No. _____

IN THE

Supreme Court of the United States

JAVIER HERRERA,

Petitioner,

v.

KWAME RAOUL, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Gene Hamilton
AMERICA FIRST LEGAL FOUNDATION
611 Pennsylvania Ave. SE
Suite 231
Washington, DC 20003
(202) 964-3721

Thomas R. McCarthy
Taylor A.R. Meehan
Jeffrey M. Harris
Gilbert C. Dickey
Counsel of Record
C'Zar D. Bernstein
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423
gilbert@consovoymccarthy.com

Counsel for Petitioner

Date: February 12, 2024

QUESTIONS PRESENTED

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court held that the Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635. This Court remarked that it was "bordering on the frivolous" to argue "that only those arms in existence in the 18th century are protected by the Second Amendment." *Id.* at 582. Then in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), the Court again confirmed that the "'arms'" that the Second Amendment protects "covers modern instruments that facilitate armed self-defense." *Id.* at 28. Against those decisions, the State of Illinois, Cook County, and the City of Chicago banned commonly owned semiautomatic rifles and standard magazines in law-abiding Illinois citizens' homes. The questions presented are:

Whether semiautomatic rifles and standard handgun and rifle magazines do not count as "Arms" within the ordinary meaning of the Second Amendment's plain text.

Whether there is a broad historical tradition of States banning protected arms and standard magazines from law-abiding citizens' homes.

PARTIES TO THE PROCEEDING

Petitioner is Dr. Javier Herrera.

Respondents are Kwame Raoul, in his official capacity as Illinois Attorney General; Brendan F. Kelly, in his official capacity as Illinois State Police Director; Cook County; Toni Preckwinkle, in her official capacity as Cook County Board of Commissioners President; Kimberly Foxx, in her official capacity as Cook County State's Attorney; Thomas Dart, in his official capacity as Cook County Sheriff; City of Chicago; and Larry B. Snelling, in his official capacity as Superintendent of Police for the Chicago Police Department.

Robert Bevis, Law Weapons, Inc., and the National Association for Gun Rights were appellants in the consolidated case below and plaintiffs in the Northern District of Illinois.

Caleb Barnett, Brian Norman, Hood's Guns & More, Pro Gun & Indoor Range, and the National Shooting Sports Foundation, Inc., were appellees in the consolidated case below and plaintiffs in the Southern District of Illinois.

Dane Harrel, C4 Gun Store, LLC, Marengo Guns, Inc., the Illinois State Rifle Association, the Firearms Policy Coalition, Inc., the Illinois State Rifle Association, the Firearms Policy Coalition, Inc., and the Second Amendment Foundation were appellees in the consolidated case below and plaintiffs in the Southern District of Illinois.

Jeremy W. Langley, Timothy Jones, and Matthew Wilson were appellees in the consolidated case below and plaintiffs in the Southern District of Illinois.

Federal Firearms Licensees of Illinois, Guns Save Lives, Gun Owners of America, Gun Owners Foundation, Piasa Armory, Debra Clark, Jasmine Young, and Chris Moore were appellees in the consolidated case below and plaintiffs in the Southern District of Illinois.

The City of Naperville and Jason Arres, in his official capacity as Naperville Police Chief, were appellees in the consolidated case below and defendants in the Northern District of Illinois. The State of Illinois intervened as an appellee in the consolidated case below.

STATEMENT OF RELATED PROCEEDINGS

The Seventh Circuit panel consolidated the following cases for disposition and issued its opinion and judgment on November 3, 2023: *Herrera v. Raoul, et al.*, No. 23-1793; *Bevis, et al. v. City of Naperville, et al.*, No. 23-1353; *Barnett, et al. v. Raoul, et al.*, Nos. 23-1825, 23-1826, 23-1827, and 23-1828.

Herrera v. Raoul, et al., No. 23-1793 (CA7 Dec. 11, 2023) (order denying petition for rehearing and rehearing en banc).

Bevis, et al. v. City of Naperville, et al., No. 23-1353 (CA7 Dec. 11, 2023) (order denying petition for rehearing and rehearing en banc).

Barnett, et al. v. Raoul, et al., Nos. 23-1825, 23-1826, 23-1827, and 23-1828 (CA7 Dec. 11, 2023) (order denying petition for rehearing and rehearing en banc).

Bevis, et al. v. City of Naperville, et al., No. 23-1353 (CA7 Nov. 22, 2023) (order denying motion for an injunction pending disposition of petition for rehearing en banc and disposition of a petition for writ of certiorari).

National Association for Gun Rights, et al. v. City of Naperville, et al., No. 23A486 (S. Ct. Dec. 14, 2023) (order denying application for writ of injunction pending certiorari).

National Association for Gun Rights, et al. v. City of Naperville, No. 22A948 (S. Ct. May 17, 2023) (order denying application for writ of injunction pending appeal).

Herrera v. Raoul, et al., No. 1:23-cv-532-LCJ (N.D. Ill. Apr. 25, 2023) (memorandum opinion and order denying motion for preliminary injunction).

Bevis, et al. v. City of Naperville, et al., No. 1:22-cv-4775-VMK (N.D. Ill. Feb. 17, 2023) (memorandum opinion and order denying motion for preliminary injunction).

Barnett, et al. v. Raoul, et al., Nos. 3:23-cv-209-SPM, 3:23-cv-141-SPM, 3:23-cv-192-SPM, 3:23-cv-215-SPM (S.D. Ill. Apr. 28, 2023) (memorandum opinion and order granting motion for preliminary injunction).

Barnett, et al. v. Raoul, et al., Nos. 3:23-cv-209-SPM, 3:23-cv-141-SPM, 3:23-cv-192-SPM, 3:23-cv-215-SPM (S.D. Ill. Dec. 14, 2023) (memorandum opinion and order denying *Langley* plaintiffs' motion for partial summary judgment).

Barnett, et al. v. Raoul, et al., Nos. 3:23-cv-209-SPM, 3:23-cv-141-SPM, 3:23-cv-192-SPM, 3:23-cv-215-SPM (S.D. Ill. Dec. 22, 2023) (memorandum opinion and order granting defendants' motion to dismiss due-process claims).

TABLE OF CONTENTS

APPENDIX

TABLE OF CITED AUTHORITIES

Cases

Constitution, Statutes and Ordinances

Regulations

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Seventh Circuit is reported at 85 F.4th 1175 and reproduced at Pet.App.1-59. The order denying rehearing en banc is unpublished and reproduced at Pet.App.143-44. The district court's opinion is reported at _ F. Supp. 3d _, 2023 WL 3074799, and reproduced at Pet.App.109-42.

JURISDICTION

The Seventh Circuit entered its judgment and published its opinion on November 3, 2023. Pet.App.1-59. The Seventh Circuit denied petitions for rehearing en banc on December 11, 2023. Pet.App.143-44. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

Relevant provisions of Chicago, Cook County, and Illinois laws are reproduced at Pet.App.146-96.

INTRODUCTION

Petitioner, Dr. Javier Herrera, is an emergency physician and tactical medic on a SWAT team. State and local laws categorically ban him from keeping at his Chicago home the semiautomatic rifle that he uses for SWAT training, self-defense, hunting, and sport shooting. They also categorically ban him from keeping at home the magazines that came standard with his rifles and even his handgun. Respondents' outright home bans force him to keep those arms miles away outside Cook County, or be arrested, fined, and imprisoned. As a result, Dr. Herrera cannot participate in SWAT training with his rifle, endangering the team's safety and effectiveness. And he must keep his handgun inoperable at home, endangering his personal safety too. This case concerns Dr. Herrera's right to keep civilian arms that are more common than Ford F-150s in his home.

