No. 23-879

In the

Supreme Court of the United States

CALEB BARNETT, et al.,

Petitioners,

v.

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

Respondents.

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

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

In the wake of this Court's landmark decision in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022), Illinois should have trimmed back existing restrictions on constitutionally protected activity to conform to this Court's teachings. Instead, Illinois went in the exact opposite direction, banning countless firearms and magazines that had long been lawfully and safely possessed for self-defense by countless Illinois citizens. Rather than chastise Illinois for its lawless overreach, the Seventh Circuit chastised this Court, labeling *Bruen* "circular," "slippery," and not very "helpful," and discerning from it an invitation to reinstate "balancing" and "means/end analysis." Pet.App.24-25, 41-42, 45-48. The resulting decision, quite remarkably, holds that a ban on virtually all semi-automatic rifles, roughly half the magazines in circulation, and dozens of pistols and shotguns to boot *does not even implicate* the Second Amendment. By the Seventh Circuit's (and respondents') telling, all those banned weapons are not "Arms" at all, and this Court's historical-tradition test is beside the point.

The Seventh Circuit may find its decision in *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015), more "useful," Pet.App.33, than this Court's precedents, but that does not relieve it of the obligation to follow them. While it should not take this Court's intervention to secure compliance with that bedrock rule, the decision below proves otherwise. And leaving unchecked acts of defiance as blatant as Illinois' law and the Seventh Circuit's decision rubber-stamping it will just embolden those

who steadfastly refuse to accept that the Second Amendment "is not 'a second-class right.'" *Bruen*, 597 U.S. at 70 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality op.)). Whether through plenary review, summary reversal, or vacatur, the Court should not let stand the Seventh Circuit's resuscitation of a decision that now manages to "flout[]" *three* of this Court's Second Amendment precedents. *Friedman v. Highland Park*, 136 S.Ct. 447, 449-50 (2015) (Thomas, J., dissenting from denial of certiorari).

4. ARGUMENT

I. Respondents' Efforts To Defend The Seventh Circuit's Opinion Confirm That It Is Egregiously Wrong.

A. Taking a page from the Seventh Circuit's book, respondents never mention this Court's thrice-stated decree that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms." *Bruen*, 597 U.S. at 28 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008)); *accord Caetano v. Massachusetts*, 577 U.S. 411, 411 (2016) (per curiam). They ignore that *Heller* definitively "interpret[ed]" the term "Arms" to mean the same thing "today" as at the Founding, i.e., "'any thing that a man wears for his defense, or takes into his hands, or useth in wrath to cast at or strike another.'" 554 U.S. at 581. And they fail to acknowledge that *Bruen* not only reiterated that "general definition," but confirmed that "the Second Amendment's definition of 'arms' … covers modern instruments that facilitate armed self-defense." 597 U.S. at 28.

Respondents do not and cannot argue that the firearms and feeding devices Illinois has banned fail to satisfy that definition. They instead repeat mantra-like their opinion that those arms are "unsuitable and unnecessary for civilian self-defense," even going so far as to suggest that the tens of millions of Americans who think otherwise have made "poor[]" decisions about how best to defend themselves and their loved ones. *E.g.*, Illinois.BIO.4-5, 23, 27. But Illinois' assessment of the wisdom of the People's choices is no more relevant under the Second Amendment than under the First. What matters for purposes of *Bruen*'s threshold plain-text inquiry is whether the banned articles can be borne for self-defense. And on that issue, the tens of millions of Americans who use them for that purpose simply cannot be wrong.

Respondents resist that conclusion, defending the Seventh Circuit's absurd claim that *Heller* held that "weapons that are most useful in military service" do not even qualify as "Arms." Illinois.BIO.22. That is precisely the type of distortion of the letter and whole thrust of *Heller* that necessitated *Bruen* in the first place. In reality, *Heller* simply acknowledged that "weapons that are most useful in military service" may be prohibited *if* they are "highly unusual in society at large." 554 U.S. at 627. Respondents' contrary claim is nonsensical, as the notion that firearms and feeding devices lack Second Amendment protection *precisely because* they are especially useful in military service would have put the prefatory and operative clauses at odds from the outset. *But see id.* at 598 (concluding that the prefatory clause "fits perfectly"

with the operative clause). "[I]t would have meant that the musket and bayonet would have received no constitutional protection, a result that would have been anathema to the Framers and diametrically opposed to the Amendment's public understanding at the Framing." Robert Leider, *Are Rifles Constitutionally Protected Arms?*, Standing His Ground (Apr. 16, 2024), https://bit.ly/445mc1h.

