It refused to engage with this Court's

common-use test, deriding it as a "slippery concept" that is "circular," not "very helpful," and inferior to the court's own analysis in *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015). App.24-25, 41-42. The majority even went so far as to declare *Friedman* "basically compatible with *Bruen*," App.23—which would surely come as a surprise to *Bruen*'s author, who decried *Friedman* as "flout[ing]" this Court's "precedents" and "relegating the Second Amendment to a second-class right," 136 S.Ct. 447, 449-50 (2015) (Thomas, J., dissenting from the denial of certiorari).

Instead of applying *Bruen*'s definition of "Arms" or its common-use test—both of which the long-legal firearms and feeding devices Illinois now bans easily satisfy—the majority insisted that rifles, pistols, shotguns, and magazines do not even qualify as "Arms" presumptively protected by the Constitution unless a challenger proves they are not the kinds of arms that be "may be reserved for military use." App.32-35. That, in turn, apparently requires proving how they compare to "the M16 machinegun" (which the majority was convinced is not an "Arm") on measures like "firing rate," "kinetic energy," "muzzle velocity," and "effective range." App.36, 38. And the majority has already shown that few firearms will fall on the permissible side of its reserved-for-military-use line, as it declared that "hav[ing] only semiautomatic capability" is not enough to differentiate a common firearm from a machinegun. App.36.

None of that bears even a passing resemblance to the mode of analysis *Bruen* laid out in painstaking detail. It effectively eviscerates *Bruen*'s burden-shifting regime, forcing the people whose rights a state

restricts to make exceedingly burdensome showings before they can even get through the Second Amendment door to challenge something as seemingly obviously covered as a statewide ban on common firearms. The Seventh Circuit's approach not only eviscerates a fundamental right, but poses a broader risk to the rule of law. When a federal appellate court reduces a recent and emphatic Supreme Court decision to a mere speed bump in reviving pre-*Bruen* caselaw and greenlights state laws passed more in protest of than in compliance with this Court's decisions, it emboldens others to do them one better in "the Aloha spirit." *See State v. Wilson*, --- P.3d ----, 2024 WL 466105 (Haw. Feb. 7, 2024).

This Court needs to intervene before this open defiance spreads further. The Court has repeatedly reminded courts and legislatures that the Second Amendment is not a second-class right. Unfortunately, the Court now needs to instruct them that *Bruen*—a recent, emphatic 6-3 decision of this Court—is not a second-class precedent.

OPINIONS BELOW

The Seventh Circuit's opinion in the consolidated appeals, 85 F.4th 1175, is reproduced at App.5-104. The preliminary-injunction opinion in the *Barnett* case, 2023 WL 3160285, is reproduced at App.106-37.

JURISDICTION

The Seventh Circuit issued its opinion on November 3, 2023, App.5, and denied petitions for rehearing en banc on December 11, 2023, App.105. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

The relevant Illinois statutory provisions (20 ILCS 5/24-1, 5/24-1.9, and 5/24-1.10) are reproduced at App.138-74.

STATEMENT OF THE CASE

A. Legal Background

1. Mere months after this Court chastised lower courts for diminishing a fundamental right and reiterated that "the Second Amendment protects the possession and use of weapons that are 'in common use,'" *Bruen*, 597 U.S. at 21 (quoting *Heller*, 554 U.S. at 627), Illinois responded with defiance rather than compliance. Rather than revise and retrench existing restrictions to conform with *Bruen*'s teachings, it did the opposite, enacting a sweeping ban outlawing many previously lawful arms, including some of the most common firearms in America. Under Illinois House Bill 5471 ("HB5471"), "it is unlawful for any person within this State to" (among other things) "manufacture, … sell, … or purchase … an assault weapon." 720 ILCS 5/24-1.9(b). That prohibition took effect immediately. And as of January 1, 2024, it is now unlawful even to "possess" a newly prohibited weapon that was not acquired before HB5471's enactment. 720 ILCS 5/24-1.9(c).

HB5471 defines "assault weapon" exceedingly broadly. The definition captures any "semiautomatic

rifle" that has both "the capacity to accept a detachable magazine" (of any capacity) and "a pistol grip" is outlawed. 720 ILCS 5/24-1.9(a)(1)(A)(i). That alone captures roughly 20% of all firearms sold in the United States in 2020, because it sweeps in all rifles using the AR platform, the Nation's most popular style of rifle. App.130-31. Roughly one million Americans owned an AR-platform rifle in 1994; that number has increased at least six-fold since 2004, when the short-lived (and pre-*Heller*) federal ban expired—as Illinois admitted below. *See* State Parties' Opening Br. 32, *Barnett v. Raoul*, Nos. 23-1825, 23-1826, 23-1827, & 23-1828 (7th Cir. June 5, 2023), Dkt.47 ("Illinois.CA7.Br.") ("Industry and government data shows that 6.4 million … Americans[] … possess" an AR-platform rifle today.). To avoid any doubt on this score, HB5471 expressly bans "all AR type[]" rifles explicitly ("including" 43 variants listed by name), plus all "copies, duplicates, variants, or altered facsimiles with the capability of any such weapon." 720 ILCS 5/24-1.9(a)(1)(J)(ii).

Adding more belts-and-suspenders, HB5471 bans any "semiautomatic rifle" with "the capacity to accept a detachable magazine" that has *any* of the following: a "thumbhole stock"; "any feature capable of functioning as a protruding grip that can be held by the non-trigger hand"; "a folding, telescoping, … or detachable stock"; "a flash suppressor"; "a shroud attached to the barrel"; or "a grenade launcher." 720 ILCS 5/24-1.9(a)(1)(A)(i)-(vi). HB5471 also prohibits any semiautomatic rifle with a *fixed* (i.e., non-detachable) magazine that has "the capacity to accept more than 10 rounds, except for an attached tubular device designed to accept, and capable of operating

only with, .22 caliber rimfire ammunition." 720 ILCS 5/24-1.9(a)(1)(A)-(B). And lest it leave anything on the table, HB5471 lists many more rifles by name and deems all of them—plus any "copies, duplicates, variants, or altered facsimiles with the capability of any such weapon"—prohibited "assault weapons" too. 720 ILCS 5/24-1.9(a)(1)(J). All in all, HB5471 bans nearly 1,000 semiautomatic rifles—including literally all the most popular ones—by feature, name, or both.

