Nos. 23-877, 23-878, 23-879, 23-880, 23-944, 23-1010

In the Supreme Court of the United States

DANE HARREL, ET AL.,

Petitioners,

v.

KWAME RAOUL, ATTORNEY GENERAL OF ILLINOIS, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION OF COOK COUNTY RESPONDENTS

KIMBERLY M. FOXX
COOK COUNTY STATE'S ATTORNEY
CATHY MCNEIL STEIN
JESSICA M. SCHELLER*
JONATHON D. BYRER
PRATHIMA YEDDANAPUDI
EDWARD M. BRENER
500 Richard J. Daley Center
Chicago, IL 60602
(312) 603-6934
jessica.scheller@cookcountysao.org

**Counsel of Record*

JAVIER HERRERA,

Petitioner,

v.

KWAME RAOUL, ATTORNEY GENERAL
OF ILLINOIS, ET AL.,

Respondents.

CALEB BARNETT, ET AL.,

Petitioners,

v.

KWAME RAOUL, ATTORNEY GENERAL
OF ILLINOIS, ET AL.,

Respondents.

NATIONAL ASSOCIATION FOR GUN RIGHTS, ET AL.,

Petitioners,

v.

CITY OF NAPERVILLE, ILLINOIS, ET AL.,

Respondents.

JEREMY W. LANGLEY, ET AL.,

Petitioners,

v.

BRENDAN F. KELLY, IN HIS OFFICIAL CAPACITY
AS DIRECTOR OF THE ILLINOIS STATE POLICE, ET AL.,

Respondents.

GUN OWNERS OF AMERICA, INC., ET AL.,

Petitioners,

v.

KWAME RAOUL, ATTORNEY GENERAL OF ILLINOIS, ET AL.,

Respondents.

QUESTION PRESENTED

In *N.Y. State Rifle & Pistol Ass'n* v. *Bruen*, 597 U.S. 1 (2022), this Court announced a two-step inquiry governing Second Amendment challenges. At the first step, the plaintiff must demonstrate that the government action being challenged contradicts the Second Amendment's text. When conducting that textual analysis, *Bruen* expressly considered whether the regulated weapons were in common use for a lawful purpose. At the second step, the burden shifts to the government to show that its actions are nevertheless constitutional because they are consistent with this nation's history and traditions of firearm regulation.

The questions presented are:

1. Whether petitioners have shown that Cook County's regulation of assault weapons and high-capacity magazines contradicts the Second Amendment's text, where they offer no admissible evidence that assault weapons or high-capacity magazines are in common use for any lawful purpose.

2. Whether Cook County's regulation is consistent with this nation's history and tradition, where it is undisputed that governments have long carefully regulated access to weapons incompatible with the ancient English common-law principle of moderate, proportional self-defense.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT 1

I. Background 1

II. The County's Regulation And This Lawsuit 6

REASONS FOR DENYING THE PETITION 12

I. This Case Is A Poor Vehicle For The Various Questions Presented 13

A. No Extraordinary Inconvenience Warrants Interlocutory Review 14

B. Petitioners' Central Argument Regarding Common Use Is Forfeited 19

II. No Conflicts Warrant Immediate Review 20

A. There Is No Direct Conflict With This Court's Decisions 20

B. No Inter-Circuit Conflict Warrants Review Here 24

III. No Extraordinary Circumstances Warrant Review 26

IV. The Judgment Below Is Correct 32
CONCLUSION 41

TABLE OF AUTHORITIES

CASES

Page(s)

Alden v. *Maine*,
527 U.S. 706 (1999) 35

Am. Constr. Co. v. *Jacksonville, T. & K. W. R. Co.*,
148 U.S. 372 (1893) 14, 16

Antonyuk v. *Chiumento*,
89 F.4th 271 (2d Cir. 2023) 30

Ass'n of New Jersey Rifle & Pistol Clubs v.
AG New Jersey,
910 F.3d 106 (3d Cir. 2018) 25

Bailey v. *Alabama*,
219 U.S. 219 (1911) 35

Barnett v. *Raoul*,
No. 23-cv-00209, R. 179
(S.D. Ill. April 11, 2024) 14

Benjamin v. *Bailey*,
662 A.2d 1226 (Conn. 1995) 38

Bianchi v. *Brown*,
No. 21-1255, 2024 U.S. App. LEXIS 974
(4th Cir. Jan. 12, 2024) 27, 31

Caetano v. *Massachusetts*,
577 U.S. 411 (2016) 11, 23

Cockcroft v. *Smith*,
11 Mod. 43 (King's Bench 1705) 36, 40

District of Columbia v. Heller,
554 U.S. 570 (2008) 9, 10, 11, 15, 16, 20, 21,
22, 23, 24, 27, 29, 32, 34, 35, 36, 39

Furness, Withy & Co. v.
Yang-Tsze Insurance Asso.,
242 U.S. 430 (1917) 29

Fyock v. *Sunnyvale*,
779 F.3d 991 (9th Cir. 2015) 25

Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*,
240 U.S. 251 (1916) 14

Hollis v. *Lynch*,
827 F.3d 436 (5th Cir. 2016) 19, 21, 26

Johnson v. *Jones*,
515 U.S. 304 (1995) 16

June Med. Servs. LLC v. *Russo*,
140 S. Ct. 2103 (2020) 18

Katko v. *Briney*,
183 N.W.2d 657 (Iowa 1971) 38

Mayor of Philadelphia v.
Educational Equality League,
415 U.S. 605 (1974) 32

Mount Soledad Memorial Ass'n v. *Trunk*,
567 U.S. 944 (2012) 18

N.Y. State Rifle & Pistol Ass'n v. *Bruen*,
597 U.S. 1 (2022) 9, 10, 11, 13, 15, 19, 20, 21,
22, 25, 27, 28, 29, 30,
31, 32, 34, 35, 36

New York State Rifle & Pistol Ass'n v. *Cuomo*,
804 F.3d 242 (2d Cir. 2015) 26

NRA v. *Bondi*,
61 F.4th 1317 (11th Cir. 2023) 30

Ocean State Tactical, LLC v. *Rhode Island*,
95 F.4th 38 (1st Cir. 2024) 31

People v. *Brown*,
235 N.W. 245 (Mich. 1931) 38

People v. *Pace*,
44 N.E.3d 378 (Ill. App. 2015) 28

People v. *Persce*,
97 N.E. 877 (N.Y. 1912) 38

Reg. v. Nailor,
Foster Crown Cases 278 (unreported)
(Old Bailey 1704) 37

Staples v. *United States*,
511 U.S. 600 (1994) 22

State v. *Duke*,
42 Tex. 455 (Tex. 1874) 38

State v. *Wells*,
1 N.J.L. 486 (N.J. 1790) 37, 38

State v. Wilson,
543 P.3d 440 (Haw. 2024) 29

Teter v. *Lopez*,
76 F.4th 938 (9th Cir. 2023) 20, 24

Teter v. *Lopez*,
No. 20-15948, 2024 U.S. App. LEXIS 4079
(9th Cir. Feb. 22, 2024) 24, 25, 26

Ticor Title Ins. Co. v. *Brown*,
511 U.S. 117 (1994) 14, 17

Turkiye Halk Bankasi A.S. v. *United States*,
143 S. Ct. 940 (2023) 21, 23, 24

United States v. *Salerno*,
481 U.S. 739 (1987) 18, 33

Viramontes v. *County of Cook*,
No. 21-cv-04595, R. 129
(N.D. Ill. March 1, 2024) 14

Wise v. *Circosta*,
978 F.3d 93 (4th Cir. 2020) 31

STATUTES & RULES

U.S. Const. Amend. II 9, 11, 12, 20, 21, 23, 27, 29, 32, 34

18 U.S.C. § 921(a)(30) 7

18 U.S.C. § 921(a)(31) 7

18 U.S.C. § 922(v) 7

18 U.S.C. § 922(w) 7

Cook County Code of Ordinances § 54-210 7

Cook County Code of Ordinances § 54-211 7

Cook County Code of Ordinances § 54-213 7

Cook County Code of Ordinances § 54-214 7

D.C. Code § 7-2501.01(12) 24

Fed. R. App. P. 35(a) 31

Hawaii Constitution, ART. I, § 17 29

Highland Park, Ill., City Code § 136.001 8

Municipal Code of Chicago, Ill. § 8-20-075 8

Spring Gun Act 1827, 7 & 8 Geo. 4, ch. 18 38

Sup. Ct. R. 10 22

OTHER SOURCES

BLACK'S LAW DICTIONARY 1228 (8th ed. 2004) 35

Chicago Suntimes, https://chicago.suntimes.com/2022/7/18/23269300/mourners-highland-park-parade-shooting-victim-kevin-mccarthy-died-shielding-toddler-son 8

