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.

JAVIER HERRERA,
Petitioner,

v.

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

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

BRIEF IN OPPOSITION FOR THE STATE OF ILLINOIS, CITY OF CHICAGO, AND CITY OF NAPERVILLE RESPONDENTS

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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.

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QUESTION PRESENTED

Whether petitioners are entitled to a preliminary injunction on their claim that state and local laws restricting civilian possession of assault weapons and large-capacity ammunition feeding devices violate the Second Amendment.

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BRIEF IN OPPOSITION

Fourteen States, including Illinois, have enacted laws restricting most civilians from possessing certain types of semiautomatic firearms, ammunition magazines, or both: those that allow shooters to fire many rounds in rapid succession without reloading, making them the instruments of choice in mass shootings. Illinois's law was enacted in 2023 after a shooter armed with an AR-15-style rifle and 30-round magazines fired 83 rounds in less than a minute, killing 7 and wounding 48 at an Independence Day parade in Highland Park, Illinois. The Illinois law is similar to laws enacted by the City of Chicago in 1992 and 2010 and Cook County (Illinois's largest county) in 1993. Petitioners brought Second Amendment challenges to these laws, as well as a ban on commercial sales of "assault rifles" enacted by Naperville, Illinois. After two district courts declined to preliminarily enjoin the laws, and a third granted a preliminary injunction, the Seventh Circuit consolidated the interlocutory appeals.

Following expedited briefing and argument, the Seventh Circuit concluded that preliminary injunctive relief was not warranted because petitioners had not shown a likelihood of success on the merits. The court emphasized that it was not "definitively" rejecting petitioners' claims, but instead based its ruling on the record developed "in the early phases of [the] litigation." Pet.App.18, 40.[1]

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[1] Citations to the *Barnett* dockets appear as "Doc. __," "7th Cir. Doc. __," "Pet.__," and "Pet.App.__." The other dockets are cited by their case name.

The Seventh Circuit was the first circuit court to consider a Second Amendment challenge to a restriction on semiautomatic firearms or ammunition magazines after *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). And the only other circuit court to consider such a challenge after *Bruen* held, like the Seventh Circuit, that the challengers were not entitled to a preliminary injunction. See *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38 (1st Cir. 2024). There is thus no conflict among the federal courts of appeal on the question presented. Meanwhile, the question continues to percolate in at least seven circuits. In addition, this case is a poor vehicle to resolve the question presented because its interlocutory posture means that the record is still being developed and the preliminary injunction factors not reached by the Seventh Circuit provide alternate grounds for affirmance.

Petitioners seek to overcome the fact that the case is not certworthy by arguing that lower courts are "[d]isrespect[ing]" *Bruen* and the Second Amendment. *E.g.*, Pet.33. But there is no reason for the Court to depart from its usual certiorari criteria. It has been less than two years since *Bruen*, and courts are applying it carefully to laws restricting semiautomatic weapons and ammunition magazines—many of which have been on the books for decades. And as the decision below demonstrates, they are doing so in a manner consistent with *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *Bruen*.

Indeed, as the Seventh Circuit explained, the restricted firearms and magazines are not "arms" protected by the plain text of the Second Amendment: ra-

ther, at least on the record developed at the preliminary injunction stage, they are "more like machineguns and military-grade weaponry" that *Heller* stated "'may be banned.'" Pet.App.31, 36, 40 (quoting *Heller*, 554 U.S. at 627). In addition, the Seventh Circuit found, the challenged laws are consistent with this Nation's historical tradition of regulating firearms. Specifically, to protect public safety, there is a historical tradition of "regulating the especially dangerous weapons of the time" in the civilian population and reserving them, as appropriate, to the military and law enforcement, while leaving "[m]any other" weapons "universally available" for lawful self-defense. Pet.App.48.

STATEMENT

1. On July 4, 2022, a shooter armed with a semiautomatic AR-15-style rifle and 30-round magazines opened fire at a parade in Highland Park, Illinois. Doc. 37-2 ¶¶18-20. The weapon allowed the shooter to fire 83 rounds in less than a minute, killing 7 and wounding 48. *Id.* A local ordinance prohibited the sale of this type of firearm, but the shooter had legally purchased his elsewhere in Illinois. *Id.* ¶22.

On January 10, 2023, Illinois enacted the Protect Illinois Communities Act ("Act"), which restricts the sale, purchase, manufacture, delivery, importation, and possession of the instruments often chosen by mass shooters: assault weapons and large-capacity ammunition feeding devices ("LCMs"). 720 ILCS 5/24-1.9, 1.10. As the Seventh Circuit noted, the Act uses

language similar to the Federal Assault Weapons Ban. Pet.App.9. [2]

Consistent with its goal of restricting instruments chosen by mass shooters, the Act defines assault weapons in terms of the features that render them ill-suited for civilian self-defense but appropriate for offensive, combat-specific uses. *E.g.*, Doc. 37-7 ¶¶12-28. The definition thus includes semiautomatic rifles with the capacity to accept "detachable magazine[s]" and at least one of the following: a pistol grip or thumbhole stock, a protruding grip held by the non-trigger hand, a flash suppressor, a grenade launcher, a barrel shroud, or a folding, telescoping, detachable, or other stock that enhances concealability. 720 ILCS 5/24-1.9(a)(1)(A). As one of respondents' experts explained, each of these features, which render assault weapons useful on the battlefield, is unnecessary for effective self-defense. Doc. 37-7 ¶¶12-28. For instance, although a pistol grip or thumbhole stock "may be useful during military operations because it helps the shooter stabilize the weapon and reduce muzzle rise during rapid fire, [it] is not necessary to operate a firearm safely in lawful self-defense situations." *Id.* ¶¶13-14; see also, *e.g.*, *id.* ¶15 (protruding grips were "developed as a feature for troops charged with fast and efficient killing of enemy combatants in offensive warfare," but are unnecessary for self-defense). Likewise, flash suppressors enable soldiers to "stay[ ] on target in extended rapid-fire situations" by reducing

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[2] The Federal Assault Weapons Ban was in effect from 1994 until it expired under its sunset provision in 2004. See Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, tit. XI, subtit. A, 108 Stat. 1796, 1996-2010 (1994).

"the prevalence of 'night blindness' that can develop during low-light firefights," but are unnecessary for self-defense. *Id.* ¶17. And barrel shrouds are "useful in military operations"—but unnecessary for self-defense—because they "allow the shooter to attach various accessories" like lights, optical sights, and laser aiming devices. *Id.* ¶19.