HB5471 bans an array of handguns as well. HB5471 outlaws all semiautomatic pistols with "the capacity to accept a detachable magazine" with "one or more of": "a second pistol grip"; "the capacity to accept a detachable magazine at some location outside of the pistol grip"; "another feature capable of functioning as a protruding grip that can be held by the non-trigger hand"; a "part that protrudes horizontally behind the pistol grip and is designed … to allow … a firearm to be fired from the shoulder"; a shroud that "allow[s] the bearer to hold the firearm with the non-trigger hand"; "a threaded barrel"; or "a flash suppressor." 720 ILCS 5/24-1.9(a)(1)(C). It further bans any "semiautomatic pistol that has a fixed magazine with the capacity to accept more than 15 rounds." 720 ILCS 5/24-1.9(a)(1)(D). And, as with rifles, HB5471 goes on to ban these common arms twice more: first by explicitly listing "[a]ll AR type[]" pistols ("including" 13 named variants) and approximately 40 more models by name; and then once again by banning all "copies, duplicates, variants, or altered facsimiles with the capability of any such weapon." 720 ILCS 5/24-1.9(a)(1)(K).

Shotguns are included in the statute's reach too. All semiautomatic shotguns that hold more than five

rounds, have a pistol grip, or can accept a detachable magazine (regardless of capacity), are now prohibited "assault weapons." 720 ILCS 5/24-1.9(a)(1)(F), (a)(1)(L)(i)-(iv). That includes numerous common models that Americans keep and carry for self-defense, duck hunting, and shooting competitions. *See, e.g.*, Phil Bourjaily, *The Best Duck Hunting Shotguns of 2023*, Field & Stream (updated Sept. 12, 2023), https://bit.ly/42nqTBX. HB5471 also bans any shotgun with a revolving cylinder (again regardless of capacity). 720 ILCS 5/24-1.9(a)(1)(E), (a)(1)(L)(v)-(vi).

In two final catchalls, "[a]ny firearm that has been modified to be operable as an assault weapon as defined in this Section," as well as any part that can convert any firearm into the above, are swept up in the "assault weapon" ban. 720 ILCS 5/24-1.9(a)(1)(H)-(I). And the already-exceedingly-long lists of banned firearms are not static: The Illinois State Police can add to them each year. 720 ILCS 5/24-1.9(d)(3).

Possession of any of these newly classified "assault weapon[s]" (aside from grandfathered firearms timely registered with the Illinois State Police) is a misdemeanor, with subsequent violations a felony. 720 ILCS 5/24-1(a)(15), (b). Sale is a felony. 720 ILCS 5/24-1(a)(11), (14), (16), (b). And each firearm is a "single and separate violation," 720 ILCS 5/24-1(b), putting people at risk of lengthy prison terms just for possessing common and long-lawful arms. This sweeping prohibition applies to "any person within th[e] State" except police, prison officials, active-duty members of the military, and certain private security contractors. 720 ILCS 5/24-1.9(b), (e)(1)-(7).

While individuals who possessed now-banned firearms before 2023 may lawfully retain them if timely registered, they are severely restricted in how and where they may keep and bear them. Grandfathered owners "shall possess such items only" "on private property owned or immediately controlled by the person;" "on private property that is not open to the public with the express permission of the person who owns or immediately controls such property"; "while on the premises of a licensed firearms dealer or gunsmith for the purpose of lawful repair"; "at a properly licensed firing range or sport shooting competition venue"; or "while traveling to or from these locations," provided the firearm is unloaded and in a container. 720 ILCS 5/24-1.9(d). Owners may not publicly carry grandfathered arms anywhere.

2. In addition to banning many common firearms, HB5471 bans any ammunition magazine with "a capacity of … more than 10 rounds … for long guns and more than 15 rounds … for handguns," which the statute dubs a "[l]arge capacity ammunition feeding device." 720 ILCS 5/24-1.10(a)(1). These too are exceedingly common—indeed, even more so. Tens of millions of Americans own hundreds of millions of the magazine Illinois now prohibits. App.131. And the numbers are trending upward: Recent data indicate that most modern rifle magazines exceed 10 rounds. Nat'l Shooting Sports Found., *Modern Sporting Rifle Comprehensive Consumer Report* 31 (July 14, 2022), https://bit.ly/3GLmErS. In short, what the D.C. Circuit said a decade ago rings even more true today: While "[t]here may well be some capacity above which magazines are not in common use," "that capacity

surely is not ten." *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011).

Nor is it 15. While the numbers are less staggering for magazines that hold over 15 rounds (but only slightly), the average American gun owner owns more magazines that can hold *more than* 15 rounds than they do magazines that hold 10 rounds or fewer. William English, Ph.D., *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* 24-25 (Sept. 28, 2022), https://bit.ly/3yPfoHw. That makes sense, as many modern handguns come standard with magazines holding 15 or more rounds. *See, e.g.*, *Gun Digest 2018* at 386-88, 408 (Jerry Lee & Chris Berens eds., 2017).

As with the ban on "assault weapons," HB5471 bans the sale, manufacture, and purchase of such devices and imposes a $1,000-per-violation fine. 720 ILCS 5/24-1.10(b)-(c), (g). Possession is also tightly controlled: Grandfathered owners may continue to possess them, but only subject to the same severe restrictions placed on the firearms the statute deems "assault weapons." 720 ILCS 5/24-1.10(d).

B. Proceedings Below

1. The state was not the first governmental body in the Land of Lincoln to respond to *Bruen* by defiantly imposing new restrictions on common arms. The City of Naperville enacted a so-called "assault weapon" ban a few months earlier. The litigation over Naperville's ordinance soon became litigation over HB5471 too, and it produced an opinion concluding that both enactments are constitutional, notwithstanding *Bruen*. *Bevis v. City of Naperville*, 657 F.Supp.3d 1052 (N.D. Ill. 2023). Another judge in the Northern

District reached the same puzzling conclusion about HB5471 soon after. *Herrera v. Raoul*, 2023 WL 3074799 (N.D. Ill. Apr. 25, 2023).