Respondents' theory also makes nonsense of *Bruen*'s burden-shifting regime, as it leaves states free to enact total bans without even having to defend them. By respondents' (and the Seventh Circuit's) telling, historical tradition does not come into play unless the citizen whose rights have been taken away first proves that an arm "is materially different from the M-16." Illinois.BIO.10. And in carrying that burden, respondents (and the Seventh Circuit) say, the citizen cannot rely on the simple distinction that both this Court and a century's worth of law have found sufficient: whether a firearm is designed to fire only "semi-automatically," *Staples v. United States*, 511 U.S. 600, 611-12 (1994). Once that distinction is discarded, and semi-automatic rifles are deemed "almost the same gun as the M16 machinegun," Pet.App.36, the Second Amendment and historical tradition are rendered beside the point. After all, "semi-automatic *rifles* fire at the same general rate as semi-automatic *handguns*," *Heller v. District of Columbia*, 670 F.3d 1244, 1289 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), and earlier technology is not far behind. Tellingly, Illinois' counsel was unwilling to take a position below on whether the Second Amendment protects a

Winchester repeating rifle. *See* CA7 Oral Arg. at 1:22:54–1:24:35.

Making matters worse, respondents insist that common use is likewise part of the threshold inquiry and hence plaintiffs' burden to prove just to get in the Second Amendment door. County.BIO.32-33. And they insist that the only "use" that counts is "actual[ly]" firing at an assailant during a confrontation, County.BIO.32—a burden so demanding and divorced from this Court's precedents and the Second Amendment's text that it would signal a return to the pre-*Heller* regime where Second Amendment rights were illusory. The Seventh Circuit and respondents may welcome that reversion, but the Framers and this Court have made different judgments.

Respondents protest that making the government prove that banned arms are dangerous and unusual "would effectively eliminate the historical inquiry for cases involving laws prohibiting a type of weapon … in common use." Illinois.BIO.31-32. But they fail to grasp that the common-use test *is the product* of a historical inquiry: Drawing from "'the historical tradition of prohibiting the carrying of dangerous and unusual weapons,'" this Court concluded that "the Second Amendment protects the possession and use of weapons that are 'in common use.'" *Bruen*, 597 U.S. at 21 (quoting *Heller*, 554 U.S. at 627). Indeed, it *must* be a historical-tradition inquiry, as *Bruen* and *Heller* both began and ended their analyses of whether handguns are *definitively* (not just presumptively) protected with the conclusion that they are in common use. *See id.*; *Heller*, 554 U.S. at 627. The Seventh Circuit was

thus bound to apply that test; there is no get-out-of-binding-precedent-free card for decisions of this Court that a lower court deems "circular," "slippery," or "[un]helpful." Pet.App.24-25, 41-42.

Respondents claim that the court was merely criticizing "petitioners' specific interpretation of" the common-use test. Illinois.BIO.20. But the Seventh Circuit did not apply some other conception of common use; it declined to consider common use at all, in favor of resuscitating *Friedman*'s view that "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.44. Nor do respondents offer any competing conception of common use; they just parrot the critique that the test is "circular." Illinois.BIO.19.

At bottom, what the Seventh Circuit embraced, and respondents defend, is not rigorous scrutiny to protect a fundamental constitutional right, but deference to the government. Indeed, the court admitted as much when it posited that "*the legislature* [i]s entitled to conclude" that particular arms are better "reserved to the military." Pet.App.33, 36 (emphasis added). But *Bruen* was clear: "[J]udicial deference to legislative interest balancing" has no place when it comes to the right to keep and bear arms. 597 U.S. at 26. It is the Second Amendment's "balance—struck by the traditions of the American people—that demands our unqualified deference." *Id.* And the framing generation thought it was for the People, not the government, to decide which arms they may keep and bear. Illinois and the Seventh Circuit may not like that historical tradition, but a litigant's (or lower court's) displeasure with the

law of the land does not eliminate its obligation to faithfully follow it.

B. Respondents' begrudging efforts to engage with historical tradition fare no better than their efforts to evade it. Like the Seventh Circuit, they invoke various laws that "regulated the use of weapons" without banning their keeping or carrying. Illinois.BIO.25-27. If that were enough, virtually any law would pass muster. Indeed, if that were enough, *Heller* and *Bruen* would have come out the other way, as respondents invoke some of *the same laws* this Court deemed insufficient to justify possession or carry bans there. As those decisions make clear, if a state seeks to *ban* arms, it must identify a historical tradition of banning arms. A tradition of allowing possession and use subject to regulation affirmatively disproves any historical pedigree for a ban.

Respondents ask for a "'more nuanced approach,'" claiming HB5471 "implicate[s] 'dramatic technological changes' or 'unprecedented societal concerns.'" Illinois.BIO.28 (quoting *Bruen*, 597 U.S. at 27). But most of the arms Illinois bans have been around (and lawfully and safely possessed in Illinois) for decades, and their critical technology has been around since the *nineteenth* century. Pet.28-29. Nevertheless, the earliest laws banning feeding devices or semi-automatic firearms with features like pistol grips, collapsible stocks, or barrel shrouds date back to only 1989. Pet.28. That is not because such arms were initially used only by militaries; they were popular with civilians long before any gained traction with *any* military. *See* Nicholas J. Johnson et al., *Firearms Law and the Second Amendment* 463, 519 (2d ed. 2018).