An outright home ban of commonly owned arms—like the ones challenged here—is unconstitutional. *See District of Columbia v. Heller*, 554 U.S. 570, 628-36 (2008). But for more than a decade after *Heller* confirmed that individual right, courts relegated the Second Amendment to a "'second-class right.'" *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 70 (2022). They did so by privileging governments' asserted interests over the Second Amendment's text and history. *Id.* at 19-22. That failure to put text and history at the center of the analysis was supposed to change after *Bruen*.

The Seventh Circuit did not get this "Court's message." *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). A divided panel upheld a new in-home ban of common rifles and magazines enacted by Illinois mere months after *Bruen*, along with similar bans imposed by Cook County and the City of Chicago. The court agreed that it was constitutionally permissible for some of this country's largest state, county, and city governments to criminalize keeping commonly owned firearms in the homes of a SWAT medic and millions of other law-abiding citizens.

The Seventh Circuit defied *Bruen*'s text-and-history approach. On text, the court held that common civilian rifles and magazines are not "Arms" at all. Pet.App.33-38. It did not matter that *Heller* concluded that "all firearms constituted 'arms.'" Pet.App.28 (quoting *Heller*, 554 U.S. at 581-82). The court rejected the ordinary meaning of "Arms"—already adopted in this Court's precedents—in favor of asking whether the common civilian arms at issue seemed too "militaristic." Pet.App.42.

Turning to history, the Seventh Circuit gave the governments the "blank check" that *Bruen* forbids. *Bruen*, 597 U.S. at 30. The governments did nothing to "affirmatively prove" that their home bans are consistent with our historical tradition. *Id.* at 19. Indeed, they didn't even bother to rebut Dr. Herrera's extensive historical evidence that commonly owned civilian arms would have been a regular (and required) possession in Founding-era homes. No matter, the Seventh Circuit panel doubled down on its

pre-*Bruen* precedent by refusing to apply this Court's common-use test for whether weapons are protected, deriding it as "slippery" and "circular." Pet.App.22, 39 (citing *Friedman v. City of Highland Park, Ill.*, 784 F.3d 406, 412 (7th Cir.), *cert. denied*, 577 U.S. 1039 (2015)). It did not matter that *Bruen* applied the common-use test, 597 U.S. at 47, or that this Court rejected the same criticism in *Heller*, 554 U.S. at 720-21 (Breyer, J., dissenting). Instead, the court created a tradition of banning "especially dangerous weapons" to "[p]rotect … [c]ommunities." Pet.App.42. But that was Justice Stevens's *dissenting* view in *McDonald v. Chicago*, 561 U.S. 742, 899-900 (2010) (Stevens, J., dissenting). Nor did it matter that the court's newly authored tradition could justify nearly any regulation—even the handgun ban at issue in *Heller*. After flouting precedent, the Seventh Circuit held that semiautomatic rifles and magazines—including handgun magazines—are unprotected. Pet.App.33-34.

The Seventh Circuit's decision cannot stand. At a minimum, the Court should grant the petition and summarily vacate with instructions to faithfully apply *Bruen*. *See, e.g.*, *Caetano v. Massachusetts*, 577 U.S. 411 (2016) (per curiam). Alternatively, this Court should grant the petition for full review on the merits. The Seventh Circuit did not apply *Bruen*'s text-and-history test. Its decision lays the groundwork for categorical bans on commonly owned arms, which this Court just held in *Bruen* are protected when kept by law-abiding citizens for law-abiding purposes. It reduces the Second Amendment not only to a "second-class right" but to a right that applies in only some

parts of the country. Indeed, the decision conflicts with others in the Courts of Appeals. Illinois, Cook County, and Chicago are not a rule unto themselves. Keeping commonly owned arms "in defense of hearth and home" is a right for all law-abiding citizens, not only for some. *Heller*, 554 U.S. at 635.

STATEMENT OF THE CASE

A. Factual Background

1. Dr. Herrera is a board-certified emergency physician with thousands of hours of experience, and a medic on a SWAT team. Pet.App.198. He has taught tactical emergency medicine at a public university. Pet.App.198, 207. He lives in Chicago, the largest city in Cook County. Pet.App.198.

Dr. Herrera has experienced the effects of gun violence. During his medical residency, an armed attacker entered the hospital and killed a physician and two others. Dr. Herrera rendered aid at the scene. Pet.App.201.

Dr. Herrera is also a gun owner. He owns a semiautomatic Glock 45 handgun that came standard with a 17-round magazine. Pet.App.198-99. He also owns two semiautomatic AR-15 rifles. Pet.App.199. He owns these arms for lawful purposes, including training with his SWAT team, hunting, sport shooting, and self-defense. Pet.App.201, 206. These firearms are semiautomatic, meaning they can fire only one round each time the trigger is pulled. D.Ct.Dkt.63-5 ¶¶19-24. An automatic firearm, by comparison, fires continually so long as the trigger is

depressed or in multiple-round bursts. D.Ct.Dkt.63-5 ¶¶22. Automatic arms are *not* at issue in this petition.

By the State of Illinois's own estimates, millions of law-abiding Americans keep the same kinds of firearms in their homes. CA7.Dkt.47 at 22 ("6.4 million gun owners"). But not Dr. Herrera. As explained below, local laws forbid Dr. Herrera from keeping at home his rifles and the standard magazines that came with them. They also forbid him from keeping at home the 17-round magazine that came standard with his commonly owned handgun, a Glock 45, which he must keep inoperable. Pet.App.212-13. And city, county, and state laws all forbid Dr. Herrera from purchasing replacement magazines, rifle components, or rifles that he would otherwise purchase. Pet.App.198-99.

Because of the state and local bans, Dr. Herrera cannot participate in firearms training with his Chicago-area SWAT team as he otherwise would. Pet.App.202. He has served as a medic on the SWAT team for roughly five years and deploys on about one or two missions each month. Pet.App.199-200, 211. His ability to defend himself "and others depends" on his "ability to train and maintain proficiency with particular weapons." Pet.App.205. Those weapons include the AR-15, "which is the firearm SWAT officers carry" on missions. Pet.App.205. Dr. Herrera's proficiency with that rifle "makes the entire team safer and more comfortable in the high-risk environments of SWAT team missions." Pet.App.206. But Dr. Herrera cannot use his AR-15s to train with

his SWAT team because he must keep them outside Cook County. Pet.App.206.

It is textbook tactical medicine that tactical medics should be proficient with SWAT arms. Pet.App.207-10 (citing Campbell, et al., *Tactical Medicine Essentials* 12 (2d ed. 2020), reproduced at Pet.App.215-42)). All tactical medics "should learn and maintain skills in safe weapons handling and unloading, as well as techniques for rendering weapons safe" even if they do not carry a firearm on missions. Pet.App.208, 228. They should also participate in "marksmanship training." Pet.App.208, 228. At a minimum, this training helps them to handle and disarm weapons safely. Pet.App.209, 232. Indeed, Dr. Herrera has had to handle an AR-15 on a mission involving "an armed and barricaded murder suspect." Pet.App.210-11.