2. The district court in the *Barnett* litigation saw things differently. Consistent with this Court's instruction that "all instruments that constitute bearable arms" are "presumptively protect[ed]" by the Constitution, *Bruen*, 597 U.S. at 17, 28, the *Barnett* court started with the Second Amendment's text and held that the various rifles, pistols, and shotguns HB5471 bans fit comfortably within the definition of "Arms" and thus are presumptively protected. The court quickly dispatched the argument that firearms cease to be arms just because they may also be "useful in military service." App.124. It reached the same conclusion about the feeding devices HB5471 bans, finding that "not even a close call," as having more rounds at the ready plainly facilitates the ability to defend oneself in case of confrontation. App.125.

The court next turned to common use, concluding that Illinois failed to meet its "burden" to "(1) demonstrate that the 'arms' [HB5471] bans are not in 'common use'; and (2) 'identify a well-established and representative historical analogue' to [HB5471]." App.128. Illinois offered nothing to rebut the "data show[ing] that more than 24 million AR-15 style rifles are currently owned nationwide" and that tens of millions of Americans own hundreds of millions of the magazines HB5471 bans. App.130. And while Illinois pointed to various "conceal[ed] carry regulations" to try to establish a historical tradition, the court found those regulations not analogous to HB5471 since they did not even prohibit people from

carrying arms, let alone from keeping them. App.132. The court therefore enjoined the challenged provisions. App.133-36.

3. The state sought an "emergency" stay of that injunction pending appeal, and the Seventh Circuit granted it—without even giving petitioners a chance to respond—via a single-judge order issued by *Friedman*'s author. App.1. A three-judge panel later fully stayed the injunction pending appeal. App.3. After aligning argument for the appeals in all three cases, a 2-1 majority of that same panel reversed the *Barnett* decision and affirmed the *Bevis* and *Herrera* decisions.

The majority began with—but quickly elided—what it called *Bruen*'s "first step." App.36. Although this Court was explicit in *Bruen* that "the Second Amendment's definition of 'arms'" reaches all bearable "instruments that facilitate armed self-defense," 597 U.S. at 28, the majority did not acknowledge, let alone apply, that "definition." It instead claimed to "discern" from *Heller* an implicit caveat that states are "entitled to conclude" that some instruments that facilitate armed self-defense nonetheless "may be reserved for military use," and hence do not qualify as "Arms" at all. App.32-36. The majority derived that (aberrant) rule principally from its (errant) claim that *Heller* "said" that "machineguns" do not qualify as "'bearable' Arms." App.31. It therefore posited that whether firearms qualify as "Arms" turns on how much they are "like machineguns and military-grade weaponry." App.36.

Although HB5471 bans more than 1,000 models of firearms (including many that bear no resemblance

to machineguns beyond being guns, such as a turkey-hunting shotgun with a pistol grip), and petitioners challenged the law as to all of them, the only one the majority discussed was the AR-15. The AR-15 is no stranger to this Court; the majority begrudgingly acknowledged that this Court concluded in *Staples v. United States*, 511 U.S. 600 (1994), that AR-15s have long "been widely accepted as lawful possessions" in this country. App.34; *see Staples*, 511 U.S. at 612. Yet it dismissed *Staples*' conclusion as purportedly lacking "empirical support." App.34. According to the majority, a semiautomatic AR-15 is "almost the same gun" as (or even "indistinguishable from") a fully automatic M16, which the majority insisted is not an "Arm" at all. App.36, 40. Underscoring that its approach gives legislatures a nearly blank check to restrict the rights of the people, the majority deemed that (false) equivalence sufficient to render Illinois "entitled to conclude" that all of the rifles, pistols, and shotguns HB5471 bans are sufficiently machinegun-like to be outside the scope of *even the text of* the Second Amendment. App.36.

The majority's analysis was even more stilted as to ammunition feeding devices. While the majority concluded that "they also can lawfully be reserved for military use," App.40, it did not bother to explain what puts them on the military side of its line. It instead simply offered the non-sequitur that anyone "who might have preferred buying a magazine that loads 30 rounds can buy three 10-round magazines instead," and ended there. App.40.

Having erroneously pretermitted the inquiry, the majority nevertheless went on to try to ground its

analysis in historical tradition. The majority assumed without deciding that whether arms are "in common use" is a question on which the state bears the burden of proof. App.41. But it declared this "factor" less "useful" than its own (pre-*Bruen*) analysis in *Friedman*, repeating *Friedman*'s concern that the "common use" tradition recognized in *Heller* and *Bruen* is a "circular" and "slippery concept." App.25, 41-42. After criticizing *Bruen*'s instruction to focus on the "how" and "why" of historical laws, App.44-46, the majority concluded that the *real* historical tradition in this country is one of letting the government draw a "distinction between military and civilian weaponry" and confine the people to what it puts in the latter category. App.48. Once again, the majority nowhere explained what puts something on one side of that line or the other (let alone why any of the hundreds of firearms that Illinois bans and that no military in the world has ever issued would fall on the military side).

Judge Brennan dissented. He first explained that, under *Bruen*, the threshold "plain text" inquiry focuses on only those issues actually addressed in the Second Amendment's text, i.e., whether "the regulated population" is part of the "covered 'people,'" whether "the conduct regulated" constitutes "'keep[ing]' or 'bear[ing],'" and whether "the instruments regulated" constitute "'Arms.'" App.61. Because the first two questions were not disputed, Judge Brennan began with the last one, and he concluded that the "firearms and magazines" covered by HB5471 are plainly "'Arms' under the Second Amendment" as this Court has defined that term. App.61; *see* App.61-63. Judge Brennan further explained that whether an arm is "'in common use' is … part of the history and tradition

analysis" under *Bruen*, not the "plain text" inquiry, and that the banned arms satisfy that test too. App.64 (quoting *Bruen*, 597 U.S. at 43). He also countered the majority's circularity criticisms, explaining that common use "is not an 'on-off' switch for constitutional protection." App.68. Finally, he concluded that the "government parties have not met their burden" to prove that these "regulations are 'relevantly similar' to a historical law." App.83.