The Act's definition of "assault weapon" also includes semiautomatic pistols and shotguns that meet a similar features-based definition, as well as semiautomatic rifles with fixed magazines holding more than 10 rounds of ammunition, semiautomatic pistols with fixed magazines holding more than 15 rounds, shotguns with revolving cylinders, and semiautomatic firearms accepting belt-fed ammunition. 720 ILCS 5/24-1.9(a)(1)(B)-(G). These round-capacity limitations mirror those in the definition of LCMs, which are defined as a magazine or similar device that accepts more than 10 rounds for long guns or 15 rounds for handguns. *Id.* 5/24-1.10(a). As respondents' expert detailed, there is no self-defense need for round capacity of this magnitude. *E.g.*, Doc. 37-7 ¶28. Finally, the Act lists specific firearms models that fall within its definition of "assault weapon." 720 ILCS 5/24-1.9(a)(1)(J)-(L). This list, which generally duplicates the features-based definition, allows buyers and sellers to easily discern whether a particular firearm is within the Act's purview.

The Act includes several exceptions. It excludes inoperable or antique firearms, air rifles, handguns (unless they have the features prohibited by the Act), and firearms operated by bolt, pump, lever, or slide action. *Id.* 5/24-1.9(a)(2). The Act's restrictions do not apply to law enforcement, members of the military, and

other professionals with similar firearms training and experience. *Id.* 5/24-1.9(e), 1.10(e). And individuals who lawfully possessed assault weapons and LCMs prior to the Act can continue to do so, either by registering their assault weapons with the State by January 1, 2024 or, in the case of LCMs, by retaining them. *Id.* 5/24-1.9(c)-(d), 5/24-1.10(c)-(d). To assist Illinois residents with this process, the State Police made informational materials available on its website, notified all licensed firearms owners of the registration opportunity via an online portal, and provided a three-month window to register. Doc. 131 at 5-6.

Like the Act, Naperville's law was enacted in response to the Highland Park mass shooting. It prohibits the commercial sale of assault rifles within city limits. Naperville Mun. Code § 3-19-2. Its definition of "assault rifle," like the Act's, identifies weapons by features and by make and model. *Id.* § 3-19-1.

Additionally, the City of Chicago and Cook County have long imposed restrictions on assault weapons and LCMs. The City first restricted assault weapons in 1992, and LCMs in 2010. Chicago's current law makes it unlawful, subject to certain exceptions, "to import, sell, manufacture, transfer, or possess an assault weapon." Mun. Code of Chicago, Ill. § 8-20-075. "Assault weapon" is defined by features and by make and model. *Id.* § 8-20-010. The law also prohibits the carriage, possession, and sale of LCMs that accept more than 15 rounds of ammunition. *Id.* §§ 8-20-010, 8-20-085(a). The current version of the Cook County law, which was first enacted in 1993, prohibits possession, carriage, manufacture, and sale of assault weapons and LCMs with the capacity to accept more than 10 rounds of ammunition. Cook Cnty. Ord. § 54-212.

The ordinance defines "assault weapons" by features and provides a list of prohibited models. *Id.* § 54-211.

2. Six groups of plaintiffs filed suit challenging the Act's restrictions on assault weapons and LCMs. One set of plaintiffs also challenged the Naperville ordinance, and another plaintiff challenged the Chicago and Cook County ordinances.

Four of the complaints against the Act were filed in the U.S. District Court for the Southern District of Illinois, which consolidated the cases and granted a preliminary injunction. Pet.App.107-109. The court did not examine the historical record other than to say that the Act is not relevantly similar to the historical analogues identified by state respondents, which it characterized as "conceal carry regulations." Pet.App.132 (cleaned up). Rather, it held that state respondents had failed to show that assault weapons and LCMs were not in "common use," Pet.App.130, which was "dispositive," Pet.App.132. The Seventh Circuit stayed the injunction pending appeal. Pet.App.2-4.

Meanwhile, Javier Herrera filed suit in the U.S. District Court for the Northern District of Illinois, challenging the Chicago and Cook County ordinances, as well as the Act. The district court denied a preliminary injunction, determining that the restrictions on assault weapons and LCMs are consistent with this country's tradition of firearms regulation. *Herrera* Pet.App.134. The court rejected Herrera's contention that 18th- and 19th-century laws—many of which restricted concealed carry—were insufficient analogues, *Herrera* Pet.App.124, and instead applied the "'more nuanced approach'" *Bruen* endorsed for determining

whether historical and modern-day regulations are analogous, *ibid.* (quoting *Bruen*, 597 U.S. at 27). That approach was appropriate because the laws "responded to 'dramatic technological changes' and 'unprecedented societal concerns' of increasing mass shootings by regulating the sale of weapons and magazines used to perpetrate them." *Herrera* Pet.App.125 (quoting *Bruen*, 597 U.S. at 27). And under that approach, the Act is "well in line" with historical laws regulating weapons "in response to the type of harm that those weapons presented." *Herrera* Pet.App.124-125.

The final set of plaintiffs challenged the Act's restrictions on assault weapons and LCMs by filing an amended complaint in a case challenging Naperville's restrictions on the commercial sale of assault rifles. *NAGR* Doc. 48. The district court denied preliminary injunctive relief, concluding that "Naperville's Ordinance and the [Act] are consistent with the Second Amendment's text, history, and tradition." *NAGR* Pet.App.115. In particular, "the text of the Second Amendment is limited to only certain arms, and history and tradition demonstrate that particularly 'dangerous' weapons [like assault weapons and LCMs] are unprotected." *NAGR* Pet.App.133 (quoting *Heller*, 554 U.S. at 627).

3. The Seventh Circuit consolidated the six cases, expedited briefing and argument, and held in a 2-1 decision that petitioners were not entitled to a preliminary injunction. Pet.App.3-4, 7. The court concluded that petitioners had not shown a likelihood of success on the merits under *Bruen*'s standard, which considers whether the regulated conduct is covered by the text of the Second Amendment and, if so, whether the

regulation is consistent with this Nation's tradition of regulating firearms. Pet.App.7, 27. The court noted that this result, as well as the underlying methodology, was "basically compatible" with *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015), which upheld similar restrictions on assault weapons and LCMs by looking to history and tradition (as opposed to employing means-ends scrutiny). Pet.App.23.

At *Bruen*'s first step, the Seventh Circuit looked to "the 'plain text' of the Second Amendment to see whether the assault weapons and [LCMs] . . . fall within the scope of the 'Arms' that individual persons are entitled to keep and bear." Pet.App.29. The court explained that "[b]oth Supreme Court decisions and historical sources indicate that the Arms the Second Amendment is talking about are weapons in common use for self-defense," Pet.App.29-30, and "[n]ot machineguns . . . because they can be dedicated exclusively to military use," Pet.App.31. Accordingly, petitioners bore "the burden of showing that the weapons addressed in the pertinent legislation are Arms that ordinary people would keep at home for purposes of self-defense, not weapons that are exclusively or predominantly useful in military service, or weapons that are not possessed for lawful purposes." Pet.App.32-33.