Chicago Suntimes, https://chicago.suntimes.com/2022/7/10/23203191/highland-park-shooting-parade-cooper-roberts-fourth-of-july-what-one-bullet-did 8

Chicago Suntimes, https://chicago.suntimes.com/2022/7/4/23194354/highland-park-fourth-july-parade-gunfire 8

Chris Bishop, THE ENCYCLOPEDIA OF WEAPONS OF WORLD WAR II 218 (Sterling 2002) 1

Ed Tangen, *Spring Guns*, 1 AM J. POLICE SCI. 307, 307 (1930) 38

https://wgntv.com/news/highland-park-parade-shooting/charges-to-be-announced-in-highland-park-mass-shooting/ 8

https://www.ilga.gov/legislation/publicacts/102/PDF/102-1116.pdf 8

John Locke, SECOND TREATISE OF GOVERNMENT § 21 39

Local Legislators Spent Years Trying to Pass Gun Laws. After Highland Park's Deadly Parade Shooting, Illinois Took Action, https://news.wttw.com/2023/07/03/local-legislators-spent-years-trying-pass-gun-laws-after-highland-park-s-deadly-parade 28

Stephen M. Shapiro, et al., SUPREME COURT PRACTICE 248 (10th ed. 2013) 25

Tina Sfondeles, *Illinois Assault Weapons Ban Advances After Democratic Deal, Echoes Of A Child's Screams,* CHICAGO SUN-TIMES (Jan. 9, 2023), https://chicago.suntimes.com/2023/1/9/23547414/assault-weapons-ban-illinois-state-senate-harmon-highland-park-harmon-pritzker-welch 28

William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 182 (Oxford 2016)...........................36

STATEMENT

I. Background.

In 1944, the Nazi German government began arming its troops with the *Sturmgewehr 44* – German for "assault rifle 44," or, more literally, "storm rifle 44." Chris Bishop, THE ENCYCLOPEDIA OF WEAPONS OF WORLD WAR II 218 (Sterling 2002). Known earlier in its development as the *maschinenpistol 43*, this weapon "was the first of what are today termed assault rifles. It could fire single shots for selective fire in defence, and yet was capable of producing automatic fire for shock effect in the attack or for close quarter combat." *Ibid.* Following the war, in 1957, the Army invited Armalite, a firearms manufacturer, to produce a lightweight, high-velocity rifle that could operate in both semiautomatic and fully automatic modes with firepower capable of penetrating a steel helmet or standard body armor at 500 yards. R. 60-4 ¶¶44, 103.[1] Armalite devised the AR-15 to meet these specifications. *Id.* ¶103. In December 1963, the Army adopted the AR-15, rebranding it the "M-16." *Id.* ¶106; R. 60-5 at 61-62.

The AR-15 retained the same performance characteristics in terms of muzzle velocity, range, and ammunition as the M-16. R. 60-5 at 61-64, 69; R. 60-12 at 6-7; R. 60-4 ¶107. The AR-15 also has the same

---

[1] We cite the district court record as "R. ___,"the Seventh Circuit record as "7R. ___," and the appendix to Herrera's petition as "Pet.App. ___."

destructive capacity as weapons developed for use in war-time offensives by the military. R. 60-5 at 59-63, 67, 69, 77; R. 60-4 ¶¶106-107. Its performance characteristics all contributed to its uncommon lethality as compared to handguns. R. 60-12 at 7. Military-style assault rifle rounds travel two to nearly three times as fast as rounds from a handgun. R. 60-5 at 46. The M-16/AR-15 is effective at striking targets nearly nine football fields away – a distance 17.5 times further than the Glock model 17. *Id.* Military style assault rifle rounds strike their targets with kinetic energy that is many multiples greater than the energy from a handgun round. *Id.* Similarly, large-capacity magazines are military hardware, and their development was not intended for the civilian market. R. 60-5 at 74-75.

As this table illustrates, R. 60-5 at 46, there is no meaningful difference between the performance capacity of the M-16 and the AR-15, but there is a significant difference between military weapons and handguns:

Weapon	Ammo	Kinetic Energy	Muzzle Velocity	Effective Range	Semiautomatic Cyclic Rate
M-16 / AR-15 Rifle	.223 / 5.56mm	1220-1350 ft-lbs.	2800-3100 ft/sec	602-875 yards	300 rounds/ min.
AK-47 / AK 74 Rifle	7.62x 39mm	1450-1650 ft-lbs.	2300-2600 ft/sec	550-800 yards	300 rounds/ min.
FN-FAL Rifle	7.62x 51mm	2350-2550 ft-lbs.	2800-3000 ft/sec	575-800 yards	300 rounds/ min.
Glock Model 17 Pistol	9x19 mm	355-500 ft-lbs.	1100-1300 ft/sec	50 yards max.	300-400 rounds/ min.
Colt M1911 Pistol	.45 ACP	350-375 ft-lbs.	775-850 ft/sec	50 yards max.	300-400 rounds/ min.
Walther PPK Pistol	.380/ 9mm Kurz	300-500 ft-lbs.	900-1100 ft/sec	50 yards max.	300-400 rounds/ min.

These performance characteristics allow assault weapons to deliver more gruesome injuries and a greater likelihood of death. A weapon's killing

capacity is primarily determined by the kinetic energy imparted by the bullet, its effective range, and the rate at which the weapon fires projectiles. R. 60-12 at 6-7. The ammunition often used in AR-15s, the 5.56mm/.223 caliber cartridge, was adopted by the military for use in assault weapons specifically because of its light weight and ability to deliver reliable lethality. R.60-5 at 63-64. The lethality of this type of weapon and ammunition was immediately evident in Vietnam, where an AR-15 left a back wound that "caused the thoracic cavity to explode;" and a "heel wound" where "the projectile entered the bottom of the right foot causing the leg to split from the foot to the hip," both of which resulted in "instantaneous" death. R. 60-3 at ¶105. This is due to the velocity with which an assault weapon expels its ammunition and the yaw effect experienced by a bullet from a semiautomatic-rifle, in which the bullet tumbles end-over-end on impact, sending a wave of kinetic energy out radially from what will become the permanent wound cavity. R. 60-5 at 64-65.

The temporary cavity created by the 5.56mm caliber cartridge is over three times the size of the temporary cavity created by the .45 caliber bullet from the Thompson Machine gun. R. 60-11 at ¶¶11-12. In the words of one trauma surgeon, "A handgun [wound] is simply stabbing with a bullet. It goes in like a nail. [But with the AR-15,] it's as if you shot somebody with a Coke can." R. 60-4 at ¶109. This means the physical impact of ammunition shot from

an assault weapon on human tissue is vastly different than the impact from a handgun and leads to greater fatality and injury. R. 60-5 at 64-65; R. 60-11 ¶¶14–15; R. 60-12 at 6; R. 60-10 at 6. Bullets from semiautomatic AR-15 style rifles are more likely to fracture bones due to their higher energy release. R. 60-11 ¶14. Assault rifle impacts to extremities frequently result in amputations, even where a handgun injury would be treatable. R. 60-10 at 6.

Similarly, if a handgun injury requires surgery, typically only one is needed, but assault weapon injuries frequently require multiple operations and massive blood transfusions because major blood vessels and multiple organs are damaged. R. 60-12 at 6. These injuries are even more deadly for children. R. 60-11 at 15. As a pediatrician observed after the Uvalde massacre, the children "had been pulverized by bullets fired at them, decapitated," their "flesh had been ripped apart" to such an extent "that the only clue as to their identities was blood-spattered cartoon clothes still clinging to them." R. 60-1 at 14.