REASONS FOR GRANTING THE PETITION

Illinois responded to this Court's decision in *Bruen* with a fit of pique. Rather than taking this Court's reaffirmation of the Second Amendment seriously and re-examining existing restrictions for compliance with a fundamental right, Illinois swiftly criminalized possession of literally 1,000 previously lawful arms, including some of the most commonly used rifles, handguns, shotguns, and magazines in the land. HB5471 is akin to a law responding to *Gideon* by stripping defendants of previously recognized rights to counsel. The lower courts should have made short work of this act of legislative defiance.

Instead, the Seventh Circuit gave short shrift to a fundamental right enshrined in the constitutional text, and even shorter shrift to a recent and emphatic 6-3 decision of this Court. The decision below does not even conceal its lack of respect for this Court's precedents or its preference for its own pre-*Bruen* circuit law. In the course of a single opinion, the majority managed to discard this Court's definition of "Arms" as not "the correct meaning" on the theory that the Court could not really have meant what it (thrice) said, App.33; deride this Court's common-use test as

"circular," "slippery," and not "very helpful," App.24-25, 41-42; displace this Court's historical-tradition test with a form of "balancing" in which the historical fit need not be very "close" if a court does not think the burden on the right is very substantial, App.45; and dismiss the central premise of *Staples* as lacking "empirical support." App.34. And all that in service of claiming that a sweeping ban on common arms does not even implicate the Second Amendment.

This Court cannot let stand the Seventh Circuit's approval of Illinois' open defiance of this Court's precedents. Indeed, as antithetical as HB5471 is to the Second Amendment, the Seventh Circuit's cavalier treatment of this Court's precedent poses an even broader threat. When federal appellate courts dismiss Supreme Court tests as "slippery" and "circular," discount Supreme Court decisions as empirically unsupported, and elevate abrogated circuit precedent over this Court's instructions, other courts feel emboldened to follow suit. One need look no further than the remarkable recent decision of the Hawaii Supreme Court in *Wilson* to see that the refusal to respect and apply this Court's precedent is a disease that is spreading. This trend needs to be reversed before it goes any further. The Court should grant certiorari and thoroughly reject the Seventh Circuit's approval of legislation that cannot begin to be squared with *Bruen* or the constitutional text.

I. The Decision Below Defies This Court's Precedents And Creates A Circuit Split.

This case should not have detained the Seventh Circuit long. HB5471 is a frontal assault on a constitutional right and this Court's decision in *Bruen*.

No legislator acting in good faith could have read *Bruen* as an invitation for more restrictive bans on carrying and possessing common arms. But Illinois did just that, newly outlawing literally 1,000 firearms, including some of the most common in the land.

HB5471 can only be understood as a form of protest legislation, designed to defy, rather than comply with, *Bruen*. Neither the Second Amendment nor *Bruen* may be particularly popular in certain jurisdictions. But that is no surprise when it comes to the counter-majoritarian protections in the Bill of Rights—and it is certainly no excuse for failing to comply with the Constitution. The Seventh Circuit should have said as much in chastising the legislature and vindicating the rule of law. Instead, it upheld HB5471's blunderbuss attack on the Second Amendment, and it did so only by defying this Court's precedents and creating a circuit split. HB5471 should have been treated as an object lesson about the importance of fundamental rights and the rule of law. The decision below rubber-stamping it cannot stand.

A. The Seventh Circuit Replaced *Bruen*'s "Plain Text" and Common-Use Inquiries With a Rights-Diluting Tautology.

1. *Bruen*'s threshold inquiry is not demanding. The Court used the phrase "plain text" three times to describe the textual inquiry into whether conduct is presumptively protected, 597 U.S. at 17, 32, 33, and it dispensed with that inquiry in a few short paragraphs, which simply looked to the most common "definitions" of the key terms in "the Second Amendment's text" (i.e., "the people," "keep," "bear," and "Arms"), *id.* at 32-33. Ultimately, *Bruen*'s conclusion on the

threshold inquiry boiled down to a single sentence: "Nothing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms." *Id.* at 32.

The threshold inquiry should have been equally straightforward here. Illinois prohibits the general public from possessing 1,000+ models of rifles, pistols, and shotguns. *See* pp.4-8, *supra*. Because the Second Amendment's plain text covers "keep[ing] and bear[ing]," U.S. Const. amend. II, the only question at the threshold is whether those firearms are "Arms."

The answer is easy. Indeed, it should go without saying that rifles, pistols, and shotguns are "Arms," no matter what kind of grip, stock, or reloading mechanism they may have. But to the extent there was ever any doubt, this Court has removed it—repeatedly. As *Heller* explained and *Bruen* reiterated, "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms." *Bruen*, 597 U.S. at 28 (quoting *Heller*, 554 U.S. at 582); *accord Caetano v. Massachusetts*, 577 U.S. 411, 411 (2016) (per curiam). That includes "'any thing that a man … takes into his hands, or useth in wrath to cast at or strike another,'" *Heller*, 554 U.S. at 581, which a firearm surely is, no matter what features it has. Again, this Court has already said so: *Heller* noted that even "one founding-era thesaurus" that offered a relatively "limited" view of the term's scope still "stated that all firearms constituted 'arms.'" *Id.*

The inquiry is no more complicated when it comes to the ammunition feeding devices HB5471 outlaws. *See* 720 ILCS 5/24-1.10; pp.8-9, *supra*. As their name connotes, feeding devices are not passive holders of

ammunition, like a cardboard cartridge box. They are integral to the design of semiautomatic firearms and the mechanism that makes them work, actively *feeding* ammunition into the firing chamber. A semiautomatic rifle, pistol, or shotgun equipped with a feeding device containing the ammunition necessary for it to function is thus indisputably a "bearable" instrument that "facilitate[s] armed self-defense." *Bruen*, 597 U.S. at 28. After all, "without bullets, the right to bear arms would be meaningless," and the central purpose of the Second Amendment—self-defense—eviscerated. *Jackson v. City & Cnty. of S.F.*, 746 F.3d 953, 967 (9th Cir. 2014).