Based on the record before it, petitioners had not satisfied this burden because "assault weapons and [LCMs] 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." Pet.App.36. In particular, the Seventh Circuit noted, "we are not persuaded that the AR-15 is materially different from the M16," which "*Heller*

informs us . . . is not protected by the Second Amendment, and therefore may be regulated or banned." Pet.App.40. The court made clear, however, that this was only "a preliminary look at the subject" based on the record amassed in "the early phases of litigation." *Ibid.* It therefore did not "rule out the possibility" that petitioners could present evidence "that shows a sharper distinction between AR-15s and M16s." Pet.App.40-41.

The Seventh Circuit then turned to the second step of the *Bruen* analysis and concluded that petitioners had not shown a likelihood of success at that step on the current record. At this step, respondents bore the burden of showing that the restrictions are "consistent with the history and tradition of firearms regulation," which the court assumed, without deciding, included an assessment of "whether the regulated weapons are 'in common use.'" Pet.App.41. This inquiry, however, cannot be based "on numbers alone," as petitioners had argued, and must instead be anchored in history and tradition. Pet.App.43. Otherwise, the analysis would have "anomalous consequences." *Ibid.* For example, in 1994, the Federal Assault Weapons Ban "made civilian possession of AR-15s (among other assault weapons) unlawful," and "few civilians owned AR-15s." *Ibid.* But after the legislation expired in 2004, "these weapons began to occupy a more significant share of the market." *Ibid.* If common use were tied solely to numbers, "the federal ban would have been constitutional before 2004, but unconstitutional thereafter." Pet.App.44. Similarly, the constitutionality of the federal anti-machinegun statute (which *Heller* had confirmed, Pet.App.22) would depend on that statute's continued existence. Pet.App.25.

Thus, the Seventh Circuit explained, it would not base its assessment on mere numbers; instead, respondents could show that the restrictions were constitutional by showing they are part of the "'enduring American tradition of state regulation,'" based on the answers to two questions: (1) "how," and (2) "why," does the "regulation 'burden a law-abiding citizen's right to armed self-defense?'" Pet.App.44-45 (quoting *Bruen*, 597 U.S. at 29, 69). Here, respondents had satisfied this standard by pointing to historical regulations that imposed comparable burdens on the Second Amendment right as the challenged laws, and were enacted to "advance similar purposes." Pet.App.46. For example, there is a "long-standing tradition of regulating the especially dangerous weapons of the time, whether they were firearms, explosives, Bowie knives, or other like devices," to protect public safety. Pet.App.45. And, as part of this tradition, there is a "long" history of allowing "the military and law enforcement [to] have access to especially dangerous weapons," while restricting "civilian ownership of those weapons." Pet.App.48; see also Pet.App.49-51 (examples of comparable historical regulations).

REASONS FOR DENYING THE PETITION

The petition should be denied. This case is not certworthy: There is no circuit split on the question presented, and the interlocutory posture makes it a poor vehicle for resolving that question. Nor should this Court overlook the certiorari criteria and decide the question on an underdeveloped record, where there are alternate grounds for affirmance, and without the benefits of percolation among the circuit courts. Courts are working with diligence and care to apply the text-and-tradition standard announced two

years ago in *Bruen* to laws prohibiting civilian possession of assault weapons and LCMs—many of which have been on the books for decades. And, as the decision below demonstrates, they are doing so in a manner consistent with *Heller* and *Bruen*.

I. This Case Does Not Satisfy The Criteria For Certiorari.

A. There is no division of authority on the question presented.

1. Certiorari is unwarranted because there is no conflict among federal courts of appeals or state courts of last resort on the question presented. S. Ct. R. 10. Since *Bruen*, only two such courts have considered Second Amendment challenges to laws prohibiting civilian possession of assault weapons or LCMs: the decision below and a First Circuit opinion reaching a similar result. See *Ocean State Tactical, LLC*, 95 F.4th at 41.

Instead, cases considering such challenges are percolating in lower courts throughout the country. There are at least 10 cases pending in the federal courts of appeals (not to mention others in federal district courts and state courts) challenging such laws. See *Viramontes v. County of Cook*, No. 24-1437 (7th Cir.); *Capen v. Campbell*, No. 24-1061 (1st Cir.); *Miller v. Bonta*, No. 23-2979 (9th Cir.) (argued Jan. 24, 2024); *Duncan v. Bonta*, No. 23-55805 (9th Cir.) (argued Mar. 19, 2024); *Grant v. Lamont*, No. 23-1344 (2d Cir.); *Nat'l Ass'n of Gun Rights v. Lamont*, No. 23-1162 (2d Cir.); *Fitz v. Rosenblum*, Nos. 23-35478, 23-35479, 23-35539, 23-35540 (9th Cir.); *Hanson v. Dist. of Columbia*, No. 23-7061 (D.C. Cir.) (argued Feb. 13, 2024); *Del. State Sportsmen's Ass'n, Inc. v. Del. Dep't of*

Safety & Homeland Sec., Nos. 23-1633, 23-1634, 23-1641 (3d Cir.) (argued Mar. 11, 2024); *Bianchi v. Frosh*, No. 21-1255 (4th Cir.) (argued Mar. 20, 2024).

Petitioners' request is thus premature because it seeks to short-circuit the ordinary percolation process. See, *e.g.*, *United States v. Mendoza*, 464 U.S. 154, 160 (1984) (noting "the benefit [the Court] receives from permitting several courts of appeals to explore a difficult question before [it] grants certiorari"). And the benefits of percolation are especially pronounced in constitutional cases like this one because "the Court's decisions cannot be overruled by statutory amendments." Stephen M. Shapiro, *et al.*, Supreme Court Practice § 6.37(i)(1) (11th ed. 2019). The Court should thus follow its ordinary course: It should deny review and allow the question presented to continue to percolate in the circuit courts.

2. For their part, petitioners unsuccessfully attempt to manufacture a circuit split. But across six petitions, they agree on only one case that they believe conflicts with the Seventh Circuit's decision: *Teter v. Lopez*, 76 F.4th 938 (9th Cir. 2023). See, *e.g.*, Pet.30-31; *Harrel* Pet.30; *Herrera* Pet.35-36; *NAGR* Pet.17. But the Ninth Circuit recently vacated that decision, *Teter v. Lopez*, 93 F.4th 1150 (9th Cir. 2024) (granting rehearing *en banc*), and, in any event, it concerned a weapon that looks nothing like those regulated by the challenged laws: "butterfly" knives. *Teter* thus could not resolve the question presented here, let alone create a split warranting review. See S. Ct. R. 10(a) (referring to conflict on "the same important matter"); *accord*, *e.g.*, *Bunting v. Mellen*, 541 U.S. 1019, 1021 (2004) (Stevens, J.) (statement respecting denial of

certiorari) ("absence of a direct conflict among the Circuits" justified denial).