In combat, the ability to fire continuously without reloading translates to combat effectiveness. R. 60-5 at 75. When used against noncombatant civilians, these features translate to mass, indiscriminate harm. *Id.* The continuous fire enabled by large-capacity magazines make it more difficult for victims or bystanders to defend themselves by reducing their opportunities to disarm a gunman, escape, or call for

help. R. 60-4 at ¶139-141. It also makes it difficult, and more dangerous, for law enforcement to effectively respond – during the Orlando Pulse Nightclub assault-weapon massacre, for example, officers needed an armed personnel carrier to breach a wall. R. 60-16 at 13, 24, 27. This is necessary because assault weapons can discharge ammunition at a velocity that will pierce all standard issue law enforcement body armor. R. 60-8 at ¶17, 21. And even if an officer is wearing body armor capable of stopping an assault-weapon round, the impact can cause significant trauma. *Id.* ¶21.

II. The County's Regulation And This Lawsuit.

For over three decades, Cook County has regulated assault weapons. In 1994, the County enacted the Firearms Dealer's License and Assault Weapons and Ammunition Ban Ordinance. Cook County Ordinance No. 93-O-37 (approved Jan. 1, 1994)). The law prohibited the sale, transfer, acquisition, ownership, or possession of "assault weapons," defined by reference to specific model names or types. The ordinance's prefatory clause noted that assault weapons were 20 times more likely to be used to commit a crime and served no legitimate sporting purposes. Ordinance 93-O-37, at 1 (1994).

Shortly thereafter, in 1994, after five years of hearings following the 1989 Cleveland Park Elementary massacre, Congress banned the

possession of "semiautomatic assault weapons" and "large capacity ammunition feeding devices." 18 U.S.C. §§ 921(a)(30), (a)(31), 922(v), (w). The Act was written to expire 10 years after enactment, and expired in 2004.

Thereafter, in 2006, the County filled the void left by the expiration of the Act by amending its 1994 ordinance. Cook County Ordinance No. 06-O-50 (approved Nov. 14, 2006). In 2007, the ordinance was renamed the Blair Holt Assault Weapons Ban. Cook County Ordinance No. 07-O-36 (approved June 19, 2007). Currently, the ordinance expands the definition of assault weapon to include conversion kits, as well as semiautomatic shotguns with revolving cylinders and "grenade, flare or rocket launcher[s]," and includes a non-exhaustive list of various prohibited models and copies or duplicates thereof. Cook County Ordinance 13-O-32 (approved July 17, 2013), currently codified at Cook County Code of Ordinances (hereafter, "Code") § 54-210, et seq. The ordinance also prohibits the possession of large-capacity magazines with the capacity of more than 10 rounds. Code § 54-211. All persons who lawfully possessed assault weapons or large-capacity magazines at the time of enactment had 60 days to dispose of them. Code § 54-213. Violation of the ordinance is punishable by up to six months' imprisonment and a $5,000-$15,000 fine. Code § 54-214.

Cook County was not alone in advancing regulation in this area. The City of Chicago, the Village of Highland Park, and other home rule units of government passed similar ordinances in the early 2000s. *See* Municipal Code of Chicago, Ill. § 8-20-075, Highland Park, Ill., City Code § 136.001.

On July 4, 2022, an individual armed with an assault rifle opened fire on a crowd watching a parade in Highland Park, Illinois, killing 7 and wounding 48. https://chicago.suntimes.com/2022/7/4/23194354/highland-park-fourth-july-parade-gunfire. Among the victims: a two-year-old boy orphaned when his parents were slain, https://chicago.suntimes.com/2022/7/18/23269300/mourners-highland-park-parade-shooting-victim-kevin-mccarthy-died-shielding-toddler-son, and an 8-year-old boy paralyzed from the waist down when a bullet severed his spine. https://chicago.suntimes.com/2022/7/10/23203191/highland-park-shooting-parade-cooper-roberts-fourth-of-july-what-one-bullet-did. The weapon used was purchased legally. https://wgntv.com/news/highland-park-parade-shooting/charges-to-be-announced-in-highland-park-mass-shooting/. The Illinois legislature passed a materially identical ban on assault weapons and high-capacity magazines in response. https://www.ilga.gov/legislation/publicacts/102/PDF/102-1116.pdf.

Decades after the County ordinance's passage, in January 2023, Herrera filed suit in district court

asserting that the County, City and State regulations violate his Second Amendment rights. R. 1 at 22-28. Herrera simultaneously requested a preliminary injunction barring the ordinance's enforcement. R. 4. Following briefing and oral argument, the district court denied that motion. Pet.App.122.

Herrera appealed to the Seventh Circuit, which consolidated Herrera's appeal with the other petitioners' challenges to Illinois and other local regulations of assault weapons for briefing and oral argument. 7R. 23. In that consolidated appeal, the County explained that petitioners' constitutional claims failed for two independent reasons. 7R. 41 at 13. First, petitioners failed to offer any admissible evidence that assault weapons or large-capacity magazines are commonly used for lawful purposes, as required by *Heller* and *Bruen*. *Id.* Second, because the Second Amendment's central purpose is to protect the right to self-defense, regulations of assault weapons are consistent with the ancient historic tradition of limiting that right to the use of weapons consistent with moderate, proportionate self-defense. *Id.* at 23. Petitioners did not respond to this argument, except to make a cursory claim that moderation was not a historic principle of the right to self-defense. 7R. 55 at 35. But in reply, the County noted that this principle was expressly adopted in English self-defense decisions dating back to at least 1705. 7R. 74 at 10.

The Seventh Circuit held that petitioners were not entitled to preliminary injunctive relief. Pet.App.1-108. As the Court explained, under *District of Columbia v. Heller*, 554 U.S. 570 (2008), "the definition of 'bearable Arms' extends only to weapons in common use for a lawful purpose," *id.* at 29, as confirmed by the English Bill of Rights and Blackstone's writings, which both rooted the right to bear arms in the natural right to self-defense, *id.* at 29-30. And because "*Heller* itself stated that M16s are not among the Arms covered by the Second Amendment; they are instead a military weapon," *id.* at 32, petitioners' claims failed at the first step of the *Bruen* analysis because "assault weapons and high-capacity magazines are much more like machineguns and military-grade weaponry than they are like the many different types of firearms that are used for individual self-defense," *id.* at 33. Indeed, the court noted, the record demonstrated that "the AR-15 is almost the same gun as the M16 machinegun," other than the latter's automatic capacity. *Id.* at 34.

That said, the court cautioned that its decision was based only on "the record before us," and stressed, mid-opinion, that its review was "preliminary." Pet.App.38. And while that review persuaded the panel majority that the plaintiffs failed to show a strong chance of success on the merits, Second Amendment "challenges to gun regulations often require more evidence than is presented in the early phases of litigation," and the court did "not rule out

the possibility that the plaintiffs will find other evidence that shows a sharper distinction between AR-15s and M16s (and each one's relatives) than the present record reveals." *Ibid.*

Turning, "for sake of completeness," to *Bruen*'s second step, Pet.App.38, the court noted that *Bruen* required consideration of "whether the regulated weapons are 'in common use" and assumed for sake of argument that this requirement is a consideration at the second step, on which the government bears the burden of proof, *id.* at 39. Noting that the parties offered conflicting statistics regarding common use, the court "decline[d]" to rely "on numbers alone," out of concern that doing so could cause "anomalous results." *Id.* at 40-41. Rather, because "'common use' cannot be severed from the historical scope of the common-law right that the Second Amendment was designed to protect against encroachment," the court concluded, "the relevant question is what are the modern analogues to the weapons people used for individual self-defense in 1791, and perhaps as late as 1868." *Id.* at 41-42. This defeated petitioners' claims because "weapons used for self-defense are the ones that *Heller*, *McDonald*, *Caetano*, and *Bruen* had in mind—not a militaristic weapon such as the AR-15." *Id.* at 42.

Ultimately, the court concluded, "the distinction between military and civilian weaponry [is] useful for Bruen's second step," because governments "have long

contemplated that the military and law enforcement may have access to especially dangerous weapons, and that civilian ownership of those weapons may be restricted." Pet.App.45. And a survey of laws dating back to the 1700s demonstrated a longstanding "distinction between weapons and accessories designed for military or law-enforcement use, and weapons designed for personal use. The legislation now before us respects and relies on that distinction." *Id.* at 46-48 (collecting authority).

Six petitions for certiorari followed.