2. The Seventh Circuit did not even try to explain how a rifle, pistol, or shotgun could fall outside the definition of "Arms" this Court has embraced. It just refused to take the Court at its word. According to the majority, what *Bruen* reiterated is "the Second Amendment's definition of 'arms,'" 597 U.S. at 28, is actually *not* "the correct meaning of 'Arms' for the Second Amendment," App.33. The majority went so far as to proclaim that the Second Amendment *cannot* "extend[], prima facie, to all instruments that constitute bearable arms"—despite this Court having declared three times that it does—because *Heller* purportedly "said" that "machineguns" fall outside "the scope of 'bearable' Arms," yet one "can certainly pick up and carry a machinegun." App.31. Thus, in the Seventh Circuit's view, *Heller*'s treatment of machineguns means that arms that may be prohibited are not "Arms" at all. Voila, as the magic trick makes the Second Amendment right disappear.

That reflects a patent misreading of *Heller* and makes nonsense of *Bruen*'s burden-shifting regime. Not surprisingly, the argument fails at its premise. *Heller* nowhere "said" (or even suggested) that "machineguns" do not qualify as "'Arms." In fact, the very passage of *Heller* on which the majority relied explicitly described "M-16 rifles and the like" as "arms." 554 U.S. at 627. It could not be otherwise, as whatever else may be said about M16s, they are clearly "weapons" that people can use "to cast at" (i.e., fire at) an adversary. *See id.* at 581. *Heller* did not embrace the illogical proposition that some firearms are not "Arms" at all; it simply theorized that if it could be shown that "M-16 rifles and the like[]" fall within "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons,'" then they "may be banned" without violating the Second Amendment. *Id.* at 627. Indeed, the Court's entire brief discussion of "M-16 rifles and the like" follows immediately on the heels of its recognition of that historical tradition, and it exists solely to respond to a potential critique stemming from what that tradition means for certain military weapons ("sophisticated arms") that, despite the militia clause, may be banned consistent with the Second Amendment to the extent that they "are highly unusual in society at large." *Id.* The internal inconsistency the Seventh Circuit purported to perceive in *Heller* thus does not exist.

While the majority's (il)logic depends on a misreading of *Heller*, it is even more obviously incompatible with *Bruen*, as it hopelessly conflates *Bruen*'s threshold-textual inquiry and the state's historical-tradition burden. The majority seemed to think that any weapon that can be banned consistent

with the Second Amendment must *ipso facto* not be an "Arm" at all. But it failed to grasp that something can be *presumptively* protected by the Second Amendment yet still be subject to restriction. That is the whole point of the historical-tradition test *Bruen* set forth in such meticulous detail: to identify when conduct that is *presumptively* protected by the Second Amendment may nevertheless be restricted "consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S at 17. If nothing not *ultimately* protected by the Second Amendment could be *presumptively* protected either, then the distinct inquiries *Bruen* articulated would collapse into each other. And if a challenger could not even make it past the threshold inquiry without first proving that a law is *not* analogous to a historically permissible regulation, then the state would be relieved of its historical-tradition burden in virtually every case.

3. Perhaps one could forgive (albeit not excuse) the Seventh Circuit's misreading of *Heller*'s treatment of machineguns if this Court had never addressed which "Arms" the people are entitled to keep and bear. But this Court has repeatedly instructed that the "Arms" that are protected "consistent with this Nation's historical tradition" include, at a minimum, arms "in common use today" for lawful purposes, as opposed to those that are "dangerous and unusual." *Bruen*, 597 U.S at 17, 47; *see also, e.g.*, *Heller*, 554 U.S. at 625; *Caetano*, 577 U.S. at 420 (Alito, J., concurring in the judgment). Yet the Seventh Circuit refused to abide by that clear teaching either. The majority instead dismissed the common-use test as a mere "factor," and not a major one, deriding it as "circular," "slippery," and not "very helpful." App.24-25, 41-42.

It is not for inferior federal courts to grade this Court's work, let alone reject its holdings as unworkable. That is particularly true when the criticisms have already been ventilated in dissenting opinions, *see Heller*, 554 U.S. at 720-21 (Breyer, J., dissenting), and pre-*Bruen* circuit law, *Friedman*, 784 F.3d at 409, and rejected by a majority of this Court.[1] Nevertheless, the majority continued to insist that the Seventh Circuit's own analysis in *Friedman*—an unabashedly rights-denying decision in which the court upheld a sweeping ban on common arms "based … in substantial part on its view of the benefits of the ordinance, including that the arms ban reduced 'perceived risk' and 'makes the public feel safer,'" App.87 (Brennan, J., dissenting) (quoting *Friedman*, 784 F.3d at 411-12)—is more "useful" than what this Court had to say in *Heller* or *Bruen*, and hence displaced this Court's common-use test in favor of

[1] As petitioners explained below (but the majority ignored), *Friedman* failed to grasp that the dangerous-and-unusual test is "conjunctive": "A weapon may not be banned unless it is *both* dangerous *and* unusual." *Caetano*, 577 U.S. at 417 (Alito, J., concurring in the judgment). The majority was therefore wrong to claim that a new arm would "enjoy[] only limited or no Second Amendment protection" if it were "outlawed quickly following its introduction," App.68 (Brennan, J., dissenting) (discussing majority); a state could not ban even an uncommon arm without demonstrating that it is dangerous in some way that meaningfully differentiates it from common ones. Otherwise, states could outlaw arms with technological advancements that make them *safer* by limiting the people to older models that are already common. While one outlier state is endeavoring to do just that, *see Boland v. Bonta*, 662 F.Supp.3d 1077 (C.D. Cal. 2023) (preliminarily enjoining that effort), *appeal filed*, No. 23-55276 (9th Cir. Mar. 27, 2023), such bizarre measures have never been part of this Nation's historical tradition.

Friedman's claim that the Second Amendment's definition of "Arms" excludes all so-called "weapons that may be reserved for military use." App.33.