Herrera (and only Herrera) cites a handful of additional cases that he asserts give rise to a split, *Herrera* Pet.36-37, but all were decided before *Bruen*, and none holds that a law like those challenged here violates the Second Amendment. In fact, three—*Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney General*, 910 F.3d 106 (3d Cir. 2018); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242 (2d Cir. 2015); and *Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015)—upheld state laws prohibiting civilian possession of assault weapons or LCMs, and each was issued by a circuit that is currently reconsidering the question in light of *Bruen*, *supra* pp.12-13. The fourth—*Hollis v. Lynch*, 827 F.3d 436 (5th Cir. 2016)—rejected a challenge to a federal law prohibiting civilian possession of machineguns, and so is of even less use to Herrera.

Implicitly acknowledging that lower courts are not divided on the constitutionality of laws prohibiting civilian possession of assault weapons and LCMs, petitioners focus on perceived differences in the lower courts' reasoning, especially about how to describe and apply "this Court's common-use test." *E.g.*, Pet.30-31; *Herrera* Pet.37. But methodological differences on discrete components of a complex analysis do not create a split in authority for purposes of Rule 10. See Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. App. Prac. & Process 91, 96 (2006) (Court "not particularly interested in ironing out minor linguistic discrepancies among the lower courts because those discrepancies are not outcome determinative"). In any

event, the perceived methodological differences petitioners identify rest on a mischaracterization of the Seventh Circuit's decision. *Infra* p.19-20, 25 n.3, 29-30, 35.

B. The interlocutory nature of the Seventh Circuit's decision makes this a poor vehicle to decide the question presented.

1. The interlocutory posture of these cases is an additional reason to deny certiorari. *E.g.*, *Abbott v. Veasey*, 580 U.S. 1104, 1104-1105 (2017) (Roberts, C.J.) (statement respecting denial of certiorari); *Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 945 (2012) (Alito, J.) (statement respecting denial of certiorari). Each was decided at the preliminary injunction stage, so there has been no final adjudication on the merits of the constitutionality of the challenged laws.

This Court would benefit from further development of the parties' evidence and the lower courts' review of that evidence. As explained, *infra* Section II, resolving the legal issues presented here requires developed evidentiary and historical records. For precisely this reason, the Seventh Circuit declined to make any final pronouncements on these issues, noting that Second Amendment challenges "often require more evidence than is presented in the early phases of litigation." Pet.App.40. It invited the parties to develop additional evidence on remand and made clear that evidence presented in later phases of litigation could affect its ultimate determination. Pet.App.39-41. In fact, the court stated three times that its decision "is just a preliminary look at the subject." Pet.App.40; *accord* Pet.App.18, 51.

2. The interlocutory posture of these cases also means that there are multiple, alternate grounds for affirmance. To obtain a preliminary injunction, petitioners must show not only a likelihood of success on the merits but also that they would suffer irreparable harm absent an injunction, and that the balance of the equities and the public interest favor preliminary relief. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Respondents challenged these factors in the district court, and, although the Seventh Circuit did not resolve them, Pet.App.52, two of the three district courts decided them in respondents' favor, Pet.App.14-16. If certiorari were granted, respondents would renew these arguments, which would provide alternate bases to affirm.

For example, before the Seventh Circuit, petitioners argued that every challenge on Second Amendment grounds creates an irreparable harm that has no adequate remedy at law. *E.g.*, 7th Cir. Doc. 56 at 56; *NAGR* 7th Cir. Doc. 27 at 46-47. This was so, petitioners contended, even though they can legally possess a wide variety of semiautomatic firearms and magazines under the challenged laws, and the record developed thus far showed that assault weapons and LCMs are not used or even suitable for self-defense. *Infra* pp.22-24. But petitioners' theory has never been recognized by this Court outside of the First Amendment context, see *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976), and would involve expanding existing doctrine in a way that could have wide-ranging consequences on constitutional litigation. If accepted, the theory would effectively merge the likelihood-of-success factor with the irreparable-harm factor, meaning that any plaintiff claiming a constitutional violation under

42 U.S.C. § 1983 could obtain a preliminary injunction by default just by showing some likelihood of success on the merits.

3. Awaiting final resolution, moreover, will not cause undue delay, as petitioners suggest. *E.g.*, Pet.32-33; *Harrel* Pet.32. The district court in the consolidated *Barnett* cases entered an expedited discovery schedule, Doc. 169, and anticipates holding an evidentiary hearing this summer, see Doc. 148 at 19.

Petitioners' arguments about costs associated with "burdensome," Pet.32-33, and "unnecessary," *Harrel* Pet.16, discovery also are misplaced. Like any other party, respondents are entitled to build their record outside of an emergency posture, including by challenging petitioners' evidence. See *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (preliminary injunctions are decided "on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits").

To that end, respondents propounded discovery requests to probe the accuracy of petitioners' estimates regarding civilian ownership and use of assault weapons and LCMs—the centerpiece of their "common-use" argument—because those estimates lacked information necessary to assess their reliability. *Infra* pp.33-34. Indeed, discovery in a similar case resulted in a stipulation that the plaintiffs there would not rely "in any respect," *Hartford v. Ferguson*, No. 3:23-cv-05364-RJB, Doc. 84 (W.D. Wash. Jan. 29, 2024), on the same surveys of firearms ownership that petitioners cite extensively, *e.g.*, Pet.9; *Harrel* Pet.7, 8, 11, 24, 25. Petitioners have indicated that they intend to present additional experts supporting their "common

use" theory. Doc. 175. In addition, respondents are developing a factual and historical record beyond what they marshalled in time for the preliminary injunction hearing. For example, respondents intend to submit an expanded report from their expert historian that describes analogous historical laws not previously presented to the district court, as well as additional experts of their own. This Court should not consider petitioners' claims without the benefit of a full record, which currently is being developed.

C. The Court should reject petitioners' request that it depart from the usual certiorari criteria.

Petitioners nevertheless urge this Court to short-circuit its ordinary processes and decide this case in an interlocutory posture, on an undeveloped record, and without the benefit of additional percolation because courts purportedly are "[d]isrespect[ing]," Pet.33, "[f]louting," *Herrera* Pet.14, and showing "hostility" to, *Harrel* Pet.32, the Court's decision in *Bruen*. But the challenged laws are not "protest legislation," Pet.16, enacted "[in] the wake of" *Bruen*, *Harrel* Pet.4: The Chicago and Cook County laws are decades-old, and Illinois and Naperville acted in response to the horrific mass shooting in Highland Park. In addition, this Court has never addressed the validity of laws that restrict the manufacture, sale, or possession of assault weapons or LCMs. See *Bruen*, 597 U.S. at 72 ("Nor does [*Bruen*] decide anything about the kinds of weapons that people may possess.") (Alito, J., concurring). Courts thus are now, for the first time, applying *Bruen*'s text-and-tradition standard to laws restricting assault weapons and LCMs, and doing so in good

faith. If the Court wishes to review those courts' conclusions on the constitutionality of such laws, it should wait for them to do that work rather than take the first opportunity to consider the question itself. See *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

The Seventh Circuit undertook that analysis carefully and in a faithful attempt to follow *Bruen*. As explained, *infra* Section II, the court not only described *Bruen*'s text-and-tradition standard at length, but also applied every component to a question this Court has never addressed. To be sure, the Seventh Circuit also assessed whether *Bruen* abrogated its prior opinion in *Friedman*. Pet.App.26-27. But its decision that *Friedman* was "basically compatible" with *Bruen* did not amount to a determination that *Bruen* was "inferior to the court's own analysis in *Friedman*." Pet.2. Instead, it reflected the court's conclusion that it did not need to overrule *Friedman* in light of *Bruen*.