2. City, county, and state laws forbid Dr. Herrera from purchasing and keeping firearms and magazines at home. It is unlawful in Chicago to "sell, … or possess" any "assault weapon"—defined to include AR-15s. Chi. Muni. Ord. §8-20-075(a); *id.* §8-20-010(a)(10)(B)(ii). It is also unlawful to possess a "high capacity magazine," defined as holding more than 15 rounds. *Id.* §§8-20-10, 8-20-085(a). Residents face incarceration and fines for violating these bans. *Id.* §8-20-300(a).

Cook County makes it unlawful to "acquire, carry or possess" any "assault weapon," including an "AR-15." Cook Cnty. Ord. §54-212(a); *id.* §54-211(7)(A)(iii). It is also unlawful to possess a "large capacity magazine," defined as holding more than 10 rounds.

Id. §§54-211, 54-212(a). Residents face incarceration and fines for violating these bans. *Id.* §54-214(a).

Illinois joined Cook County and the City of Chicago at the beginning of 2023. Only months after *Bruen*, Illinois enacted a new state law banning semiautomatic rifles and magazines. It is now a felony to knowingly "purchase" and a misdemeanor to knowingly "possess an assault weapon," including AR-15s. 720 Ill. Comp. Stat. 5/24-1.9(b), (c); *id.* §§24-1.9(a)(1)(A)-(B), (J)(ii)(II), 24-1(b). It is also unlawful to "knowingly possess a large capacity" magazine, defined as holding more than 10 rounds for rifles and 15 rounds for handguns. *Id.* §24-1.10(c); *id.* §24-1.10(a)(1). A narrow grandfathering provision allows rifles or magazines owned before January 2023 to remain in the State, but owners must register rifles with the State police. *Id.* §§24-1.9(d), 24-1.10(d).[1] Residents face incarceration and fines for violating these bans. *Id.* §§24-1(a)(15), (16), (b), 24-1.10(g).

B. Procedural History

1. Dr. Herrera filed a lawsuit challenging the constitutionality of Chicago's, Cook County's, and the State's laws the same month the State enacted its rifle ban. D.Ct.Dkt.1. He seeks to keep his lawfully acquired arms and magazines at home and to acquire new ones to be kept at home. Pet.App.198-99. To that end, he moved for a preliminary injunction of the

[1] Because he could not locate a suitable storage location outside Illinois, Dr. Herrera ultimately completed the registration process.

state, county, and city bans. D.Ct.Dkts.4, 5. Preliminary relief would allow him to keep an AR-15, its magazine, and the 17-round magazine that came with his handgun at home. It would mean he could buy new arms and magazines. And it would mean Dr. Herrera no longer had to drive hours to retrieve and return the banned weapons for SWAT training. Pet.App.206.

The parties prepared a voluminous evidentiary record in the district court. Despite the central question being legal and historical, the governments deployed 20 experts and witnesses whose testimony spanned more than 2,000 pages.[2] For his part, Dr. Herrera submitted his own declarations demonstrating how the home bans infringe on his rights and undermine the safety of his SWAT team, Pet.App.197-242, and expert reports about the arms at issue, D.Ct.Dkts.63-4, 63-5. Dr. Herrera also identified 25 militia acts protecting common arms useful in militia service and 114 other firearms laws, all spanning about 550 pages. D.Ct.Dkt.63-1.

The district court denied Dr. Herrera's motion. Pet.App.142. The court concluded that Dr. Herrera is unlikely to succeed on the merits of his claims because the challenged laws are consistent with a historical tradition of "regulating 'particularly dangerous weapons.'" Pet.App.125-26. For that conclusion, the court relied on the *dissenting* opinion in *McDonald v.*

[2] The governments' submissions are available on the district court docket. See *Herrera v. Raoul*, 1:23-cv-532 (N.D. Ill. 2023), D.Ct.Dkts.52 (State), 60 (County), 61 (City).

City of Chicago, 561 U.S. 742: "'[F]rom the early days of the Republic, through the Reconstruction era, to the present day, States and municipalities … banned altogether the possession of *especially dangerous weapons*.'" Pet.App.119-20 (emphasis added) (quoting *McDonald*, 561 U.S. at 899-900 (Stevens, J., dissenting)). The district court also found that Dr. Herrera suffers no irreparable harm. Pet.App.134-40. It reasoned that Dr. Herrera could use other weapons for self-defense, that his SWAT "allegations are speculative," and that the Second Amendment does not get the same presumption as the First. Pet.App.135-39.

2. Dr. Herrera appealed the day after the district court denied his motion. CA7.Dkt.1. The Seventh Circuit consolidated Dr. Herrera's appeal with several others. CA7.Dkt.23. These included *Barnett v. Raoul*, No. 23-1825 (CA7), in which the district court preliminarily enjoined the State's bans, 2023 WL 3160285 (S.D. Ill.).

In a 2-1 decision, the panel affirmed on the sole ground that Dr. Herrera and other challengers could not succeed on the merits of their Second Amendment claims. Pet.App.50-51. The majority principally held that semiautomatic rifles and both rifle and handgun magazines are not "Arms." Pet.App.27-38. The court conceded that "Arms" includes "all instruments that constitute bearable arms." Pet.App.28 (quoting *Heller*, 554 U.S. at 582). But it then announced that "bearable arms" excludes "weapons that may be reserved for military use." Pet. App.31. For the AR-15, the majority found that—in their view—it was not "materially

different from the M16." Pet.App.37. It reached this conclusion by downplaying "that the AR-15 has only semiautomatic capability," noting that it could be modified to fire at rates closer to automatic fire. Pet. App.34. The court found that standard-capacity magazines could be "reserved for military use" because "several magazines of the permitted size" could be purchased instead. Pet.App.37.

The majority concluded that historical tradition would support the bans based on the same distinction between arms that could be reserved for the military. The majority first rejected this Court's "common-use" test as a "slippery concept." Pet.App.39. Instead, the court found that there was a tradition of regulating "especially dangerous weapons" to "[p]rotect … [c]ommunities." Pet.App.42-44. This tradition turns on the same "distinction between military and civilian weaponry" that it used in its textual analysis. Pet.App.45. For support, the majority relied on seven historical examples, ranging from laws banning the *public discharge* of weapons to concealed-carry and Bowie knife regulations to 20th-century bans. Pet.App.46-48.

The majority relied on its pre-*Bruen* decision in *Friedman v. Highland Park*, 784 F.3d 406, to justify its focus on what weapons it thought should be reserved for military use. Pet.App.22-23. Even before *Bruen*, two Justices of this Court explained that *Friedman* "flouts two of [its] Second Amendment precedents" in favor of a made-up test. See *Friedman*, 577 U.S. at 1039 (Thomas, J., dissenting from denial of cert.). *Friedman* "'ask[s] whether a regulation bans

weapons that were common at the time of ratification or those that have some reasonable relationship to the preservation or efficiency of a well regulated militia, and whether law-abiding citizens retain adequate means of self-defense.'" Pet.App.23 (cleaned up) (quoting *Friedman*, 784 F.3d at 410). Though this rule neither looks to the Second Amendment's text nor historically analogous regulations, the majority found it "consistent with the methodology approved in *Bruen*." Pet.App.23. The court explained that *Friedman* was "particularly useful" to reject this Court's common-use test as "circular." Pet.App.22 & n.5, 39. Instead, "the relevant question" at both steps of *Bruen*'s analysis is whether the weapon at issue seems "militaristic." Pet.App.41-42.