Talk about circular. That is not so much a test as a tautology, as arms may be *reserved* for military use under the majority's test *only* if their possession is not protected by the Second Amendment. Yet the Seventh Circuit nowhere explained what it is that purportedly makes a firearm better suited "for military use" than "for private use"—let alone why an amendment designed to "secur[e] the militia by ensuring a populace familiar with arms" to be used in its service, *Heller*, 554 U.S. at 617, would protect only the latter, or how 1,000 weapons long allowed for private use could be deemed military-only. *See* App.95-99 (Brennan, J., dissenting). Nor did the majority have anything to say about the fact that "semi-automatic *rifles* fire at the same general rate as semi-automatic *handguns*," the latter of which are "constitutionally protected" despite actually being standard-issue military arms. *Heller*, 670 F.3d at 1289 (Kavanaugh, J., dissenting). In fact, the court acknowledged that many firearms are suited for both purposes. App.36 n.8 (majority op.). It just (wrongly) insisted that *Heller* had already put M16s in the "military use" camp, and that the state is "entitled to conclude" that the semiautomatic AR-15—which has never even been military-issue, let alone "reserved for military use"—should go with them because they are purportedly "almost the same gun." App.36, 40.[2]

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[2] The Seventh Circuit appeared to base that conclusion largely on its mistaken belief that a person can fire an unmodified

As explained, the majority was wrong about what *Heller* said about M16s. But even accepting its incorrect premise that automatic firearms do not qualify as "Arms," the majority's effort to wish away the obvious difference between a *semi*automatic firearm like an AR-15 and a *fully* automatic firearm like the M16 defies common sense. An entire legal regime dating back nearly a century has been built around that distinction. *See* pp.27-28, *infra*.

Indeed, this Court itself has squarely rejected the argument that "the AR-15 is almost the same gun as the M16 machinegun," App.36, for "precisely" that reason. *See Staples*, 511 U.S. at 610-15. The core question before the Court in *Staples* was whether an AR-15 rifle is sufficiently similar to an M16 rifle to put people on notice that they should ensure that it has not been modified in some way that renders its possession illegal. In answering that question "no," the Court accepted that "certain categories of guns," including "machineguns," may be so dangerous and unusual that people should know that even their mere possession may be illegal. *Id.* at 611-12. But it refused to extend that logic to "conventional semi-automatic" firearms such as AR-15 rifles, "precisely because guns falling outside those categories traditionally have been widely accepted as lawful possessions." *Id.* at

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semiautomatic AR-15 300 times in a minute. App.38. That would require (among other things) a super-human trigger finger. Indeed, even California has admitted that the average unmodified AR-15 has a maximum effective firing rate of no more than 45 rounds per minute. *See* Supplemental Sur-Rebuttal Expert Report & Decl. of Colonel (Ret.) Craig Tucker, *Rupp v. Bonta*, No. 8:17-cv-00746, 2023 WL 6960601, ¶22 (C.D. Cal. Feb. 24, 2023).

612, 615. *Staples* thus necessarily turned on two conclusions: (1) AR-15s are not even in the same "category" as M16s, let alone "almost the same gun," *contra* App.36, and (2) AR-15s *have* traditionally been widely owned in this country, even if M16s have *not*.

The majority was forced to acknowledge the latter point; it just dismissed this Court's (eminently correct) assessment of the law throughout the country in 1994 as purportedly lacking "empirical support." App.34. Putting aside the irony of that accusation given the majority's rampant resort to ill-informed speculation, it is not for *that* court to pick and choose which of *this* Court's decisions it deems worthy of its respect. The majority's repeated failure to heed that bedrock rule is reason enough for this Court to intervene. But its insistence on displacing this Court's precedents with a legal test built entirely around a patent misreading of *Heller* makes this Court's review imperative.

B. The Seventh Circuit's Effort to Ground Its Preferred Test in History Defies This Court's Cases Yet Again.

Not content with refusing to accept this Court's definition of "Arms" and deriding its common-use test, the majority criticized *Bruen*'s instruction to compare the "how" and "why" of modern laws to historical ones for good measure, suggesting that it is somehow akin to "balancing" or "the discredited means/end analysis." App.45-48. The majority then essentially reduced the historical-tradition test to just that, positing that "a broader restriction" that "burdens the Second Amendment right more … requires a closer analogical fit," while "a narrower restriction with less impact on the constitutional right might survive with a looser

fit." App.45. (Unsurprisingly, it seemed to think that HB5471 falls in the latter camp.)

The panel then insisted that the *real* historical tradition in this country is not the one this Court has repeatedly recognized, but rather is one of letting the government draw a "distinction between military and civilian weaponry" and "reserve" the former "for military use." App.33, 48. *But see Bruen*, 597 U.S. at 47; *Heller*, 554 U.S. at 627. Yet the majority failed to identify almost any historical law that removed from the civil market and reserved for the military arms that had long been kept and used for lawful purposes. Indeed, most of the historical laws the majority discussed did not ban any types of arms at all.

For example, the majority pointed to historical laws prohibiting people from "discharging … any cannon, gun, or pistol within city limits." App.49 (citing laws from Boston and Cleveland). But such laws have nothing to do with reserving arms "for military use" and are not remotely analogous in their "how" or "why" to a flat possession ban like HB5471. Under those historical laws, people retained the right to keep and carry their bearable arms for self-defense and other lawful uses; they just could not fire them wantonly. A law that bans possession of a class of arms outright, by contrast, deprives citizens of the entire "right to armed self-defense" with respect to those arms. *Bruen*, 597 U.S. at 21. The former cannot begin to justify the latter. After all, if the mere existence of historical laws prohibiting the indiscriminate firing of guns on city streets sufficed to justify a modern law banning an entire class of arms, then *Heller* should have come out the other way. *But*

see Heller, 554 U.S. at 632-33 (concluding that the same Boston ordinance the majority cited "provide[s] no support for" restricting citizens' ability to possess *any* types of arms).

The majority next invoked nineteenth-century laws "forbidding or limiting the use of" Bowie knives. App.49. But as Judge Brennan pointed out and petitioners explained below, those laws almost uniformly either prohibited only the concealed carry of Bowie knives (or carry with intent to do harm) or provided heightened punishments for using one in the commission of a crime. *See* App.101 (Brennan, J., dissenting); Response Br. 48-49, *Barnett v. Raoul*, Nos. 23-1825, 23-1826, 23-1827, & 23-1828 (7th Cir. June 20, 2023) ("*Barnett*.Response.Br."), Dkt.56; *see also* David Kopel, *Bowie Knife Statutes 1837-1899*, Reason.com (Nov. 20, 2022), bit.ly/3RNRpQD. As for the next group of laws it invoked, even the majority admitted that they too just "restrict[ed] the carry" (and typically only concealed carry) of various "concealable weapons." App.49-50 (majority op.). *Bruen* already explained that such laws do not even support modern laws restricting *all carry*, *see* 597 U.S. at 48-49, 53-55; *a fortiori*, they cannot support possession bans. And "taxation and registration requirements," App.50, are obviously not remotely analogous in their "how" or "why" to criminal prohibitions on the mere possession of common arms. *See Bruen*, 597 U.S. at 29.