REASONS FOR DENYING THE PETITION

In the wake of a 1989 assault-weapon massacre at a California elementary school, Cook County regulated "assault weapons" – defined broadly to include automatic machine guns, semiautomatic rifles, and grenade and rocket launchers – as well as high-capacity magazines. Decades later, when another assault-weapon massacre at a suburban parade made clear that piecemeal local regulation was insufficient, Illinois passed its own, materially identical regulation. Petitioners sought a facial preliminary injunction of both regulations, claiming they violate the Second Amendment, but the Seventh Circuit held on interlocutory appeal that they failed to make the showing necessary for such extraordinary relief, and remanded for further proceedings.

Petitioners respond with an uncoordinated barrage of petitions, offering a host of differing – and often conflicting – explanations why they believe review is appropriate. It is not. This case is a poor vehicle for review, involving no conflicts or extraordinary circumstances that might warrant review absent a conflict. Even if this Court overlooks those problems, petitioners' claims fail on the merits at each step of *Bruen* – the first for a failure to provide evidence of common use, the second for a failure to dispute a primary argument for affirmance offered below. We address these failings, in turn.

I. This Case Is A Poor Vehicle For The Various Questions Presented.

This case is an exceedingly poor vehicle for review. First, it arrives in an interlocutory posture, from an order denying a preliminary injunction. Review of such interlocutory rulings requires a showing of extraordinary inconvenience that few petitioners even attempt, and none make. Second, petitioners forfeited their present argument that assault weapons and large-capacity magazines are commonly used, by arguing below that common use should not be considered. Third, petitioners lack Article III standing to seek facial invalidation of the regulations here.

A. No Extraordinary Inconvenience Warrants Interlocutory Review.

As this Court has long explained, the interlocutory nature of a decision is reason "of itself alone" to deny certiorari, *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), because it will not review an issue when "it is not clear that [its] resolution of [that issue] will make any difference" to the petitioner, *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117, 122 (1994) (per curiam). Precisely because "many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters," review of interlocutory orders is inappropriate "unless it is necessary to prevent extraordinary inconvenience and embarrassment." *Am. Constr. Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 384 (1893); accord, *e.g.*, *Hamilton-Brown Shoe*, 240 U.S. at 258 ("except in extraordinary cases, the writ is not issued until final decree").

This case directly implicates the concerns underlying that rule. The Seventh Circuit stressed that it took only "a preliminary look" at this case, and acknowledged that the plaintiffs might prevail on a better-developed record. Pet.App.37-38. The circuit's district courts heard this message, and have allowed separate Second Amendment challenges to the these regulations to proceed through discovery to final judgment on the merits. See *e.g., Barnett* v. *Raoul*, No. 23-cv-00209, R. 179 (S.D. Ill. April 11, 2024) (setting

discovery schedule); *Viramontes* v. *County of Cook*, No. 21-cv-04595, R. 129 at 10 (N.D. Ill. March 1, 2024); see *id.* R. 88 at 1 (March 8, 2023) (denying stay in order to "present[ ] a case with [a] substantial record to the Court of Appeals as quickly as possible"). *Viramontes* is now on appeal. *Id.* R. 133 (March 22, 2024).

Moreover, petitioners' divergent positions only demonstrate why factual development is necessary here. One petitioner claims a historical tradition foreclosing regulation of firearms in the home. Herrera Pet. 27-28. Another claims semiautomatic firearms are rooted in this nation's traditions by their supposed modern "popularity." Harrel Pet. 28-31. Another claims a "tradition vis-à-vis semiautomatic firearms" demonstrated by a lack of 20th-Century regulations. Barnett Pet. 27-28. Yet another seeks to overrule *Heller*'s treatment of the Second Amendment's prefatory clause, 554 U.S. at 627, by claiming a tradition of "ensur[ing] the citizenry would be as well-equipped as the military," GOA Pet. 29. Two others expect a historical "twin" of the regulations here, contra *Bruen*, 597 U.S. at 30, demanding proof of historic regulations that grandfather possession by law enforcement and military personnel, Langley Pet. 17-18; NAGR Pet. 20.

These positions are often directly at odds with each other. For example, where one petitioner focuses on 20th-century regulations, Barnett Br. 27-28,

another declares consideration of post-Reconstruction sources "unfaithful" to this Court's precedent, GOA Pet. 33. And where the latter believes *Heller* requires civilians be "as well-equipped as the military," *id.* at 29, the former admits *Heller*'s "recognition" of a historical tradition allowing bans of military weapons like machine guns, Barnett Pet. 19.

The fact that the petitions come before this Court in such a state of disarray demonstrates precisely why review of these cases is premature and imprudent. Interlocutory review is a notoriously "unwise use of appellate courts' time, by forcing them to decide in the context of a less developed record, an issue very similar to one they may well decide anyway later, on a record that will permit a better decision." *Johnson* v. *Jones*, 515 U.S. 304, 317 (1995). And the reason a developed record permits a better decision is that development inevitably narrows and refines the issues, leaving only those most solidly grounded in fact. In other words, a developed record prevents the very kind of disarray exemplified by the petitions now before this Court.

Only two petitioners acknowledge that this case's interlocutory posture poses a problem, but neither show the "extraordinary inconvenience and embarrassment" needed to overcome that problem. *Am. Constr.*, 148 U.S. at 384. Rather, petitioner Harrel makes the strange claim that immediate review is necessary because denying such review

would force petitioners to "try to prove their case by presenting evidence and expert testimony" under the standards announced below. Harrel Pet. 32. But if the petitioners can still prevail on remand, immediate review is premature because correcting any supposed legal errors here might not make any ultimate difference to the petitioners. See *Ticor Title*, 511 U.S. at 122.

Indeed, Harrel does not dispute that he might still prevail on remand. Rather, he complains that "none of the record that is likely to develop in this case will have any impact *on this Court's analysis*" if it grants immediate review. Harrel Pet. 32 (emphasis added). That is true of every petition seeking review of an interlocutory ruling, and only weighs against immediate review that would admittedly deprive this Court of a fully developed record to inform its legal analysis.

Petitioner Barnett's arguments fare no better. He declares it will "bankrupt" petitioners to provide the evidence necessary to prevail under the decision below, Barnett Pet. 33, because the Seventh Circuit has forced them to compile a record regarding "each and every one of the myriad firearms" being regulated, *id.* at 32. This is not a complaint about the decision below, but rather about the longstanding rule that a plaintiff bringing a facial constitutional challenge to legislation must carry the "most difficult," "heavy burden" of demonstrating that

legislation is unconstitutional in every possible application. *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). That a test "deliberately difficult" to satisfy in *every* case, *e.g.*, *June Med. Servs. LLC* v. *Russo*, 140 S. Ct. 2103, 2175 (2020) (Gorsuch, J., dissenting), will prove difficult to satisfy in *this* case is a feature of our federal system, not a bug, and does not constitute the extraordinary inconvenience necessary to justify review of an interlocutory decision. That is particularly so since the plaintiffs could avoid that burden by seeking as-applied relief, which would require only evidence concerning the specific firearms or magazines they desire.

Petitioners also complain that providing evidence will likely result in another loss on remand, Barnett Pet. 33, but offer no reason to believe this is so. Instead, they complain that an Oregon district court rejected a different claim after a trial. *Ibid.* But that case did not involve assault weapons, and it should go without saying that merely gesturing at a district court's judgment on one issue says nothing about how another circuit's district courts will resolve a different issue on different evidence. Regardless, if petitioners' fears come to pass, they can return with a final judgment in hand, see, *e.g.*, *Mount Soledad Memorial Ass'n* v. *Trunk*, 567 U.S. 944, 946 (2012) (Alito, J., respecting denial of certiorari), at which point this Court can act secure in the knowledge that it has before it a fully developed record. For present purposes, though, petitioners have only empty

speculation, which never warrants immediate review of an interlocutory decision.

B. Petitioners' Central Argument Regarding Common Use Is Forfeited.

Although the plaintiffs take differing positions regarding the Seventh Circuit's supposed errors, their grievances coalesce around a single perceived problem – namely, its analysis of "common use." Specifically, they complain that the Seventh Circuit did not apply the language from this Court's opinions literally, like a statute, based on an analysis of "'statistical'" evidence. Herrera Pet. 37-38 (quoting *Hollis*, 827 F.3d at 449).