Judge Brennan dissented. Pet.App.60-108. He thought it a "remarkable conclusion" that semiautomatic rifles "are not 'Arms.'" Pet.App.60. Following *Heller* and *Bruen*, he affirmed that "Arms" applies to "all bearable instruments that facilitate armed self-defense," including modern rifles and magazines. Pet.App.64.

Judge Brennan also criticized the majority for relying on *Friedman*, a decision that *Bruen* "effectively abrogated." Pet.App.92. The majority "criticize[d]" *Bruen*'s common-use test "as spawning unworkable circularity issues." Pet.App.70. But Judge Brennan explained that this Court "certainly was not worried about circularity" in both *Bruen* and *Caetano*. Pet.App.71. He concluded that the lower court was "not free to ignore the [Supreme] Court's instruction." Pet.App.71. Applying that instruction, Judge Brennan

concluded that semiautomatic firearms and their magazines are not within the historical tradition of regulating "'dangerous and unusual weapons,'" recognizing that millions are in circulation. Pet.App.76-77.

Finally, Judge Brennan concluded that the governments had not satisfied their burden to identify analogous historical regulations. He explained that their examples "are limited only to the public carry of certain weapons," not outright bans. Pet.App.82. Other regulations restricted "only unusual kinds of pistols, preserving the right to continue carrying army or navy pistols." Pet.App.83. Gunpowder regulations were also disanalogous, as this Court had concluded in *Heller*. Pet.App.84. So too were "[t]rap" and "spring gun" regulations—they "fire indiscriminately … to protect property versus human life." Pet.App.85. And the majority's examples were similarly disanalogous—*Heller* rejected the anti-discharging ordinances, and the other examples did not involve outright bans on *possession* before the 20th-century. Pet.App.85-87.

Dr. Herrera petitioned for rehearing and rehearing en banc. CA7.Dkt.133. The Seventh Circuit denied that petition. Pet.App.144. Dr. Herrera now timely petitions this Court for certiorari.

REASONS FOR GRANTING THE PETITION

The decision below is irreconcilable with *Bruen*. Without this Court's review, it will begin another decade-long resistance to this Court's assurance that

the Second Amendment is no "second-class right." *Bruen*, 597 U.S. at 70. The decision below holds that arms are not arms. And it remakes *Bruen*'s text-and-history approach into the "blank check" that *Bruen* said it was not. *Id.* at 30. Flouting *Bruen*'s text-and-history approach, the Seventh Circuit relieved the governments of their burden by ignoring the overwhelming evidence that commonly owned long guns, useful for both self-defense and in the common defense of communities, are the paradigmatic "arms" that the Second Amendment was ratified to protect. It held that those common arms may be banned from homes without any analogous historical precedent. In doing so, it created multiple conflicts with the decisions of other Courts of Appeals. This Court should grant the petition and, at a minimum, summarily vacate and remand, or, alternatively, set the case for full merits review.

I. This Court should summarily vacate and remand.

The Seventh Circuit's decision ignored controlling precedent. In *Heller*, this Court held it unconstitutional to ban common handguns at home. 554 U.S. at 635. Flouting *Heller*, the Seventh Circuit held that the government may ban common rifles and magazines from homes. Pet.App.31-34. Defying *Heller*, history, and the English language, it held that these common arms are not "Arms" at all under the Second Amendment. And flouting *Bruen*, the court held that common rifles can be banned in homes because of a smattering of more recent laws mostly regulating carry of arms outside the home.

At a minimum, summary vacatur is warranted for the Seventh Circuit to explain how a government can ban civilian rifles from homes but not handguns. And it is further warranted to hold the governments to their burden to "demonstrate a tradition of broadly prohibiting" the keeping "of commonly used firearms for self-defense" at home. *Bruen*, 597 U.S. at 39. If any gun law aimed at "protecting communities" can justify these in-the-home bans, as the Seventh Circuit held, then that burden is no burden at all. Pet.App.44-45.

A. The Seventh Circuit's holding that arms are not arms warrants summary vacatur. The Seventh Circuit interpreted "Arms" in a way contrary to this Court's decisions, history, and the English language. The lower court defined "Arms" to mean "non-militaristic weapons." Pet.App.42. It circularly defined "militaristic" to mean "weapons exclusively for military use" or those "that may be reserved for military use." Pet.App.23, 31. And it held that the only "arms" protected are those on the "civilian side of the line." Pet.App.36-37.

The Seventh Circuit's interpretation of "Arms" mangles text, history, and this Court's precedents. In *Heller*, this Court said that the Second Amendment presumptively "extends … to all instruments that constitute bearable arms" including those "that were not in existence at the time of the founding." 554 U.S. at 581-82. In *Bruen*, this Court reaffirmed that "Arms" includes "modern instruments that facilitate armed self-defense." 597 U.S. at 28. And even before *Bruen*, this Court summarily vacated a decision for ignoring

Heller's "clear" definition of arms. *Caetano*, 577 U.S. at 411-12.

This historical meaning has not changed since *Heller*. Then and now, "[a]ll firearms constituted 'arms.'" 554 U.S. at 581. That meaning is incompatible with the Seventh Circuit's view that civilian "weapons and accessories," which the majority deemed "designed for military or law-enforcement use," are categorically "exclude[d]" from the Second Amendment's meaning of "arms." Pet.App.48. The Seventh Circuit cannot ignore that text as a means of skirting the historical analysis that *Bruen* requires.

The Seventh Circuit's application of its definition highlights how nonsensical it is. While the military uses handguns, protected by *Heller*, it is undisputed that the military does *not* use AR-15s.[3] Pet.App.32. Not only is the AR-15 a civilian arm, it is the most popular civilian rifle in America. And as this Court said in *Miller* and said again in *Heller*, the Second Amendment protects at its core those civilian weapons that were "typically possessed" that "could contribute to the common defense." *United States v. Miller*, 307 U.S. 174, 178-79 (1939); *Heller*, 554 U.S. at 621, 624-25 (*Miller* held that the Second Amendment protects "arms that 'have some reasonable relationship to the

[3] Unlawfully converting an AR-15 to fully automatic military functionality would not only be illegal but also would convert the rifle to one that is uncommon amongst civilians, see *Hollis v. Lynch*, 827 F.3d 436, 448-52 (5th Cir. 2016), just like sawing off a shotgun would convert an otherwise protected shotgun into an uncommon and regulable arm, see *Miller*, 307 U.S. at 178-79.

preservation or efficiency of a well regulated militia.'").

B. The Seventh Circuit's historical approach also warrants summary vacatur. Remarkably, the majority rejected the tradition of protecting possession of common weapons in the home that this Court has recognized. This rejection was rooted not in history but in the majority's complaint that this Court's typical-possession test is "circular" and "slippery." Pet.App.22, 39. It reasoned that a regulation cannot "have been constitutional" at one time, "but unconstitutional thereafter." Pet.App.41. But that reasoning was the *dissent's* in *Heller*. 554 U.S. at 721 (Breyer, J., dissenting). It contradicts *Bruen*'s reasoning: "even if" certain dangerous and unusual firearms were banned at the founding, those bans would now be outside that tradition if the firearms are "in common use *today*." 597 U.S. at 47 (emphasis added). And it conflicts with *Heller*'s holding that handguns cannot be prohibited in the home because they are commonly owned now. 554 U.S. at 628-29.