Nor is there any merit to petitioners' accusation that the Seventh Circuit derided *Bruen*'s common-use test as "slippery," "circular," and "not very helpful." *Ibid.* (cleaned up). Instead, the court noted that relying "on numbers alone" to determine whether a weapon was in common use would be circular and lead to "anomalous consequences," including by tying the government's ability to prohibit civilian possession of machineguns to the continued existence of the federal anti-machinegun law and by suggesting that the Federal Assault Weapons Ban was constitutional when it was enacted but not after it expired. Pet.App.25, 43. The Seventh Circuit did not, in other words, criticize this Court's opinions; it simply criticized petitioners'

specific interpretation of those opinions while faithfully applying this Court's prescribed test.

There is likewise no evidence that other lower courts—specifically, the Hawaii Supreme Court and the Fourth and Ninth Circuits—are in "open defiance" of *Bruen*. Pet.3; *Harrel* Pet.31-32. The Hawaii Supreme Court's decision in *State v. Wilson*, 543 P.3d 440 (Haw. 2024), did not involve a restriction on assault weapons or LCMs, and, in any event, the portions of *Wilson* that petitioners say failed to "faithfully follow this Court's precedents," Pet.34, address a claim under the state constitution, not the Second Amendment, *Wilson*, 543 P.3d at 442, 450-452, 459. There is also no basis to conclude that the Fourth Circuit acted irregularly by *sua sponte* ordering rehearing *en banc* in *Bianchi v. Frosh*, No. 21-1255. Indeed, the day before issuing the order in *Bianchi*, the Fourth Circuit granted rehearing *en banc* in another Second Amendment case, *Maryland Shall Issue, Inc. v. Moore*, 2024 WL 124290 (4th Cir. Jan. 11, 2024), that was heard in the same sitting. It is consistent with Federal Rule of Appellate Procedure 35 for a circuit court to order rehearing *sua sponte* to "secure or maintain uniformity of the court's decisions." Similarly, if the *en banc* Ninth Circuit were to eliminate an "emerging division among the circuits" by altering its caselaw in *Teter* or in another case, *Harrel* Pet.31, that would reflect only the ordinary operation of Federal Rule of Appellate Procedure 35(b), which expressly envisions rehearing *en banc* as a way of resolving intercircuit conflict.

In the end, the six petitions reduce to an argument that this Court should consider the question presented on an undeveloped (and developing) record and

where there are alternate grounds for affirmance—even though there is no circuit split, the question presented is widely percolating among the circuit courts, and those courts are in good faith applying *Heller* and *Bruen*. Petitioners' request that the Court bypass its usual certiorari criteria should be rejected.

II. The Decision Below Is Consistent With *Heller* And *Bruen*.

This Court should deny certiorari for the additional reason that the decision below is consistent with *Heller* and *Bruen*. The Seventh Circuit faithfully applied the text-and-tradition test. It decided, first, that based on the record developed so far, assault weapons and LCMs are not "arms" within the Second Amendment's text because they are sufficiently similar to "M-16 rifles and the like," which *Heller* deemed permissible to ban. 554 U.S. at 627. And, second, the court determined that the challenged laws are "relevantly similar," *Bruen*, 597 U.S. at 29, to historical regulations of dangerous and unusual weapons: The modern and historical regulations share the same justifications (protecting the public from new forms of violence) and impose the same minimal burden on self-defense. Petitioners' arguments to the contrary—including that so long as a weapon may be carried, its popularity among civilians determines its Second Amendment protection—do not call the Seventh Circuit's decision into question.

A. Assault weapons and LCMs are not "arms" protected by the Second Amendment.

As *Heller* and *Bruen* recognized, the Second Amendment right "'is not unlimited,'" *Bruen*, 597 U.S.

at 21 (quoting *Heller*, 554 U.S. at 626), and "extends only to certain types of weapons," *Heller*, 554 U.S. at 623; see also *id.* at 626 (no "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose").

Namely, as the Seventh Circuit explained, "[b]oth Supreme Court decisions and historical sources indicate that the Arms the Second Amendment is talking about are weapons in common use for self-defense." Pet.App.29-30; *Bruen*, 597 U.S. at 28, 32 (Amendment protects firearms "in common use today for self-defense") (cleaned up); *Heller*, 554 U.S. at 628 ("the inherent right of self-defense" is "central to the Second Amendment"). It does not, by contrast, protect "weapons that are exclusively or predominantly useful in military service." Pet.App.33; see also *Heller*, 554 U.S. at 627 ("weapons that are most useful in military service—M-16 rifles and the like—may be banned"). And, as the Seventh Circuit concluded based on the record before it, assault weapons and LCMs "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." Pet.App.36.

Respondents presented substantial evidence that assault weapons and LCMs are designed for offensive, militaristic use rather than self-defense. This included evidence that they derive from rifles and magazines designed for modern militaries with features that "increase the effectiveness of killing enemy combatants in offensive battlefield situations." Doc. 37-7 ¶31; Doc. 37-9 ¶94. For example, the AR-15 models in circulation today trace their origin to combat rifles that were designed for, and adopted by, the military in the 1950s and 1960s as M-16s. Doc. 37-6 ¶¶25-32;

Doc. 37-9 ¶¶55-59. When manufacturers initially sought to make these military-style weapons more marketable to civilians, they were branded as "assault weapons," and, more recently, as "modern sporting rifles." Doc. 37-7 ¶¶ 32-40. In fact, as the Seventh Circuit observed, "the AR-15 is almost the same gun as the M16 machinegun." Pet.App.36. The "only meaningful distinction" is that M-16s have the ability to toggle between semiautomatic and automatic fire. *Ibid.*

The evidence also showed that the features of assault weapons and LCMs are unsuitable and unnecessary for civilian self-defense. Assault weapons enable high-velocity rounds to be fired at "a high rate of delivery" and "a high degree of accuracy at long range." Doc. 37-14 ¶14 & n.5. Accordingly, they cause "more victims and injuries per event." Doc. 37-10 ¶25. LCMs "increase this destructive potential by increasing the number of rounds someone can fire without having to reload." Doc. 37-14 ¶30. These features are unnecessary for self-defense, which is primarily conducted at close range, Doc. 37-6 ¶59; Doc. 37-9 ¶98, and with average shots fired well below the round capacity of LCMs, Doc. 37-9 ¶105.