This case is a poor vehicle to consider this central, shared grievance.[2] Petitioners Herrera and Langley forfeited their present argument, having argued below that common use was *not* the proper consideration, 7R. 65 at 10, 17; 7R. 55 at 25, claiming that focus on use would be underprotective of Second Amendment rights because "*no* firearms [are] in common use," *ibid*. It was *respondents* who argued that common use was the proper consideration at step one of the *Bruen* analysis. See 7R. 74 at 5-6

[2] This is not the only forfeiture here, only the most notable. Petitioners also forfeited, for example, their new claim of a supposed tradition of allowing civilians to use the same weapons as the military, GOA Pet. 29, which was not raised below.

(explaining that "'use' is the textual touchstone" and cannot be jettisoned in service of "practical concerns"). Having taken the position that consideration of literal common use was insufficiently protective of Second Amendment rights, petitioners cannot now declare it of such well-settled importance as to require review, let alone "summary vacatur." Herrera Pet. 17.

II. No Conflicts Warrant Immediate Review.

Even setting aside these vehicle problems, this Court's immediate review is inappropriate because petitioners have not identified any conflicts of authority that would warrant immediate review. The supposed conflict with the common-use rule of *Bruen* and *Heller* is not a conflict, but a dispute over the application of a properly stated rule. And petitioners' claim of an inter-circuit conflict was largely negated when the conflicting Ninth Circuit decision, *Teter* v. *Lopez*, 76 F.4th 938, 942 (9th Cir. 2023), was subsequently vacated for en banc review.

A. There Is No Direct Conflict With This Court's Decisions.

While petitioners claim that the Seventh Circuit's decision directly conflicts with this Court's instructions regarding "common use" – even going so far as to demand summary reversal, Herrera Pet. 15 – it does not. Although *Bruen* considered common use as part of the first, textual step of the Second

Amendment analysis, 597 U.S. at 31-32, this Court has never elaborated on how common use is analyzed, or even what threshold must be crossed for the use of a weapon to become common. Indeed, the very authority petitioners invoke notes this fact. *Hollis* v. *Lynch*, 827 F.3d 436, 449 (5th Cir. 2016). Nor did this Court have reason to offer such guidance – there was no doubt that the ordinary handguns in *Heller* are commonly used, and the *Bruen* parties did not dispute common use, 597 U.S. 1 at 31-32.

Nor can *Bruen* or *Heller* be read to say anything about how the common-use standard would apply in any particular case. This Court has "often admonished" against reading its decisions to address circumstances not before it, *Turkiye Halk Bankasi A.S.* v. *United States*, 143 S. Ct. 940, 950 (2023), and nothing in *Bruen* or *Heller* undermined that general rule. Neither purported to express any opinion regarding weapons not at issue in those cases. To the contrary, *Heller* emphasized that the Second Amendment does not protect "any weapon whatsoever." 554 U.S. at 626. And a critical mass of the *Bruen* majority wrote separately to warn that nothing in that decision said "*anything* about the kinds of weapons that people may possess," 597 U.S. 1, 72 (Alito, J., concurring) (emphasis added), let alone implied that the Second Amendment protects "any weapon whatsoever," *id.* at 81 (Kavanaugh, J. & Roberts, C.J., concurring).

In sum, the lower courts have only a general instruction to consider common use at *Bruen*'s first step, but no specific instructions on how to do so. That forecloses any claim that the judgment here directly conflicts with *Heller* or *Bruen*. Having given only a general instruction to consider common use at *Bruen*'s first step, but no direction as to how that use is to be evaluated, this Court left the lower courts free to develop the common-use analysis in a manner that is most consistent with the historical and textual principles underlying this Court's decisions. That is precisely what the Seventh Circuit sought to do here, by construing the common-use standard in a manner that would avoid circularity that might ultimately undermine the core right to self-defense.

Regardless of whether this Court thinks the Seventh Circuit's concerns misplaced, the lack of any direct instruction regarding the common-use standard shows that petitioners' claim of a direct conflict actually amounts to a complaint about the application of a properly stated legal rule. After all, the Seventh Circuit did not question *whether* common use had to be considered, it merely questioned *how* to do so. That weighs against review here, because disagreements about the application of a properly stated legal rule do not usually warrant review. Sup. Ct. R. 10.

Petitioners' attempt to manufacture conflicts with *Staples* v. *United States*, 511 U.S. 600 (1994), and

Caetano v. *Massachusetts*, 577 U.S. 411 (2016) (per curiam), fares no better. *Staples* did not mention the Second Amendment, let alone interpret it, because that case presented only a "question of statutory construction." 511 U.S. at 604. Thus, any reading of *Staples* to speak to this case runs directly afoul of this Court's oft-repeated warning not to construe broad language in its decisions to address matters not before the Court at the time. *Turkiye Halk*, 143 S. Ct. at 950. But that is precisely what the petitioners do here, contorting this Court's broad statement in *Staples* that "guns" in *general* are "widely accepted as lawful possessions," and thus not sufficiently, inherently dangerous to dispense with criminal law's baseline *mens rea* requirement, 511 U.S. at 611-12, into a specific statement that AR-15s in *particular* are widely accepted as lawful and thus protected by the Second Amendment, NAGR Pet. 25-26; Harrel Pet. 23, 29.

As for *Caetano*, that per curiam opinion stood for exactly two legal principles. First, "the Second Amendment extends to arms that were not in existence at the time of the founding." 577 U.S. at 412 (cleaned up). Second, the Second Amendment does not protect "'only those weapons useful in warfare.'" *Ibid.* (quoting *Heller*, 554 U.S. at 624-25). Nothing in the Seventh Circuit's opinion even arguably conflicts with either principle, so *Caetano* provides no basis for review here.

Finally, petitioners claim that *Heller* categorically rejected as unconstitutional any regulation of "handguns," Langley Pet. 14-15; accord Barnett Pet. 22, leaving open only the possibility of regulating "long guns," NAGR Pet. 11. Not so – *Heller* involved a challenge to a blanket ban on "any firearm originally designed to be fired by use of a single hand," D.C. Code § 7-2501.01(12), and cannot be fairly read to express any opinion, let alone a binding one, on a narrower restriction on particular handguns, *Turkiye Halk*, 143 S. Ct. at 950.

B. No Inter-Circuit Conflict Warrants Review Here.

This case also involves no conflict among the circuits that might warrant review – indeed, petitioners candidly admit that, following *Bruen*, the lower courts have "unanimously" upheld regulations of assault weapons and magazines. NAGR Pet. 30-32 (collecting authority).

Nevertheless, petitioners claim that this Court should grant review on the basis of a supposed conflict with the Ninth Circuit's decision in *Teter* v. *Lopez*, 76 F.4th 938, 942 (9th Cir. 2023), but that conflict has since resolved itself. While the petitions were pending, the Ninth Circuit granted en banc review and vacated the panel's decision. *Teter* v. *Lopez*, No. 20-15948, 2024 U.S. App. LEXIS 4079 (9th Cir. Feb. 22, 2024). That eliminates *Teter* as a basis for review, since a

supposed conflict with a vacated decision does not warrant this Court's intervention. See Stephen M. Shapiro, et al., SUPREME COURT PRACTICE 248 (10th ed. 2013) ("A conflict with a decision that has been discredited or that has lost all weight as authority by reason of intervening decisions of . . . the courts of appeals will not be an adequate basis for granting certiorari."). Rather, *Teter*'s vacatur only reinforces what the judgment's interlocutory posture already made apparent: this Court's review is premature.

While petitioners offer up other supposed conflicts among the circuits, none warrants review. Petitioner Herrera claims a conflict with *Ass'n of New Jersey Rifle & Pistol Clubs* v. *AG New Jersey*, 910 F.3d 106 (3d Cir. 2018), and *Fyock* v. *Sunnyvale*, 779 F.3d 991 (9th Cir. 2015), regarding whether magazines are "arms." Herrera Pet. 36. But this Court expressly overruled *New Jersey Rifle* for applying the wrong legal standard under the Second Amendment. *Bruen*, 597 U.S. at 19 & n.4. And while this Court did not overrule *Fyock*, that case, too, applied the legal standard overruled in *Bruen*. Indeed, neither decision even attempted to apply either step of *Bruen* – instead, they determined that magazines were arms not on the basis of text or history, but on a judicial evaluation of their supposed necessity. *New Jersey Rifle*, 910 F.3d at 116; *Fyock*, 779 F.3d at 998. Because neither *New Jersey Rifle* nor *Fyock* applied the standards announced in *Bruen*, they do not warrant review here. Shapiro, supra, at 248.