Instead of following this Court's precedents, the Seventh Circuit created its own tradition of reserving "especially dangerous weapons" for "the state only" to "protect communities." Pet.App.44-46. But that view was Justice Stevens's dissenting view. See *McDonald*, 561 U.S. at 899-900 (Stevens, J., dissenting) (finding tradition of "bann[ing] altogether the possession of especially dangerous weapons"). The binding majority opinions of this Court have held that dangerousness alone is insufficient. See *Caetano*, 577 U.S. at 412

(rejecting argument that stun guns are "'dangerous per se at common law'" because they must also be unusual *today*). "[T]he relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes." *Id.* at 418 (Alito, J., concurring).

The Seventh Circuit remade *Bruen*'s historical test into the "regulatory blank check" that *Bruen* condemned. 597 U.S. at 30. If popular civilian rifles can be banned in the home based on a tradition of regulating "especially dangerous weapons" to "[p]rotect Illinois [c]ommunities," Pet.App.44-45, then *Bruen*'s test permits virtually any conceivable gun regulation—even the handgun ban *Heller* invalidated. Compare 554 U.S. at 634 (rejecting argument from "handgun violence"), with *id.* at 682 (Breyer, J., dissenting) (handguns "are the overwhelmingly favorite weapon of armed criminals"). This Court's cases demand a more targeted assessment of "how and why" modern and historical "regulations burden a law-abiding citizen's right to armed self-defense." *Bruen*, 597 U.S. at 29. *Bruen* and *Heller* make clear that justifications must be defined more specifically than "public … safety," Pet.App.45, like "firearm violence in densely populated communities." *Bruen*, 597 U.S. at 27. The Seventh Circuit should have considered justifications more specific than ordinary police powers.

The majority's distortion of this Court's rules shows through the rest of its historical analysis. Its two lead historical examples were ones that *Heller* already held are *not* analogous to outright home bans.

Compare Pet.App.46 (relying on ordinances that outlawed public "discharging" of firearms), with *Heller*, 554 U.S. at 632-34 (rejecting dissent's reliance on these examples). Most of the majority's five other examples are disanalogous carry regulations that "did not apply to all pistols, let alone all firearms," *see Bruen*, 597 U.S. at 48, or are from the late-19th-century and 20th-century. Pet.App.47-48. But *Bruen* held that "late-19th-century" and "20th-century evidence" does "not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence." 597 U.S. at 66 & n.28. The majority ignored Dr. Herrera's "earlier evidence," *id.*, that commonly owned long arms were protected by federal statutes from 1792 to 1903. See *infra* Section II.B.1.

Any doubt about how far the majority departed from this Court's precedents is dispelled by its reliance on its pre-*Bruen* decision in *Friedman*. Beyond relying on *Friedman*'s critique of this Court's common-use test, the majority relied on *Friedman* to adopt a test that looks nothing like the text-and-history test *Bruen* reaffirmed. The majority thought it "'better to ask whether [1] a regulation bans weapons that were common at the time of ratification or [2] those that have some reasonable relationship to the preservation or efficiency of a well regulated militia, and [3] whether law-abiding citizens retain adequate means of self-defense.'" Pet.App.23 (cleaned up) (quoting *Friedman*, 784 F.3d at 410) ("This approach, we believe, is consistent with the methodology approved in *Bruen*."); *id.* at 39 ("we find the analysis in *Friedman* to be particularly useful"); *id.* at 41 (rejecting the common-use test "[f]or the reasons set

forth in more detail in *Friedman*"). This Court should summarily vacate "to prevent the Seventh Circuit from relegating the Second Amendment to a second-class right." *Friedman*, 577 U.S. at 1039 (Thomas, J., dissenting from denial of certiorari).

II. The Seventh Circuit relegated the Second Amendment to a second-class right by upholding outright bans of commonly owned rifles and magazines in the home.

A faithful application of *Bruen*'s test requires the Seventh Circuit to take another look. The Second Amendment presumptively protects Dr. Herrera's right to keep his modern rifles and magazines at home. And history establishes that commonly owned arms, especially those useful for the common defense, are at the Second Amendment's core. The Seventh Circuit's analysis failed at both steps.

A. The Seventh Circuit redefined "Arms" to exclude common civilian rifles and magazines.

The "Second Amendment's plain text covers" Dr. Herrera's "conduct." *Bruen*, 597 U.S. at 17. "[T]he 'textual elements' of the Second Amendment's operative clause—'the right of the people to keep and bear Arms, shall not be infringed'—'guarantee the individual right to possess … weapons in case of confrontation.'" *Id.* at 32. Modern rifles and handguns are weapons. And magazines are necessary for both to operate. D.Ct.Dkt.63-5 ¶¶25-35. The Second Amendment therefore presumptively guarantees Dr.

Herrera's right to "keep" them at home. U.S. Const. amend. II.

Other circuits have applied that simple analysis after *Bruen*. E.g., *Range v. Att'y Gen.*, 69 F.4th 96, 103 (3d Cir. 2023) (en banc) (plaintiff's "request[] to possess a rifle to hunt and a shotgun to defend himself at home" is "presumptively protect[ed]'"). But not the Seventh Circuit. It ignored "the constitutional right as defined by *Heller*." *Id.* It concluded that "Arms" meant "non-militaristic weapons," and it defined "militaristic" circularly as "weapons that may be reserved for military use." Pet.App.31, 42. It then found that AR-15s and standard rifle and handgun magazines are militaristic weapons. Pet.App.37.

1. The Seventh Circuit's rewriting of the Second Amendment ignores ordinary meaning, history, and precedent.

The Seventh Circuit's circular definition defies ordinary meaning and history. For its gerrymandered definition of "Arms" the Seventh Circuit could muster no historical authority. Its definition ignores both the ordinary meaning of "Arms" and the traditional understanding of the "right" to them. Both confirm that the Second Amendment's text *at least* protects long arms.

Ordinary Meaning. The ordinary meaning of "Arms" included all bearable weapons. *Heller*, 554 U.S. at 580-81. "Arms" meant "[w]eapons of offense." N. Webster, American Dictionary of the English

Language (1828). This Court has already confirmed that this is the meaning of "Arms" in the Second Amendment, and that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Heller*, 554 U.S. at 582. Semiautomatic rifles, handguns, and their magazines fit comfortably within that interpretation. See Pet.App.60-62 (Brennan, J., dissenting).

The Seventh Circuit's only support for its alternative definition was a misrepresentation of *Heller*. The majority pointed to this Court's statement that "[t]he term was applied, then as now, to *weapons that were not specifically designed for military use and were not employed in a military capacity*." Pet.App.28 (quoting *Heller*, 554 U.S. at 581). From this, the Seventh Circuit concluded that weapons that are "more like … military-grade weaponry" in its view are not "Arms," even if commonly owned and used exclusively by civilians. Pet.App.33. But *Heller*'s point was that "Arms" did not apply *only* to weapons that could be used for common defense. 554 U.S. at 581 (distinguishing a definition saying that arms were "*generally* made use of in war"). For centuries, no one doubted that civilian weapons useful for the common defense were at the heart of the Second Amendment's protections.

The Seventh Circuit then jumped 45 pages to maul an unrelated part of *Heller*. Pet.App.28-32. *Heller* said that "M-16 rifles … may be banned" because of a "*historical tradition*" of regulating "dangerous and unusual weapons." 554 U.S. at 627 (emphasis added);

id. at 624-25 (citing Part III). It "did not say that dangerous and unusual weapons are not *arms*." *Teter v. Lopez*, 76 F.4th 938, 950 (9th Cir. 2023). And even looking to tradition, *Heller* found only a tradition regulating weapons "that are highly unusual in society at large," *Heller*, 554 U.S. at 627, while in-home possession of weapons "in common use" was protected, *id.* at 624. The Seventh Circuit ignored *Heller*'s reasoning. It instead drew on out-of-context snippets to hold that "'[b]earable arms" must exclude some category of arms that it finds are like "a military weapon." Pet.App.32.