Indeed, assault weapons and LCMs can be counterproductive for self-defense. Assault weapons are inherently dangerous in a home defense scenario, where firing one poses "substantial risks to individuals in adjoining rooms, neighboring apartments or other attached dwelling units." Doc. 37-9 ¶¶98-101. LCMs likewise are poorly suited for self-defense as compared to smaller magazines because "the physical size/profile of the shorter magazine is easier to carry, shoot

and conceal." Doc. 37-7 ¶25. This is why the most "respected," "popular," and "effective" self-defense firearms, like the "Model 1911" and "Sig P938," are handguns built to function with magazines that hold 15 or fewer rounds. *Id.* ¶¶25-26. Indeed, it is "widely" accepted that such firearms, which remain legal in Illinois, are preferable for self-defense. Doc. 37-6 ¶61.

Based on the evidence presented, the Seventh Circuit thus found that assault weapons and LCMs are not "arms," and thus not covered by the Second Amendment's text, because they are "much more like machineguns and military-grade weaponry," Pet.App.36—which *Heller* stated "'may be banned,'" Pet.App.31 (quoting *Heller*, 554 U.S. at 627)—than the firearms typically used for civilian self-defense. This is consistent with *Heller* and *Bruen*.

B. The challenged laws are consistent with historical tradition.

The Seventh Circuit's application of the historical-tradition standard is likewise consistent with this Court's precedent. The court began by correctly describing that standard. Pet.App.27-29, 44-45. As the court detailed, *Bruen* held that the Second Amendment permits firearms regulation when the government shows that the regulation is "relevantly similar" to historical regulations. 597 U.S. at 29. *Bruen* did not "provide an exhaustive survey of the features that render regulations relevantly similar" but noted two "central considerations": "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified." *Ibid.* (cleaned up). And when a modern-day regulation implicates "unprecedented

societal concerns or dramatic technological changes," courts should apply a "more nuanced approach" to reasoning by analogy. *Id.* at 27.[3]

Bruen also reiterated that our country has a longstanding tradition of regulating "dangerous and unusual" weapons. *Id.* at 21; see also *Heller*, 554 U.S. at 627. As the Seventh Circuit recognized, these regulations have limited the sale, possession, and use of such weapons since the Colonial era. Pet.App.45, 49-51. In each era, legislatures imposed restrictions on the sale, possession, and use of categories of weapons that responded to the particular type of harm that those weapons presented when their proliferation caused escalating or novel forms of violence. *E.g.*, Docs. 37-11, 37-12, 37-15. And legislatures reserved certain of these "especially dangerous" weapons to the military and law enforcement while ensuring that "[m]any other weapons remain that are more universally available" for civilian self-defense. Pet.App.48.

Respondents presented evidence that this tradition pre-dates the Founding era. For instance, colonies regulated the use of weapons like trap guns, clubs, pocket pistols, daggers, and dirks. 1686 N.J. 289, 289-290, ch. 9; see also, *e.g.*, Doc. 37-12 ¶¶82-83, Exs. E-F.

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[3] Petitioners' argument that the Seventh Circuit "displace[d] this Court's historical-tradition test with a form of 'balancing,'" *e.g.*, Pet.15, thus misdescribes the lower court's decision, which accurately quoted *Bruen*'s standard and expressly rejected the "means/end analysis that *Bruen* disapproved," Pet.App.52 n.13. Indeed, the dissenting judge described the historical-tradition standard in much the same way as the panel majority. Pet.App. 66 (Brennan, J., dissenting).

Legislatures continued to impose restrictions on specific weapons during the Early Republic and Founding eras. Doc. 37-12 ¶¶73-80, Ex. C. As one example, States regulated a wide range of clubs in response to their increasing use by criminals and as fighting instruments. *Ibid.* The problem was so prevalent that by the end of the 19th century, "every state in the nation had laws restricting one or more types of clubs." *Id.* ¶73.

As new dangerous and unusual weapons emerged during the 19th century, States continued to restrict them. One such weapon was the Bowie knife, which gained notoriety in the 1830s as effective for fighting. *Id.* ¶63; Doc. 37-11 ¶24. When homicide rates increased, in part due to knife-dueling, so did laws restricting the use, sale, and possession of Bowie knives. Doc. 37-11 ¶¶64, 70; Doc. 37-15, table 2. By the 20th century, most States restricted Bowie knives. *E.g.*, Doc. 37-15, table 2. Several of these statutes prohibited only civilian use of the weapons, as the challenged laws do, by exempting military and peace officers from their scope. Pet.App.49; see also Doc. 37-15, table 2; Tex. Pen. Code § 6490(1) (1873).

States also prohibited carrying pistols, revolvers, and other concealable weapons in response to advancements in technology that made them more effective for criminal purposes. *E.g.*, Doc. 37-11 ¶¶16-17, 25-26; Doc. 37-15, table 3; Doc. 37-12 ¶82. By the turn of the century, nearly all States prohibited or severely restricted the carrying of concealable weapons, Doc. 37-11 ¶28, a practice that *Bruen* deemed constitutional, 597 U.S. at 21. Many of these statutes, too, had exceptions for the military and police officers. See, *e.g.*, Doc. 37-15, tables 1, 3; Wash. Code § 929 (1881).

This tradition continued into the late 19th and early 20th centuries, when hand-held semiautomatic and automatic firearms were invented. Doc. 37-12 ¶¶14-16. After these weapons began to impact civilian life, *id.* ¶16, States responded, with the majority enacting anti-machinegun laws between 1925 and 1934, *id.* Exs. B, D. Around this same time, many States enacted restrictions on semiautomatic weapons, removable magazines, and magazine capacity. *Id.* ¶¶28, 32, Ex. B; Doc. 37-15. In 1934, Congress followed suit with the National Firearms Act, which imposed a tax on the manufacture, sale, and transfer of machineguns, short-barreled shotguns, and other firearms associated with criminal violence. Doc. 37-12 ¶25. That statute contained exemptions for "transfers to the U.S. government, states, territories, political subdivisions, and peace officers." Pet.App.50. This Court confirmed the constitutionality of the restrictions on short-barreled shotguns in *United States v. Miller*, 307 U.S. 174, 178 (1939), and on machineguns in *Heller*, 554 U.S. at 624, 627.