The majority was thus left pointing to twentieth-century restrictions on "explosive, incendiary, or poison gas bomb, grenade, mine, rocket, missile, or similar device[s]" and (of course) "machineguns."

App.50. But it did not even try to claim that any of those weapons has ever been commonly owned "by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. It simply pointed to the fact that their possession and use have long been restricted. App.35-36 & n.7, 42. That breezy (mis)characterization of the history overlooks that when bearable, fully automatic submachineguns first hit the civilian markets in the 1920s (after the military showed little interest in them), the people did not respond by clamoring to buy them en masse. *See Barnett*.Response.Br.8. They instead responded throughout the country by restricting or banning them almost immediately. Indeed, within a decade, more than half the states had restricted their possession and use, and the federal government followed suit not long thereafter. *See* Illinois.CA7.Br.37. While those restrictions could have been repealed at any time, most never have been, which ought to suffice to debunk the majority's seeming view that the only thing stopping machineguns from becoming "the quintessential self-defense weapon," *Heller*, 554 U.S. at 629, is the fact that they have long been so highly restricted.

Contrast that with the Nation's tradition vis-à-vis semiautomatic firearms. Semiautomatics came onto the civilian market in the 1890s. Yet no state restricted them until a few swept them up in the 1920s and 1930s in ham-fisted efforts to restrict then-new fully automatic arms. *See* 1927 Mich. Pub. Acts 887, 888; 1927 R.I. Acts & Resolves 256, 256-57; 1933 Minn. Laws ch. 190. And each of those outlier laws was ultimately repealed outright or replaced with one that restricted only automatics. *See* 1959 Mich. Pub. Acts 249, 250; 1959 R.I. Acts & Resolves 260, 260, 263;

1963 Minn. Sess. L. ch. 753, at 1229.[3] Indeed, it was not until 1989 that any state started targeting certain semiautomatic firearms for restriction. *See* 1989 Cal. Stat. 60, 64. Neither did Congress until 1994, *see* Pub. L. No. 103-322, 108 Stat. 1796 (1994) (formerly codified at 18 U.S.C. §922(w)), and Congress allowed that law to expire in 2004 after a Justice Department study revealed that it had produced "no discernible reduction" in firearm violence, Christopher S. Koper et al., *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets & Gun Violence, 1994-2003*, Rep. to the Nat'l Inst. of Justice 96 (2004), https://bit.ly/3wUdGRE. Even now, moreover, bans like HB5471 remain outliers; the vast majority of the firearms Illinois now bans (including AR-15s) remain legal in most of the country.

The lack of historical support for HB5471 on ammunition feeding devices is, if anything, even more striking (which perhaps explains why the majority did not even try to ground that holding in history). Arms capable of firing more than 10 or 15 rounds were among the most popular models on the civilian market

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[3] In addition to the three states referenced in the text, California and Ohio also enacted licensing laws for certain semiautomatics, but did not enact outright bans. *See* 1933 Cal. Stat., ch. 450; 1933 Ohio Laws 189, 189. And while a Virginia law enacted in that era could be read to include semiautomatics that hold more than 16 rounds, it applied only to use of the firearm in a "crime of violence" or "for offensive or aggressive purpose." 1934 Va. Acts ch. 96, §§1(a), 4(d). In all events, as with the three states' laws cited in the text, each of these laws was either repealed outright or replaced with laws restricting only fully automatic arms. *See* 1965 Cal. Stat., ch. 33, at 913; 1972 Ohio Laws 1866, 1963; 1975 Va. Acts, ch. 14, at 67.

as early as the 1860s. *See Duncan v. Bonta*, 19 F.4th 1087, 1154-55 (9th Cir. 2021) (en banc) (Bumatay, J., dissenting). Yet while "high-capacity magazines" were "common" by at least "the late nineteenth century or early twentieth century," *id.* at 1130 (Berzon, J., concurring), no state restricted the manufacture, sale, or possession of ammunition feeding devices *of any capacity* until the 1990s, *see* N.J. Stat. §2C:39-1y, -3j, -9h.[4] Neither did Congress until the 1994 federal "assault weapons" law, which expired in 2004. *See* p.28, *supra*.

In the end, then, the Seventh Circuit did not identify any historical support for its novel "reserved for the military" test or its effort to place common magazines and semiautomatic firearms like the AR-15 rifle on the "military-only" side of its line. That should come as no surprise; this Court has already studied

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[4] Before 1990, only the District of Columbia restricted law-abiding citizens' ability to keep or bear feeding devices of a particular size. In 1932, Congress passed a local D.C. law prohibiting the possession of firearms that "shoot[] automatically or semiautomatically more than twelve shots without reloading." Act of July 8, 1932, Pub. L. No. 72-275, §§1, 8, 14, 47 Stat. 650, 650, 652 (repealed via 48 Stat. 1236 (1934)) (currently codified as amended at 26 U.S.C. §§5801-72). That law was not understood to sweep up ammunition feeding devices as an original matter; indeed, when Congress enacted the National Firearms Act imposing stringent regulations on machineguns for the whole country just two years later, it chose not to impose any restrictions on magazines. *See* Pub. L. No. 73-474, 48 Stat. 1236 (1934). Nevertheless, after the District achieved home rule in 1975, the new D.C. government interpreted the 1932 law "so that it outlawed all detachable magazines and all semiautomatic handguns." David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 866 (2015).

the same history in exhaustive detail and concluded that, "[a]part from a few late-19th-century outlier jurisdictions, American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense," *Bruen*, 597 U.S. at 70, let alone prohibited the bare possession of arms that are "typically possessed by law-abiding citizens for lawful purposes," *Heller*, 554 U.S. at 625. The only thing surprising is the Seventh Circuit's refusal (once again) to take this Court at its word.

C. The Seventh Circuit's Decision Creates a Circuit Split.

In addition to denying and defying this Court's precedent several times over, the decision below opens up a circuit split with the Ninth Circuit, which has squarely rejected the Seventh Circuit's implausible reading of this Court's precedents. *See Teter v. Lopez*, 76 F.4th 938 (9th Cir. 2023).