Common law. The lower court also ignored common-law understandings of "the right of the people to … keep Arms." U.S. Const. amend. II. All courts agreed that "rifles" that "are usually employed in civilized warfare" are arms the people have an "unqualified right to keep." E.g., *Aymette v. State*, 21 Tenn. 154, 158-61 (1840). The only controversy was whether this right included only weapons useful for the common defense.[4]

---

[4] Compare *Bliss v. Com.*, 12 Ky. 90, 90-93 (1822) ("a sword in a cane" is protected), *Simpson v. State*, 13 Tenn. 356, 360 (1833) ("without any qualification whatever as to their kind or nature"), and *Cockrum v. State*, 24 Tex. 394, 402 (1859) ("The right to carry a bowie-knife for lawful defense is secured…."), with *Aymette*, 21 Tenn. at 159 (arms "usual in civilized warfare" or that "contribute to the common defence"), *State v. Smith*, 11 La. Ann. 633, 633 (1856) ("arms … such as are borne by a people in war"), *English v. State*, 35 Tex. 473, 475 (1872) ("protects only the right to 'keep' such 'arms' as are used for purposes of war"), *Hill v. State*, 53 Ga. 472, 474 (1874) ("The word 'arms,' evidently means the arms of a militiaman, the weapons ordinarily used in battle,

Ordinary meaning, this Court's precedents, and the common law all confirm that commonly owned rifles are presumptively protected. *Andrews v. State*, 50 Tenn. 165, 179 (1871). But the Seventh Circuit rewrote this Court's precedent to extract a circular definition that denies this presumption even for in-home possession of common, exclusively civilian arms.

2. Nearly any weapon could be denied Second Amendment protection under the Seventh Circuit's approach.

The Seventh Circuit's application of its circular definition confirms that no principle underlies its "like … military grade weaponry" test. Pet.App.33-34. Against all the evidence, the Seventh Circuit erroneously concluded that AR-15s are "exclusively for military use." Pet.App.23. In a single sentence devoid of reasoning, it concluded that standard rifle and handgun magazines like Dr. Herrera's "can lawfully be reserved for military use" too. Pet.App.37. Its reasons for these conclusions were nonsensical.

AR-15s are *civilian* rifles. *Staples v. United States*, 511 U.S. 600, 603, 611-12 (1994). The military does not use them at all. D.Ct.Dkt.63-5 ¶¶78-84. They are instead the most popular civilian rifle in the United States. Pet.App.40-41 (rejecting the relevance of civilian statistics). Millions of civilians keep them for self-defense, hunting, and target shooting. *Infra*

---

to-wit: guns of every kind...."), *Fife v. State*, 31 Ark. 455, 460 (1876) ("war arms").

Section II.B.3. And even the Seventh Circuit acknowledged that the AR-15 is "meaningful[ly] distinct[]" from the military's M-16 since the AR-15 "has only semiautomatic capability." Pet.App.33-34; see also D.Ct.Dkt.63-5 ¶¶78-84.

Still, the Seventh Circuit found that the AR-15 is an exclusively military weapon. In reaching this conclusion, the majority dismissed evidence showing that the AR-15 is a popular civilian rifle. Pet.App.40-41. Instead, it announced that the AR-15 must be military because it shared a "core design" and "operating system" with the M-16. Pet.App.34. Confronted with the stark difference between the AR-15's semiautomatic capabilities and the military's fully automatic rifles, the court primarily noted that *illegal* modifications might "essentially make" an AR-15 fully automatic. Pet.App.34. But that fact no more entails they are not "Arms" than the fact that one can unlawfully saw off the barrel of a shotgun entails that shotguns are not "Arms." See *Miller*, 307 U.S. at 178-79. Other than that, the Seventh Circuit only speculated that the slower firing rate for a semiautomatic weapon might not be enough. Pet.App.35-36. But "semi-automatic *rifles* fire at the same general rate as semi-automatic *handguns*," and the latter are "constitutionally protected." *Heller II*, 670 F.3d at 1289 (Kavanaugh, J., dissenting).

The Seventh Circuit's conclusion that the banned magazines could be "reserved for military use" made even less sense. Again, the court did not look to whether these magazines were exclusively, or even predominately used by the military. It could not do so

since Dr. Herrera's rifle magazines and his standard 17-round handgun magazine are popular among civilians. All the Seventh Circuit could say is that the military also uses similar magazines. Pet.App.35. And it noted that "[a]nyone who wants greater firepower is free under these laws to purchase several magazines of the permitted size," without ever explaining what that has to do with the purported distinction between military and civilian arms. Pet.App.37. But see *Heller*, 554 U.S. at 629 (rejecting argument that governments can ban arms "so long as the possession of other[s]" is allowed).

* * *

The Seventh Circuit's re-writing of "Arms" leaves the protection of nearly any weapon uncertain. Under the guise of identifying exclusively military arms, the Seventh Circuit found that a popular civilian rifle was not an "Arm," even though the military does not use it. D.Ct.Dkt.63-5 ¶¶78-84. And it banned common magazines because the military uses similar magazines and smaller magazines are available. If the test for an "Arm" is this malleable, then even the handgun at issue in *Heller* should have been excluded too. Cf. *Heller II*, 670 F.3d at 1286 (Kavanaugh, J., dissenting) ("There is no basis in *Heller* for drawing a constitutional distinction between semi-automatic handguns and semi-automatic rifles."). This Court's review is warranted, lest the Second Amendment right be reduced to word games.

B. The Seventh Circuit's historical analysis creates the regulatory blank check this Court condemned.

The Seventh Circuit fared no better when looking for a historical tradition of regulation. Dr. Herrera's "proposed course of conduct" fits comfortably within the "plain text of the Second Amendment." *Bruen*, 597 U.S. at 32. The governments therefore had to "demonstrate a tradition of broadly prohibiting … commonly used firearms for self-defense." *Id.* at 38. Though they failed to do so, the Seventh Circuit adopted Justice Stevens's broad tradition of regulating "especially dangerous weapons" that could justify nearly any regulation.

1. The Seventh Circuit ignored a tradition of *protecting* commonly owned rifles in homes.

Respondents and the Seventh Circuit ignored Dr. Herrera's principal historical argument—that there has long been a historical tradition of keeping long arms in homes. Since before the Founding, statutes required civilians to keep at home long arms that could be useful in common defense. The first Militia Act, 1 Stat. 271 (May 8, 1792), for example, required civilians to "provide [themselves] with a good musket or firelock … or with a good rifle," along with "twenty balls suited to the bore of [the] rifle, and a quarter of a pound of powder." *Id.* §1. This requirement makes sense because in the militia "men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *Miller*, 307 U.S.

at 179. Later militia acts maintained and expanded these requirements. E.g., Militia Act of 1803, §2, 2 Stat. 207 (Mar. 2, 1803) ("[E]very citizen duly enrolled in the militia, shall be constantly provided with arms, accoutrements, and ammunition, agreeably to the direction of the said act…."); Militia Act of 1862, 12 Stat. 597 (July 17, 1862) (including black Americans). It was not until 1903 that Congress repealed the 1792 Act. *See* Dick Act, 32 Stat. 775 (Jan. 21, 1903).