On this record, the Seventh Circuit correctly concluded that the challenged laws fit within our country's historical tradition of firearms regulation. Pet.App.44-48. When addressing *Bruen*'s "how" question, the court explained that the challenged laws are analogous to historical regulations in that they "impose a comparable burden" on the right to self-defense. Pet.App.45 (internal quotations omitted). Assault weapons and LCMs are best suited for offensive combat; their defining characteristics are unnecessary for self-defense. *Supra* pp.22-24. And the challenged laws allow possession of many other firearms, including semiautomatics, making them consistent with

their historical predecessors in that they restrict the instruments causing public harm, while preserving the right to possess firearms for self-defense. The Seventh Circuit likewise hewed to *Bruen*'s "why" question when concluding that the public-safety justifications underlying the challenged laws are consistent with those that prompted historical legislatures to "regulat[e] weapons to advance similar purposes." Pet.App.46. Like their regulatory predecessors, the challenged laws were passed in response to a developing phenomenon: the emergence of assault weapons and LCMs as the weapons of choice for mass shooters. Doc. 37-4 ¶21.

The historical support for the challenged laws is especially clear under the "more nuanced approach" to analogical reasoning, which is called for where, as here, restrictions implicate "dramatic technological changes" or "unprecedented societal concerns." *Bruen*, 597 U.S. at 27. As to the former, the challenged laws regulate instruments that did not exist during the Founding or Reconstruction eras and that were made possible only by advancements in weapons technology in the mid-20th century. Doc. 37-11 ¶¶15-17, 54; Doc. 37-14 ¶¶26, 29. As to the latter, the phenomenal lethality associated with these technological advancements has allowed single shooters armed with assault weapons and LCMs to kill many people at once. Doc. 37-4 ¶15; Doc. 37-6 ¶¶41, 50. The increasing frequency and severity of these shootings demonstrate that this is an unprecedented societal concern. Doc. 37-4 ¶¶18-21. The Seventh Circuit thus adhered to *Bruen* when holding that, on the record presented, the challenged laws are consistent with historical tradition.

C. Petitioners' arguments are not persuasive.

1. Petitioners first argue that the Seventh Circuit applied the incorrect definition of "arms." *E.g.*, Pet.18-19. According to petitioners, the Second Amendment protects all arms that a person can "bear" or, at least, all firearms and ammunition. *E.g.*, Pet.17; *Harrel* Pet.21-22; *Herrera* Pet.16. But as the Seventh Circuit noted, by using the phrase "bearable arms," this Court did not mean that the Second Amendment presumptively protects any weapons that a person can bear, like shoulder-fired rocket launchers. Pet.App.6, 31. On the contrary, the Court made clear that the Second Amendment right to armed self-defense necessarily excludes firearms that do not further that right, such as "weapons that are most useful in military service" (including "M-16 rifles and the like") or those typically used for criminal purposes. *Heller*, 554 U.S. at 627; *Miller*, 307 U.S. at 178 (short-barreled shotguns). Nor did the Court endorse petitioners' "bearable arms" argument in *Caetano v. Massachusetts*, 577 U.S. 411 (2016), as petitioners suggest. *E.g.*, Pet.17. Rather, *Caetano* held only that the Second Amendment is not limited to those bearable arms that were "in existence at the time of the founding." 577 U.S. at 411 (cleaned up).

Further, the Seventh Circuit did not "lay[ ] the groundwork for categorical bans on commonly owned arms." *Herrera* Pet.4; *accord* Pet.2. The court held (preliminarily) that civilian possession of assault weapons and LCMs could be restricted because they are unlike firearms "that ordinary people would keep at home for purposes of self-defense," and instead are

more like "weapons that are exclusively or predominantly useful in military service" given their extremely lethal capabilities. Pet.App.33, 36-37, 48 n.12. Nothing about that rule would permit a State to ban a commonly owned arm that is used by ordinary people for self-defense. By contrast, under petitioners' proposed standard, courts would undertake no inquiry at *Bruen*'s first step into whether a restricted weapon is used for a lawful purpose (let alone for self-defense). That, combined with petitioners' proposed "common use" test, would render the government powerless to ban any commonly owned weapons that a single person could carry, no matter how dangerous or inappropriate for self-defense. See *infra* pp.31-32. *Bruen* and *Heller* do not require that extreme result.

2. Petitioners next assert that the Seventh Circuit misread this Court's discussion of machineguns in *Heller* and *Staples v. United States*, 511 U.S. 600 (1994). Petitioners claim that *Heller* did not "put M16s in the 'military use' camp," Pet.22, but "simply theorized that if it could be shown that M-16 rifles and the like fall within the historical tradition," then they could be banned, *id.* at 19 (cleaned up). But *Heller* squarely stated that "weapons that are most useful in military service—M-16 rifles and the like—may be banned." 554 U.S. at 627. In fact, the Court considered it "startling" that its opinion could be interpreted to find the ban on machineguns unconstitutional. *Id.* at 624.

Petitioners also argue that *Staples* described assault weapons, unlike machineguns, as lawful possessions. *E.g.*, Pet.23-24; *Harrel* Pet.23. But as the Seventh Circuit noted, Pet.App.34-35, *Staples*—which reversed a conviction where the government failed to

prove that the defendant "knew of the features of his AR-15 that brought it within the scope of the [National Firearms] Act," 511 U.S. at 619—was not a Second Amendment case and did not assess what kinds of weapons are "arms" covered by that Amendment. And *Staples* was decided before Congress enacted the Federal Assault Weapons Ban in 1994. Thus, the Court's statement that firearms other than the "machineguns, sawed-off shotguns, and artillery pieces that Congress has subjected to regulation" were "widely accepted as lawful possessions" was merely a description of the state of federal law at the time. *Id.* at 611-612.

3. Petitioners criticize the Seventh Circuit's historical analysis, but these arguments are equally unpersuasive. Petitioners initially maintain that the court's historical analysis was unnecessary because under the "common-use" test they extract from *Heller* and *Bruen*, weapons cannot be categorically banned consistent with the historical tradition of firearms regulation if the weapons are commonly possessed *today*. *E.g.*, Pet.20; *Harrel* Pet.19; *Herrera* Pet.17.[4] This conflicts with the text and spirit of *Bruen*, which requires courts to evaluate whether the challenged regulation "is consistent with the Nation's historical tradition of firearm regulation." 597 U.S. at 17. Indeed, petitioners' theory would effectively eliminate the historical

[4] The Seventh Circuit explained that there "is no consensus on whether the common-use issue belongs at *Bruen* step one or *Bruen* step two," and "assume[d] (without deciding the question) that this is a step two inquiry." Pet.App.41. Respondents maintain that this is a step-one inquiry, *Bruen*, 597 U.S. at 32, but they agree with the Seventh Circuit that they would prevail under either approach. Pet.App.41.

inquiry for cases involving laws prohibiting a type of weapon, if it could be shown that they are in common use. Not even the dissenting judge would go this far. Pet.App. 68 (Brennan, J., dissenting) ("just because a weapon is in common use does not necessarily mean the government is barred from regulating it").