Petitioners further claim a circuit conflict regarding common use, Herrera Pet. 37, but, again, petitioners forfeited this issue below by arguing that commonality of use should *not* be taken into account because it was insufficiently protective of Second Amendment rights, 7R. 55 at 25. That forfeiture aside, this supposed conflict does not warrant review. One of the sources of this supposed conflict is *Teter*, which, again, has been vacated for en banc review.

Moreover, to the extent petitioners complain that other courts evaluate common use as a "statistical" matter, Herrera Pet. 37, acceptance of that position would not help petitioners. Under the Second Circuit's standard, a weapon "must actually be used lawfully." *New York State Rifle & Pistol Ass'n* v. *Cuomo*, 804 F.3d 242, 255 n.52 (2d Cir. 2015). But, again, petitioners offered no admissible evidence of actual use. And any supposed conflict with the Fifth Circuit's decision in *Hollis* is particularly weak – while *Hollis* acknowledged that *Cuomo* adopted a "statistical" view of common use, it ultimately concluded that the precise legal metric "does not matter" because the machine guns at issue there were not commonly used under any metric. 827 F.3d at 449.

III. No Extraordinary Circumstances Warrant Review.

Perhaps recognizing that they are unable to show

a direct conflict with this Court's decisions or an inter-circuit conflict, petitioners offer two reasons they believe that this case involves extraordinary circumstances warranting immediate review despite the lack of any conflict. First, they claim that immediate review is necessary because Illinois' regulation of assault weapons "can only be understood as a form of protest legislation," Barnett Pet. 16, a "fit of pique," *id.* at 14, a "retaliatory measure[ ]," GOA Pet. i, serving as an open "rebuke," Langley Pet. 2, or "defiance," *id.* at 4, of this Court and its decision in *Bruen*. Indeed, they even compare that regulation to Southern schools' refusal to racially integrate following *Brown*, *ibid.*, or the imposition of restrictions on the right to counsel following *Gideon*, Barnett Pet. 31. Second, they claim that the decision below was only the opening salvo in a far-flung judicial campaign to undermine the Second Amendment, this Court, and "the rule of law" itself. Barnett Pet. 3, 33.

These arguments are legally and factually meritless. As a threshold matter, the motives of *Illinois* lawmakers could not possibly justify review of the *County* regulation also challenged in this litigation. While petitioners falsely claim that Cook County acted "[a]gainst" *Heller* and *Bruen*, Herrera Pet. i; see *id.* at 3 (implying County acted "after *Bruen*"), the County's regulation was passed in 1994, in the wake of the 1989 Cleveland Elementary School massacre and takes its current name from a Chicago

teenager killed during a 2007 gang shooting. See *People* v. *Pace*, 44 N.E.3d 378 (Ill. App. 2015) (discussing Blair Holt murder). Its passage cannot possibly be characterized as a response to *Bruen*, let alone an act of defiance.

Further, it is a matter of public record that the Illinois legislature was motivated by the Highland Park parade massacre. *E.g.*, *Local Legislators Spent Years Trying to Pass Gun Laws. After Highland Park's Deadly Parade Shooting, Illinois Took Action*, https://news.wttw.com/2023/07/03/local-legislators-spent-years-trying-pass-gun-laws-after-highland-park-s-deadly-parade; Tina Sfondeles, *Illinois Assault Weapons Ban Advances After Democratic Deal, Echoes Of A Child's Screams,* CHICAGO SUN-TIMES (Jan. 9, 2023), https://chicago.suntimes.com/2023/1/9/23547414/assault-weapons-ban-illinois-state-senate-harmon-highland-park-harmon-pritzker-welch. Indeed, that motivation is so well known that even the dissenting judge below, despite agreeing with petitioners on the merits, accepted that Illinois sought to "prevent[ ] mass casualty events." Pet.App.84.

Tellingly, petitioners do not even reference the Highland Park massacre. They have instead chosen to ignore it, in the apparent hope that this Court will be unaware of the sequence of tragic local events that led Illinois to regulate assault weapons. This omission further indicates that review is inappropriate, since this Court has long expected that petitions be

"carefully prepared" and "contain appropriate references to the record and present with studied accuracy . . . whatever is essential to ready and adequate understanding of points requiring our attention." *Furness, Withy & Co.* v. *Yang-Tsze Insurance Asso.*, 242 U.S. 430, 434 (1917). Otherwise, "the rights of interested parties may be prejudiced and the court will be impeded in its efforts properly to dispose of the causes which constantly crowd its docket." *Id.* When, as here, petitioners omit "facts essential to an adequate appreciation to the situation," they do so at their own risk, because the subsequent discovery of that omission requires the petition's dismissal as improvidently granted. *Id.* at 431. That is so even if, as petitioners will likely claim, such a significant omission was somehow accompanied by "no purpose to mislead." *Id.* at 433.

Petitioners' claim that the decision below invited "contagious" "disrespect" of this Court jeopardizing "the rule of law," Barnett Pet. 33, is equally lacking. This is apparent when petitioners' "case in point" of a rogue court refusing to "follow this Court's precedents," *id.* at 34, is a decision of the Hawaii Supreme Court interpreting *the Hawaii Constitution*. *State v. Wilson*, 543 P.3d 440 (Haw. 2024) (interpreting article I, section 17 of Hawaii Constitution).[3] This Court's decisions in *Heller* and

[3] While *Wilson* also briefly addressed the Second Amendment, it

Bruen have no precedential force on matters of State law – whatever textual similarity that law may have to federal law – and thus need not be considered when interpreting State law, let alone given the binding effect petitioners demand. In short, what petitioners decry as "rebellion" was faithful adherence to a cornerstone principle of federalism that demands federal respect, not ridicule, and cannot warrant review.

Petitioners' other examples are equally unhelpful. Petitioners argue the Eleventh Circuit defied this Court by considering Reconstruction-era sources, GOA Pet. 33 (citing *NRA* v. *Bondi*, 61 F.4th 1317 (11th Cir. 2023)), but do not reconcile this position with Justice Barrett's observation that *Bruen* left open what weight, if any, should be given to such sources, *Bruen*, 597 U.S. at 82 (Barrett, J., concurring). Regardless, *Bondi* has been vacated, 72 F.4th 1346 (11th Cir. 2023), along with its purported defiance. Next, petitioners claim the Second Circuit "distinguish[ed] *Bruen* as an 'exceptional' decision that need not be followed too closely," GOA Pet. 33 (citing *Antonyuk* v. *Chiumento*, 89 F.4th 271 (2d Cir. 2023)). Petitioners never explain *where* the court said any such thing, though, because no such statement appears in *Antonyuk*, which noted only the

---

held only that the defendant lacked standing because he failed to obtain a firearms license, which would have allowed him to engage in his desired activity. 543 P.3d 440, 444 (Haw. 2024).

"exceptional nature *of New York's proper-cause requirement*." 89 F.4th 271, 302 (emphasis added). They further accuse the First Circuit of faithlessness to *Bruen* by considering whether regulating large-capacity magazines meaningfully burdens self-defense, GOA Pet. 33 (citing *Ocean State Tactical, LLC* v. *Rhode Island*, 95 F.4th 38 (1st Cir. 2024)), but this is specifically required at *Bruen*'s second step, where a regulation's burden on self-defense is considered. 597 U.S. at 29.

Unable to demonstrate contagious defiance of this Court's rulings, petitioners invite this Court to glean malfeasance from a procedural act of the Fourth Circuit. Petitioners argue that a "procedural irregularity" in a Fourth Circuit case involving assault weapons shows that court is surreptitiously "prevent[ing] a panel opinion—with which a majority of the court apparently disagreed—from seeing the light of day." Harrel Pet. 31. But there was no "irregularity" – the en banc court merely granted review before decision, *Bianchi* v. *Brown*, No. 21-1255, 2024 U.S. App. LEXIS 974, *1 (4th Cir. Jan. 12, 2024), as authorized by Fed. R. App. P. 35(a). Reflecting that fact, the dissent to which petitioners attribute their accusation of procedural impropriety made no such accusation itself – to the contrary, it acknowledged that "en banc hearing may be requested at anytime," and complained only about a break from "traditional practice." *Wise* v. *Circosta*, 978 F.3d 93, 118 (4th Cir. 2020) (Niemeyer, J., dissenting). That problem aside,

the supposed conspiracy is nonsensical. Granting en banc review hardly silenced the panel, who could have dissented from en banc review (but, notably, did not) and remain free to express their views in a concurrence, dissent, or the ultimate en banc majority opinion.