Against that unbroken history, the Seventh Circuit held that the governments can ban commonly owned civilian arms in the home. But the history of the militia system shows that there could be no lawful bans of common civilian arms that would be useful in the common defense. It also shows that there is no tradition of banning any weapon that seems too much like a military one to a court. After all, the common arms that the militia acts required in the home were "unequivocally [the] military arms" of the day.[5]

2. The Seventh Circuit concocted a historical tradition.

After ignoring a specific tradition of protecting long guns, the Seventh Circuit adopted Justice Stevens's overbroad tradition of banning "especially dangerous weapons." Pet.App.42-43; accord *McDonald*, 561 U.S. at 899-900 (Stevens, J., dissenting). *Bruen* was clear that it is not enough to

---

[5] H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 Chi.-Kent L. Rev. 403, 517 & n.488 (2000).

point to any historical regulation to support a modern one. The tradition must involve "relevantly similar" regulations. *Bruen*, 597 U.S. at 29. Courts must ask "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* On the "how" side, the question is whether "modern and historical regulations impose a comparable burden." *Id.* On the "why" side, it is "whether that burden is comparably justified." *Id.* A court must look at the specific burden imposed by a law—*e.g.*, "a flat ban on the possession of [modern rifles] in the home"—and the specific reason for that burden—*e.g.*, reducing "violence in densely populated communities." See *id.* at 27.

But after ignoring the history Dr. Herrera presented, the Seventh Circuit also ignored these instructions. It identified not a single "flat ban" of common firearms of *any* kind in the home, let alone rifles. *See id.* Instead, it purported to find a "long-standing tradition" that "especially dangerous weapons" are "for the state only." Pet.App.42, 46. This tradition, according to the majority, permits the state to prohibit common weapons even in the home. These regulations are permitted, the majority reasoned, to "[p]rotect … [c]ommunities." Pet.App.44.

The court drew this broad tradition from laws that looked nothing like the challenged in-home bans of common weapons. Its two lead examples are ordinances that outlawed "the [public] discharging" of firearms, Pet.App.46, already rejected by this Court as disanalogous, *Heller*, 554 U.S. at 633-34. And most of the other five are late-19th-century regulations "restricting the carry of a wide array of dangerous and

concealable weapons"—Bowie knives and the like. Pet.App.47. *Bruen* already explained why these regulations are disanalogous: They generally "restricted only concealed carry, not all public carry," "applied only to certain '*unusual*'" weapons, and "did not prohibit … long guns for self-defense—including the popular" ones of the time. 597 U.S. at 48-49 (emphasis added); accord *Range*, 69 F.4th at 104 n.8 ("the 19th-century local laws … are inapposite because they involved prohibitions on concealed carry, a lesser restriction than a total ban").

Drawing a broad authority to prohibit common weapons from these regulations writes the exact "regulatory blank check" that *Bruen* condemned. 597 U.S. at 30. If regulations of the discharge of firearms and the carrying of dangerous and unusual weapons can justify in-home bans of common weapons, then *Bruen*'s command to find "relevantly similar" laws is meaningless.

Bruen demands more. The Seventh Circuit should have asked two questions. Regarding "how," it should have asked whether "American governments" have "broadly prohibited … commonly used firearms for personal defense" in the home. *Id.* at 70. Because the "Founders themselves could have adopted" a similar policy, analogies must be very close. *Id.* at 27. And for "why," the question is whether the historical regulations were aimed at "firearm violence in densely populated communities." *Id.*

Bruen already answered both questions. History "does not demonstrate a tradition of broadly

prohibiting the public *carry* of commonly used firearms for self-defense." *Id.* at 38 (emphasis added). It follows that there is no tradition against *keeping* them at home.

Finally, the Seventh Circuit improperly relied on regulations of uncommon arms from "the late 1800s," 1934, 1968, and 1986. Pet.App.47. *Bruen* said courts should not do so. 597 U.S. at 66 n.28 ("We will not address any of the 20th-century historical evidence brought to bear by respondents."). "[L]ate-19th-century" and "20th-century historical evidence … does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Id.* at 66 & n.28. Other circuits have faithfully applied *Bruen* on this point. E.g., *Range*, 69 F.4th at 104 n.8 (20th-century laws are "too late").

3. The Seventh Circuit defied this Court's holding that common weapons are traditionally protected in the home.

The Seventh Circuit made much of *Heller*'s statement that M-16s can be banned. Pet.App.28-29. But it ignored why: they are "highly unusual in society at large." *Heller*, 554 U.S. at 627. *Heller* acknowledged a "historical tradition" of regulating "'dangerous *and* unusual weapons.'" *Id.* (emphasis added). But mere dangerousness is not enough. *Caetano*, 577 U.S. at 411-12 (summarily vacating decision because finding of dangerousness is not enough); see also *id.* at 417 (Alito, J., concurring) ("this is a conjunctive test"). Instead, this same tradition recognizes that common

civilian weapons are protected. *Heller II*, 670 F.3d at 1272 (Kavanaugh, J., dissenting) (Dangerous and unusual weapons "are equivalent to those weapons not 'in common use.'"); *Caetano*, 577 U.S. at 418 (Alito, J., concurring) ("[T]he relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes.").

This Court has recognized a tradition of protecting commonly owned weapons in the home. *Heller*, 554 U.S. at 627. But the Seventh Circuit rejected this tradition, insisting that common use is "slippery" and "circular." Pet.App.22, 39. Instead, it claimed to discover a tradition permitting bans of "especially dangerous weapons," even inside the home. Pet.App.42-43. That supposed tradition defies this Court's precedent and is not supported by any evidence.

This case would have been much simpler if the Seventh Circuit had followed the common-use test. Semiautomatic rifles like the AR-15 are commonly owned. By the State's own estimate, semiautomatic gun owners (6.4 million[6]) are more common than lawyers (1.3 million[7]), teachers (4 million[8]), and Ford F-150s.[9] The federal government admits that "the AR-

---

[6] D.Ct.Dkt.52-4 ¶27 & n.23.

[7] American Bar Association, ABA Profile of the Legal Profession, at 22 (2022), perma.cc/WFN4-6RKF.

[8] National Center for Education Statistics, Teacher Characteristics and Trends, perma.cc/L8HX-NW25.

[9] *Miller v. Bonta*, 542 F. Supp. 3d 1009, 1022 (S.D. Cal. 2021), *vacated* 2022 WL 3095986 (CA9).

15-type rifle" is "one of the most popular firearms in the United States," including "for civilian use." 87 Fed. Reg. 24,652, 24,655 (Apr. 26, 2022).[10] Between 1990 and 2018, nearly 20 million semiautomatic rifles were produced in the United States, with almost two million in 2018 alone. D.Ct.Dkt.63-6 at 9. The popularity of semiautomatic rifles has only grown. In 2020 alone, "2.8 million … AR- or AK-type rifles" "were introduced into the U.S. civilian gun stock."[11] The AR-15 is the modern equivalent of the militiaman's rifle of choice. See *supra* Section II.B.1; D.Ct.Dkt.63-5 ¶¶81-84.

Rifle and handgun magazines with a capacity of 11 or more rounds are also common. Dr. Herrera's 17-round handgun magazine is one of 71 million so-called large-capacity magazines in circulation. D.Ct.Dkt.63-6 at 9. And his rifle magazines are among the approximately 90 million rifle magazines in circulation. *Id.*

* * *

Like its remaking of the text, the Seventh Circuit's historical approach amounts to little more than a search for a reason that common civilian weapons can be banned from the home. The court ignored a specific tradition showing that common civilian weapons that could be used for the common defense were required

---

[10] "The contents of the Federal Register shall be judicially noticed…." 44 U.S.C. §1507.