In addition, although petitioners sought to use manufacturing and ownership estimates for AR-15-style rifles and LCMs to establish common use, *e.g.*, Doc. 10 at 9-10; *Herrera* Doc. 5 at 16-17, the Seventh Circuit explained, the common-use inquiry cannot be based "on numbers alone" because that would lead to "anomalous consequences," Pet.App.43. For example, in 1994, the Federal Assault Weapons Ban "made civilian possession of AR-15s (among other assault weapons) unlawful," and "few civilians owned AR-15s." *Ibid.* After the legislation expired, however, "these weapons began to occupy a more significant share of the market." *Ibid.*; see also Doc. 37-7 ¶¶39-40 (88% of "modern sporting rifles" entered circulation between 2004 and 2020). If common use were tied solely to numbers, "the federal ban would have been constitutional before 2004, but unconstitutional thereafter." Pet.App.44. And the federal anti-machinegun statute (whose constitutionality *Heller* had confirmed, Pet.App.22) would be lawful only because machineguns had been, and continued to be, banned. Pet.App.25. However, "[a] law's existence can't be the source of its own constitutional validity." *Ibid.* (internal quotations omitted).

Thus, the Seventh Circuit was correct to reject petitioners' "simple" test. *Harrel* Pet. 2. But even if the common-use standard relied solely on numbers, petitioners still would be unlikely to succeed. They rely

on the claim that Americans own more than 24 million AR-15-style rifles and have owned "hundreds of millions" of magazines that hold more than 10 rounds. *E.g.*, Pet.10; *Harrel* Pet.24; Doc. 10 at 9, 16. These ownership estimates, however, come from unreliable sources. The first is an unpublished, non-peer-reviewed paper recounting an online survey that does not disclose its funding or measurement tools. *Harrel* Pet.24 (citing William English, *2021 National Firearms Survey* (May 13, 2022)); Doc. 37-4 ¶29 n.28. The second comes from an industry trade organization that has never published the underlying data. *Harrel* Pet.24 (citing *Commonly Owned: NSSF Announces Over 24 Million MSRs in Circulation*, NSSF (July 20, 2022)). Beyond these flaws, the estimates are misleading: data shows that 6.4 million gun owners (less than 8% of the 81 million gun owners in the United States and 2% of all Americans) possess assault rifles. Doc. 37-4 ¶27. And the LCM estimate, which derives from the online survey, purports to show a 13-fold increase in LCM ownership over "just 8 years," a number that defies logic. *Id.* ¶29 n.28.

4. Petitioners argue, alternatively, that the Seventh Circuit relied on improper analogues when discussing history. They contend that historical restrictions on public carriage and discharging weapons are inapposite because the challenged laws relate to possession. Pet.25-26; *Herrera* Pet.29-30. But these historical analogues are relevant because they share the same justifications (protecting the public from new forms of violence) and impose the same minimal burden on self-defense (restricting only the conduct causing the violence while leaving other means of armed self-defense available) as the challenged laws.

In any event, respondents' historical evidence was not limited to laws regulating public carriage and discharge. On the contrary, that evidence showed that States regulated the possession and use of trap guns in the 18th and 19th centuries, Doc. 37-12, Ex. B, and the sale and possession of Bowie knives in the 19th century, *id*. Ex. C; Doc. 37-15. Then, in the early 20th century, the federal government and a majority of States enacted anti-machinegun laws, at least 16 of which prohibited civilian possession. Doc. 37-12, Exs. B, D. States also imposed restrictions on semiautomatic weapons, including restrictions on possession. Doc. 37-12, Ex. B; Doc. 37-15.

Petitioners assert that the anti-machinegun laws are improper analogues because they, unlike the restrictions challenged here, were enacted "almost immediately" after automatic weapons were introduced into the civilian market. Pet.27. But petitioners ignore that the timing of these laws coincided with the increased use of machineguns in violent crime—just as laws regulating assault weapons and LCMs coincided with their increased use in mass shootings. The Tommy gun was introduced into the civilian market in the early 1920s, but news reports of its criminal misuse did not begin to appear until the mid-1920s. Doc. 37-12 ¶¶15-22. In the late 1920s and early 1930s, States and the federal government responded with laws prohibiting civilians from possessing machineguns. S*ee id.* ¶¶22-24. Similarly, when assault weapons were introduced into the civilian market in the second half of the 20th century, commercial sales started slowly, see Doc. 37-7 ¶38, and they were not regularly used to perpetrate criminal violence, *e.g.*, Doc. 37-4 ¶19 & table 7. But after the expiration of

the Federal Assault Weapons Ban in 2004, sales of these weapons increased, Doc. 37-7 ¶¶39-40, and mass shootings involving them became prevalent, Doc. 37-4 ¶21. The Act and laws like it followed.

Finally, petitioners contend that the Seventh Circuit created a new and unsupported historical tradition based on "letting the government draw a distinction between military and civilian weaponry and reserve the former for civilian use." Pet.25 (internal quotations omitted); *Herrera* Pet.29. But the court did not create a "new" tradition; rather, as explained, *supra* pp.25-27, it found that the tradition of restricting certain weapons for civilian use included a tradition of reserving some of them, if appropriate, to the military or law enforcement. That tradition is supported by many federal, state, and local laws. *Ibid.*

* * *

This Court should deny the petitions, including Herrera's request for summary vacatur. *Herrera* Pet.14-20. There is no circuit split on the question presented, this case's interlocutory posture makes it a poor vehicle to resolve that question, and the Seventh Circuit's decision is consistent with *Heller* and *Bruen*.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL 2024

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.,
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v.
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Respondents.

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KWAME RAOUL, Attorney General of Illinois, et al.,
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CALEB BARNETT, et al.,
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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.

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

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the Brief in Opposition for the State of Illinois, City of Chicago, and City of Naperville Respondents contains 8,942 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.

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AFFIDAVIT OF SERVICE

SUPREME COURT OF THE UNITED STATES

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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 ILLINOISE STATE POLICE, ET AL., ET AL.,

Respondents,

GUN OWNERS OF AMERICA, INC. ET AL.,

Petitioners,

v.

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

Respondents,

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STATE OF NEW YORK)

COUNTY OF NEW YORK)

I, Darian J. Girard, 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 for the State of Illinois, City of Chicago, and City of Naperville Respondents in the above-captioned matter upon:

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by sending three copies of same, addressed to each individual respectively, through the United States Postal Service via Priority Mail.

That on the same date as above, I sent to this Court forty copies copy of the within Brief in Opposition for the State of Illinois, City of Chicago, and City of Naperville Respondents through the Overnight Next Day Federal Express, postage prepaid. prepaid.

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.

Darian J. Girard

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

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