IV. The Judgment Below Is Correct.

Finally, the judgment below was correct.

Regarding *Bruen*'s first step, this Court made clear in *Heller* that "the sorts of weapons protected" by the Second Amendment "[a]re those 'in common use at the time.'" 554 U.S. at 627. And it falls on petitioners to demonstrate that a weapon is commonly used, as *Bruen* demonstrated when it considered common use at the first step, before the burden shifted to the government. 597 U.S. at 32-33.

Petitioners ran aground on this modest burden. Despite bearing the burden to show common use, petitioners offered no admissible evidence of use, and even admitted below that they would not prevail if such evidence were required. 7R. 55 at 25. Rather, they focused on sales and ownership, *e.g.*, Harrel Pet. 24-25; NAGR Pet. 10; Herrera Pet. 31-32; Barnett Pet. 4-5. But ownership is not the test, as illustrated by *Bruen* itself, which repeatedly focuses on the commonness of a weapon's *use*. *E.g.*, 597 U.S. at 21. And regarding actual use, all that petitioners

mustered were surveys recounting unidentified individuals' explanations why they supposedly *purchased* assault weapons. Harrel Pet. 8. But those surveys show only intent, not use, and are anyway inadmissible double hearsay. See *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, 618 (1974). Absent admissible evidence of common use, petitioners failed to show any likelihood of success on the merits, warranting denial of preliminary injunctive relief.

The failure of petitioners' evidence is particularly stark when it is remembered they seek the facial invalidation of the regulations at issue. Barnett Pet. 12. Facial challenges require proof that the law at issue is unconstitutional in every conceivable circumstance. *Salerno*, 481 U.S. at 745. And petitioners concede that, to make such a showing here, they would have to show that every weapon regulated is commonly used for a lawful purpose. Barnett Pet. 32-33. The respondents regulate a wide variety of weapons defined as "assault weapons," including grenade launchers. R. 60-2 at 5. But no petitioner claimed in the Seventh Circuit a desire to obtain a grenade launcher or anything of the like, focusing instead on models of handguns and rifles with particularly lethal features qualifying them as assault weapons. They would have had to show not only that semiautomatic rifles are commonly used for lawful purposes, but the same for semiautomatic shotguns with revolving cylinders and "grenade, flare

or rocket launcher[s]," which also fall within the County's definition of prohibited weapons. Petitioners did not attempt this showing – indeed, they rest their requests for review on their belief they will be unable to make that showing, see Barnett Pet. 33 – precluding relief under *Salerno* and requiring affirmance regardless of what supposed legal errors occurred below. This precludes petitioners from seeking facial relief, since invalidation of a prohibition on ownership of particular weapons they did not claim to desire – or even claim they would be able to obtain absent the challenged regulations – would not redress any injury they supposedly suffer.

In arguing that common possession should suffice to show common use, petitioners seize upon *Heller*'s statement "that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." 554 U.S. at 625. But that states the obvious – if a weapon is not commonly possessed, it naturally follows that it is not commonly used, either. It cannot be fairly read to negate countless *Bruen*'s and *Heller*'s references to "use."

Petitioners also make much of this Court's statement that "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), treating that statement as establishing that all weapons are conclusively "arms"

for purposes of *Bruen*'s first step. But in making this argument, petitioners overlook that *Heller* excluded military-grade weapons, and those not commonly used for lawful purposes, from the definition of "arms." 554 U.S. at 624-25. Further, the term "prima facie," makes clear that bearable arms are only *presumptively* within the Second Amendment's text. See BLACK'S LAW DICTIONARY 1228 (8th ed. 2004) (defining "prima facie" as "Sufficient to . . . raise a presumption . . . ."); accord, *e.g.*, *Bailey* v. *Alabama*, 219 U.S. 219, 234 (1911). The common-use test explains when that presumption falls away: when, as here, the weapons at issue are not commonly used. Absent proof of common use, petitioners' requests for preliminary injunctive relief failed *Bruen*'s first step as a matter of law, requiring affirmance.

Even if the analysis proceeded to *Bruen*'s second step, the result would be the same. As *Heller* explained, "the inherent right of self-defense has been central to the Second Amendment right." 554 U.S. at 628. And *Bruen* anchored the second-step analysis in that right, explaining that a challenged regulation must be analyzed by considering specifically how it burdens an individual's "*right* to armed self-defense." 597 U.S. at 29 (emphasis added). But before it can be determined how significantly a historical or modern regulation burdens the right to self-defense, it must first be determined what that right *is* – in other words, how the Framers would have understood that right at the time of the Second Amendment's passage.

Neither *Heller* nor *Bruen* explored that scope of the historical self-defense right, so it is necessary to turn to original sources. On that subject, William Blackstone – the Framers' "preeminent authority on English law," *Alden* v. *Maine*, 527 U.S. 706, 715 (1999) – teaches that killing in self-defense is a form of excused homicide, 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 182 (Oxford 2016).[4] And as Blackstone explains, the acts that constituted excusable homicide at English common law end at "the bounds of moderation, either in the manner, *the instrument*, or the quantity," so an act otherwise permissible by the law becomes "manslaughter at least, and in some cases (according to the circumstances) murder" if a person uses a weapon or implement excessive for an otherwise-lawful task. *Id.* at 182-83 (emphasis added). As Blackstone summarized this rule, "'*immoderate suo jure utatur, tunc reus homicidii sit* [if he use his right beyond the bounds of moderation, then he is guilty of homicide].'" *Id.* at 183. Indeed, at English common law, "excessive" actions "could not proceed but from a bad heart" and are thus "equivalent to a deliberate act of slaughter." *Id.* at 199-200.

These inherent limits of the self-defense right are

---

[4] We cite Blackstone's pagination of the Commentaries, provided in the Oxford edition, not to the Oxford book's internal pagination, for ease of reference across editions.

reflected in decisions of the English courts themselves dating back to at least 1705. As Chief Justice Holt then explained, moderation was a central component of English self-defense, which is inapplicable to "*excessive*" force because the law only protects the use of weapons that are actually "necessary for a man's defense." *Cockcroft* v. *Smith*, 11 Mod. 43 (King's Bench 1705). This is because the English law of self-defense did not grant the right "in case of a small assault, [to] give a violent or unsuitable return." *Id.* Put another way, "hitting a man with a little stick on the shoulder, is not reason for him to draw a sword and cut and hew the other." *Id.*

This traditional understanding of the self-defense right crossed the Atlantic and found its way into early American criminal law. In fact, one of the earliest reported American decisions regarding self-defense rejected that defense because it was not "necessary for the prisoner to avail himself of the instrument" — there, a club — "which occasioned the death. On his own confession, much less would have been sufficient," making his actions "clearly manslaughter." *State* v. *Wells*, 1 N.J.L. 486, 493 (N.J. 1790). And in reaching that conclusion, *Wells* relied on a decades-old English case, *Reg. v. Nailor*, Foster Crown Cases 278 (unreported) (Old Bailey 1704), which rejected a plea of self-defense – despite the fact the defendant "could not escape nor avoid the blows" of his attacker – because his use of a penknife to wound and ultimately kill an unarmed attacker was

not necessary given the threat he faced. *Wells*, 1 N.J.L. at 492.