[11] See House-Passed Assault Weapons Ban of 2022 (H.R. 1808), at 2 (Aug. 4, 2022), perma.cc/MB73-PSC3.

to be kept in the home. It also ignored this Court's precedents recognizing a tradition of protection for weapons in common use. Instead, it created a broad tradition of banning common civilian weapons from the home because they are "especially dangerous," without pointing to any analogous regulation to support that tradition. Pet.App.42-43. This Court's review of the Seventh Circuit's "regulatory blank check" is needed. *Bruen*, 597 U.S. at 30.

III. The Seventh Circuit's decision created several circuit splits.

The Seventh Circuit's decision created at least two splits with other circuits. First, the Courts of Appeals are now split about the meaning of "Arms." Until now, every circuit that has considered the issue has concluded that modern rifles and magazines count.[12] But not the Seventh Circuit. Second, courts are now split about whether this Court's common-use test applies to semiautomatic rifles and magazines. Some say it does. But not in the Seventh Circuit, where the commonality of rifles and even handgun magazines is now irrelevant.

The Seventh Circuit's departures from the norm has alarming consequences for Second Amendment rights. The Seventh Circuit has stripped millions of law-abiding Americans of the presumptive protection that the Second Amendment promises them.

[12] Because *Bruen* reaffirmed that text and history determine the meaning of the Second Amendment, it left in place pre-*Bruen* holdings that arms were covered under the historical understanding of "Arms." 597 U.S. at 19.

Governments in Illinois, Wisconsin, and Indiana can now freely ban common arms without having to overcome that presumption. This Court should restore the uniformity that the Seventh Circuit disrupted.

A. The Seventh Circuit adopted a nonsensical definition of "Arms." According to majority, "Arms" means "non-militaristic weapons." Pet.App.42. It held that modern rifles do not meet that definition because they seem too much like M16s, even though they are not military-issued weapons, have no automatic firing capability, and are owned in the millions. And the banned magazines are not within that definition because a person could buy several smaller magazines. Pet.App.37. On that basis, the court held that even Dr. Herrera's *handgun* magazines—a necessary component of a weapon *Heller* already held is protected—could be banned. Pet.App.37-38. The lower court's decision conflicts with the decisions of other circuits with respect to both weapons and magazines.

Weapons. The Seventh Circuit's decision conflicts with the Ninth Circuit's holding that all weapons that constitute bearable arms are "Arms." The Ninth Circuit recently endorsed the "general definition of 'arms'" that the lower court rejected here. *Teter*, 76 F.4th at 949. Following *Heller*, "Arms" means "'[w]eapons of offence' that may be 'use[d] in wrath to cast at or strike another.'" *Id.* The court then rejected the "argument that the purported 'dangerous and unusual' nature of" weapons "means that they are not 'arms' as that term is used in the Second Amendment." *Id. Heller* "did not say that dangerous

and unusual weapons are not *arms*." *Id.* at 950. Instead, "the relevance of a weapon's dangerous and unusual character lies in the '*historical tradition* of prohibiting the carrying of dangerous and unusual weapons.'" *Id.* at 949-50. And it held that whether a weapon is "'dangerous and unusual' is a contention as to which [the state] bears the burden of proof in the second prong of the *Bruen* analysis." *Id.* at 950. For that reason, the court held that "bladed weapons" are presumptively protected "Arms."

The Seventh Circuit rejected this straightforward definition of "Arms." Instead, it chose to ask whether a weapon seemed to it like one that could be reserved for the military.

Magazines. The Third and Ninth Circuits have both held that magazines are covered by the Second Amendment. The Third Circuit held that magazines holding ten or more rounds are "arm[s] under the Second Amendment." *ANJRPC, Inc. v. Att'y Gen.*, 910 F.3d 106, 116 (3d Cir. 2018). It correctly reasoned that "magazines feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended." *Id.* (citing *Miller*, 307 U.S. at 180). The Ninth Circuit similarly held that a restriction on possession of magazines holding more than ten rounds "burdens conduct falling within the scope of the Second Amendment," explaining that "there must also be some … right to possess the magazines necessary to render [semiautomatic] firearms operable." *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015).

But the Seventh Circuit held that rifle magazines holding more than ten rounds and handgun magazines holding more than fifteen rounds are not covered by the Second Amendment. Pet.App.37-38. It reached this conclusion because the military uses similar handgun magazines, and a person could instead buy several smaller magazines—irrelevant considerations that no other circuit has considered. Pet.App.37.

B. The Seventh Circuit's rejection of this Court's common-use test deepened a circuit split. *Heller* derived the common-use rule from "historical tradition." 554 U.S. at 627. According to the rule, if a weapon is in common use, it is "protected." *Id.* This Court later made clear that the common-use test is binding. *Caetano*, 577 U.S. at 411-12. And this Court applied it in *Bruen* to distinguish historical regulations targeting "'dangerous and unusual weapons,'" unlike those "unquestionably in common use today." 597 U.S. at 47.

After *Heller*, the Second, Fifth, and Ninth Circuits acknowledged and applied the common-use test. The Fifth Circuit held that "protected weapons are 'those in common use at the time.'" *Hollis*, 827 F.3d at 446. "If a weapon is dangerous and unusual, it is not in common use and not protected by the Second Amendment." *Id.* The Fifth followed the Second Circuit's recognition that "'common use is an objective and largely statistical inquiry.'" *Id.* at 449 (quoting *N.Y. State Rifle and Pistol Ass'n v. Cuomo*, 804 F.3d 242, 256 (2d Cir. 2015)). Courts have applied the test to military arms like the M-16. E.g., *id.* (unprotected

because not in common use). They have applied the test to civilian arms like the AR-15 and their magazines. E.g., *Cuomo*, 804 F.3d at 255-57; *Heller II*, 670 F.3d at 1260-61. And the Ninth Circuit applied it to invalidate regulations of arms that are used both by civilians and the military, such as "bladed weapons." *Teter*, 76 F.4th at 949-50.

The Seventh Circuit was the first circuit to reject the common-use test after *Bruen*. *But see Kolbe v. Hogan*, 849 F.3d 114, 136 & n.10 (4th Cir. 2017) (en banc) (rejecting common-use test before *Bruen*), *abrogated by Bruen*. It rejected the common-use test as circular. Pet.App.22 & n.5. And it held that statistics are irrelevant. Pet.App.40-41. Instead, "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." Pet.App.41-42. By replacing the objective common-use inquiry with its idiosyncratic one, commonality is now irrelevant in the Seventh Circuit. This Court should restore the governments' burden—acknowledged by the other circuit courts—to demonstrate a weapon is not in common civilian use.

CONCLUSION

For the above stated reasons, the Court should grant the petition.

Respectfully submitted,

George P. Hamilton
AMERICA FIRST LEGAL FOUNDATION
611 Pennsylvania Ave. SE
Suite 231
Washington, D.C. 20003
(202) 964-3721

Thomas R. McCarthy
Taylor A.R. Meehan
Jeffrey M. Harris
Gilbert C. Dickey
Counsel of Record
C'Zar D. Bernstein
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423
gilbert@consovoymccarthy.com

Counsel for Petitioner

Date: February 12, 2024