Teter involved a challenge to Hawaii's prohibition on "possess[ing] a butterfly knife," which "is simply a pocketknife with an extra rotating handle." *Id.* at 942, 950. As *Teter* noted, "[i]n answering" the threshold question of whether "'[the plaintiffs'] proposed course of conduct'" was presumptively protected, "*Bruen* analyzed only the 'Second Amendment's text.'" *Id.* at 948 (first alteration added) (quoting *Bruen*, 597 U.S. at 32). The *Teter* court thus followed suit, "first consider[ing] whether the possession of butterfly knives is protected by the plain text of the Second Amendment." *Id.* As the court explained, for purposes of that threshold inquiry "it is irrelevant whether the particular type of firearm at issue has military value"; all that matters is whether it "fit[s] the general

definition of 'arms'" articulated in *Heller* and *Bruen*. *Id.* at 949. Because "bladed weapons" plainly fit that definition regardless of what type of handle they have, the court held that "the Constitution 'presumptively guarantees' keeping and bearing [butterfly knives] 'for self-defense.'" *Id.* (quoting *Bruen*, 597 U.S. at 33).

Unlike the Seventh Circuit, the Ninth Circuit then acknowledged and applied this Court's common-use test. As *Teter* explained, when assessing whether an arm may be banned consistent with historical tradition, "we consider … whether [it] is commonly possessed" or "commonly owned." *Id.* at 950. And because this Court has held that there is no historical tradition of "categorically bann[ing] the possession of" common arms, *Teter* correctly recognized that resort to history could not justify a ban on arms in common use today. *Id.* at 951. All of that is irreconcilable with the precedent-defying, rights-diluting approach the Seventh Circuit embraced here.

II. This Case Is Exceptionally Important, And Time Is Of The Essence.

The decision below is not only exceptionally wrong, but exceptionally important—for the people of Illinois, the litigation of Second Amendment claims, and the rule of law. Any jurisdiction that responded to *Gideon* with a thousand new restrictions on the right to counsel would have gotten a well-deserved judicial tongue-lashing. But instead of making quick work of HB5417, the Seventh Circuit made quick work of the preliminary injunction petitioners secured before a district court that faithfully followed this Court's precedent. *See* pp.10-13, *supra*. Thus, as things currently stand, law-abiding Illinoisans are

prohibited from acquiring 1,000+ different rifles, pistols, and shotguns, including many of the most popular models on the market and virtually all semiautomatic rifles, as well as ammunition feeding devices that are ubiquitous throughout the rest of the country. And those fortunate enough to have obtained such arms before Illinois' sweeping new ban took effect may keep them (under severe restrictions) only if they happened to learn about and comply with onerous registration requirements that, as of December 31, 2023, fewer than 30,000 of the state's 2.5 million licensed firearm owners had managed to complete. *See* Illinois State Police, *Firearm Owner Identification Card Statistics*, https://bit.ly/3OEjUzE (last visited Feb. 11, 2024).

Yet rather than at least give the parties a prompt and final resolution of a question that is plainly legal in nature, the Seventh Circuit relegated petitioners—and the rights of law-abiding Illinois citizens—to a costly and time-consuming exercise in futility: The court insisted that, in order for their claims to move forward, plaintiffs must develop an exceedingly burdensome factual record documenting how each and every one of the myriad firearms Illinois has banned compares on measures like "firing rate," "kinetic energy," "muzzle velocity," and "effective range" to firearms (like the M16) that the majority has (mistakenly) decided are not "Arms." App.38.

The majority did not explain what on its laundry list of metrics would suffice to persuade it that a firearm is "materially different from the M16." App.40. But one thing is clear: None of that bears any relevance to this Court's definitive pronouncements on

what constitutes an "Arm" and which "Arms" may be banned consistent with historical tradition. Indeed, saddling plaintiffs with the burden of supplying such a multitude of information just to get in the Second Amendment door seems more designed to bankrupt those with the temerity to challenge sweeping firearms bans into submission than to inform any inquiry this Court has deemed relevant.

Left standing, the decision below will leave petitioners with no choice but to continue down this fruitless path, all to the likely end of being told by the Seventh Circuit yet again that a sweeping ban on firearms somehow escapes any Second Amendment scrutiny at all. Worse still, the decision will serve as yet another model for how to make Second Amendment challenges as costly and burdensome as possible to litigate. *See, e.g.*, *Or. Firearms Fed'n v. Kotek*, 2023 WL 4541027 (D. Or. July 14, 2023) (refusing to rule on preliminary injunction motions and instead forcing the challengers to endure a lengthy trial on how magazines work, how firing capacity has been regulated throughout history, and what kind of damage a firearm equipped with a "large capacity magazine" can inflict in the hands of a mass murderer, only to ultimately conclude that magazines are not even "Arms").

And the threat posed by the decision below is not limited to the Second Amendment; it extends to the rule of law. Disrespect for this Court's decisions is contagious. If Illinois' disrespect for the Second Amendment and *Bruen* is not promptly enjoined, other jurisdictions will follow its lead. And if a federal appellate court can dismiss Supreme Court precedents

as "circular," not "correct," or un-empirical, then other courts will be emboldened to do the same. The recent Hawaii Supreme Court decision elevating "the Aloha spirit" over the need to faithfully follow this Court's precedents is a case in point. *See Wilson*, 2024 WL 466105, at *7, *10, *19, *20 (denying that "the language of the Second Amendment … support[s] a right to possess lethal weapons in public for possible self-defense," and holding that "[t]here is no individual right to keep and bear arms under article I, section 17 [of the Hawaii Constitution]"—which tracks the Second Amendment verbatim (save for "two commas and three capital letters")—in large part because "[t]he spirit of Aloha clashes with a federally-mandated lifestyle that lets citizens walk around with deadly weapons during day-to-day activities").

It is unfortunate that this Court needs to intervene just two years after *Bruen* to remind lower courts that they are not free to pick and choose among fundamental rights or Supreme Court precedents. But it is imperative that this Court do so. HB5471 is "stop me if you can" legislation. This Court can, and it should.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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