Significantly, the compatibility of a weapon with lawful, moderate self-defense is relevant not only to criminal prosecutions, but also to whether a particular weapon's use may be legally prohibited. See, *e.g.*, *Benjamin* v. *Bailey*, 662 A.2d 1226, 1232 (Conn. 1995) *People* v. *Brown*, 235 N.W. 245, 247 (Mich. 1931); *People* v. *Persce*, 97 N.E. 877, 879, (N.Y. 1912); *State* v. *Duke*, 42 Tex. 455, 458-459 (Tex. 1874). The example of this most familiar to lawyers is the longstanding prohibition on spring guns. Although the English commonly used spring guns "against poachers and trespassers," Ed Tangen, *Spring Guns*, 1 AM J. POLICE SCI. 307, 307 (1930), Parliament all but banned their use in 1827, Spring Gun Act 1827, 7 & 8 Geo. 4, ch. 18 (now recodified as Offenses Against The Person Act 1861, 24 & 25 Vict., ch. 100, § 31). This was out of concern that their use violated the common-law principle that a response to aggression may never "exceed[ ] the limits of a just and necessary defence." House of Commons Debates, March 23, 1827, vol. 17, cc19-34 (comments of Sir Edmund Carrington). The American legal prohibition on spring guns reflects the same concern, *e.g.*, *Katko* v. *Briney*, 183 N.W.2d 657, 661 (Iowa 1971), which is so well-settled in American law that it is literally taught to first-year law students.

Application of the moderation principle to assault weapons and large-capacity magazines leads to the same results. Assault weapons are the descendants of weapons of war, capable of producing astonishing harm to the human body – decapitation, R. 60-1 at 14, exploded limbs and organs, R. 60-12 at 2, lethal wounds the size of soda cans, R. 60-4 ¶109 – that is fundamentally incompatible with the moderate, proportional self-defense recognized at English common law. And a large-capacity magazine – useful only to an individual intending to quickly fire off dozens of rounds of ammunition – is, by its very nature, incompatible with the concept of a proportionate, moderate response to a perceived threat. As a result, both are "militaristic" weapons that may be withheld from civilian ownership, Pet.App.42, just like the M16 machinegun that *Heller* recognized may be banned, 554 U.S. at 627.

Tellingly, petitioners ignored this historical evidence below – and continue to do so, see Herrera Pet. 3 (falsely claiming County "did nothing" to establish tradition) – and never explained why regulations of assault weapons and large-capacity magazines are inconsistent with the ancient tradition of moderate self-defense.[5] Instead, they cursorily

---

[5] While one Herrera amicus now claims John Locke believed "one has the right to kill even a petty thief in self-defense," FML Amicus 2, that was murder at English common law. It also misunderstands Locke, who did not endorse the wanton killings

denied that the self-defense right required moderation, 7R. 55 at 35, a frivolous argument given the English authority to the contrary, *Cockcroft*, 11 Mod. 43. This failure to meaningfully dispute the existence of a longstanding tradition directly supporting the regulations at issue here forfeits any argument on that point. That forfeiture, standing alone, warrants affirmance, bringing this response back to where it began: this case is an exceedingly poor vehicle for review.

---

of the "state of nature," but rather offered them as "one great reason of men's putting themselves into society." John Locke, SECOND TREATISE OF GOVERNMENT § 21.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

KIMBERLY M. FOXX
COOK COUNTY STATE'S ATTORNEY
CATHY MCNEIL STEIN
JESSICA M. SCHELLER*
JONATHON D. BYRER
PRATHIMA YEDDANAPUDI
EDWARD M. BRENER
500 Richard J. Daley Center
Chicago, IL 60602
(312) 603-6934
jessica.scheller@cookcountysao.org

Attorneys for Respondents

*Counsel of Record

April 15, 2024

SUPREME COURT OF THE UNITED STATES

No. 23-877, 23-878, 23-879, 23-880, 23-944, 23-1010

---X

DANE HARREL, ET AL.,

Petitioners,

v.

KWAME RAOUL, ET AL.,

Respondents.

---X

JAVIER HERRERA,

Petitioner,

v.

KWAME RAOUL, ET AL.,

Respondents.

---X

CALEB BARNETT, ET AL.,

Petitioners,

v.

KWAME RAOUL, ET AL.,

Respondents.

---X

NATIONAL ASSOCIATION FOR GUN RIGHTS, ET AL.,

Petitioners,

v.

CITY OF NAPERVILLE, ILLINOIS, ET AL.,

Respondents.

---X

---X

JEREMY W. LANGLEY, ET AL.,

Petitioners,

v.

BRENDA F. KELLY, ET AL.,

Respondents.

---X

NATIONAL ASSOCIATION FOR GUN RIGHTS, ET AL.,

Petitioners,

v.

KWAME RAOUL, ET AL.,

Respondents.

---X

CERTIFICATE OF WORD COUNT

As required by Supreme Court Rule 33.1(h), I certify that the document contains 8,613 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 15, 2024

Noel Reyes

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859
www.counselpress.com

Sworn to and subscribed before me this 15th day of April, 2024.

Mariana Braylovskiy

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026

#328049

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859
www.counselpress.com

AFFIDAVIT OF SERVICE

SUPREME COURT OF THE UNITED STATES

No. 23-877, 23-878, 23-879, 23-880, 23-944, 23-1010

--X

DANE HARREL, ET AL.,

Petitioners,

v.

KWAME RAOUL, ET AL.,

Respondents.

--X

JAVIER HERRERA,

Petitioner,

v.

KWAME RAOUL, ET AL.,

Respondents.

--X

CALEB BARNETT, ET AL.,

Petitioners,

v.

KWAME RAOUL, ET AL.,

Respondents.

--X

--X

NATIONAL ASSOCIATION FOR GUN RIGHTS, ET AL.,

Petitioners,

v.

CITY OF NAPERVILLE, ILLINOIS, ET AL.,

Respondents.

--X

JEREMY W. LANGLEY, ET AL.,

Petitioners,

v.

BRENDA F. KELLY, ET AL.,

Respondents.

--X

NATIONAL ASSOCIATION FOR GUN RIGHTS, ET AL.,

Petitioners,

v.

KWAME RAOUL, ET AL.,

Respondents.

--X

STATE OF NEW YORK)

COUNTY OF NEW YORK)

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859
www.counselpress.com

I, Noel Reyes, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by Counsel of Record for *Respondent(s).*

That on the 15th day of April, 2024, I served the within *Brief in Opposition of Respondents Cook County, Toni Preckwinkle, Kimberly M. Foxx, and Thomas J. Dart* in the above-captioned matter upon:

David H. Thompson
Cooper & Kirk, PLLC
Attorneys for Petitioners Dane Harrell, et al.
1523 New Hampshire Ave, N.W.
Washington, DC 20036
(202) 220-9600
DTHOMPSON@COOPERKIRK.COM

Jane Elinor Notz
Office of the Attorney General,
State of Illinois
Attorneys for Kwame Raoul, Cities of Chicago and Naperville, et al.
115 South LaSalle Street, 23rd Floor
Chicago, IL 60603
(312) 814-5376
JANE.NOTZ@ILAG.GOV

Gilbert Charles Dickey
Consovoy McCarthy, PLLC
Attorneys for Petitioner Javier Herrera
1600 Wilson Boulevard, Suite 700
Arlington, VA 22209
(703) 243-9423
gilbert@consovoymccarthy.com

Erin E. Murphy
Clement & Murphy
Attorneys for Petitioners Caleb Barnett, et al.
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
ERIN.MURPHY@CLEMENTMURPHY.COM

Barry Kevin Arrington
Arrington Law Firm
Attorneys for Petitioners National Association for Gun Rights, et al.
4195 Wadsworth Boulevard
Wheat Ridge, Co 80033
(303) 205-7870
BARRY@ARRINGTONPC.COM

Robert Jeffrey Olson
William J. Olson P.C.
Attorneys for Petitioners Gun Owners of America, inc. et al.
370 Maple Avenue, West, Suite 4
Vienna, VA 22180-5615
(703) 356-5070
rob@wjopc.com

Thomas G. Maag
Attorneys for Petitioners
Maag Law Firm, LLC
22 West Lorena Avenue
Wood River, IL 62095
(618) 216-5291
tmaag@maaglaw.com

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859
www.counselpress.com

by sending three copies of same, addressed to each individual respectively, through FedEx Overnight Mail. An electronic version was also served by email to each individual.

That on the same date as above, I sent to this Court forty copies copy of the within *Brief in Opposition of Respondents Cook County, Toni Preckwinkle, Kimberly M. Foxx, and Thomas J. Dart* through the Overnight Next Day Federal Express, postage prepaid. prepaid. In addition, the brief has been submitted through the Court's electronic filing system.

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 15th day of April, 2024.

Noel Reyes

Sworn to and subscribed before me this 15th day of April, 2024.

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026

#328049