In all events, no amount of nuance can change the fact that there is no historical tradition of banning common arms just because they were especially dangerous in the hands of criminals. To the contrary, our Nation's tradition is one of protecting the rights of law-abiding citizens to defend themselves against those who would use arms to do them harm. *See Bruen*, 597 U.S. at 47; *Heller*, 554 U.S. at 627. Because Illinois' ban flies in the face of that tradition, it violates the Second Amendment.

II. This Case Is Exceptionally Important, And This Court's Intervention Is Needed Now.

Perhaps recognizing that the decision below cannot be reconciled with this Court's precedents, respondents emphasize the procedural posture of this case and urge this Court to defer review. That would be a weak argument even in the context of a state's good-faith effort to comply with this Court's precedents, as the loss of constitutional rights even temporarily is a quintessential irreparable injury, and this Court routinely vindicates constitutional rights in cases that arise in an interlocutory posture. But the nature of Illinois' law and the decision below makes this plea distinctly problematic. Deferring review in the face of defiance of this Court's decisions and constitutional rights will just beget more defiance, while law-abiding citizens face criminal charges for possessing common arms that have long been lawfully and safely possessed by their fellow citizens.

That dynamic alone would justify this Court's intervention. But the broader state of affairs underscores the pressing need for action. States are

just as bound as lower courts by this Court's pronouncements of constitutional law. Yet Illinois is not alone in responding to *Bruen* with defiance instead of compliance. In the less than two years since *Bruen*, the lesson many of the states whose "may-issue" regimes *Bruen* invalidated have learned is that it is politically expedient to protest *Bruen* by greeting its reaffirmation of the Second Amendment with new restrictions on Second Amendment rights. Those new restrictions on everything from who may obtain and carry arms, to which arms they may possess, to where they may carry them, and more, have been passed reflexively, with states not even bothering to examine whether they find any purchase in historical tradition. Indeed, it has become commonplace for states defending new firearms restrictions to plead for more time to examine the historical record that should have been considered *before* they were enacted.

More troubling still, the public record is replete with examples of state officials acknowledging that they passed these post-*Bruen* measures in an avowed effort to frustrate the exercise of the rights this Court recognized. *See, e.g.*, State of N.Y., *Governor Hochul Announces Extraordinary Session of the New York State Legislature to Begin on June 30* (June 24, 2022), https://bit.ly/3Uafz9i (calling special session of state legislature to respond to "[t]he Supreme Court's reckless and reprehensible decision"); N.J. Office of the Governor, *Governor Murphy Signs Executive Order to Combat Gun Violence* at 2:49, 3:22-3:54, 4:31-4:33 (June 24, 2022), https://rb.gy/16k7u (condemning *Bruen* as "dreadful," "tragic," and "misguided," and expressing "outrage" that "ordinary

citizens" have a "general right" "to carry firearms in public").

It would be one thing if lower courts were strictly policing this unabashed resistance. But many courts have poured the old wine of Second-Amendment skepticism into new bottles (e.g., demanding threshold inquiries into whether firearms are "Arms") and allowed this protest legislation to take effect. Indeed, respondents' insistence that there is no circuit split on the question presented underscores the problem. Illinois.BIO.13. The lack of a split is partially explained by the Ninth Circuit promptly resuming its uniform pre-*Bruen* practice of vacating and rehearing en banc any panel decision vindicating Second Amendment rights. *See Duncan v. Bonta*, 83 F.4th 803, 808 (9th Cir. 2023) (Bumatay, J., dissenting) (lamenting that that court "has shot down every Second Amendment challenge to a state regulation of firearms"). Respondents note that the First Circuit recently turned down a capacity-limit challenge, Illinois.BIO.12, but neglect to mention that it did so only by deeming capacity limits a "negligible" burden analogous to "bans on sawed-off-shotguns," *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 46 (1st Cir. 2024). And it hardly helps respondents' cause that the Fourth Circuit en banced not one *but two* Second Amendment cases in the span of a day (one sua sponte, no less) after one produced an opinion vindicating Second Amendment rights and another appeared poised to do the same. *See* Pet. for Cert., *Bianchi v. Brown*, No. 23-962 (U.S.).

And that is just the courts of appeals. Since *Bruen*, one district court has held that magazines are

mere "accoutrements" akin to cardboard boxes and thus categorically outside the Second Amendment's ambit. *See Ocean State Tactical, LLC v. Rhode Island*, 646 F.Supp.3d 368, 387-88 (D.R.I. 2022). Another concluded that they *are* "Arms" when they hold ten rounds, but somehow cease to be when they hold eleven. *Or. Firearms Fed'n v. Kotek*, 2023 WL 4541027, at *26 (D. Or. July 14, 2023); *see also Capen v. Campbell*, 2023 WL 8851005, at *17 (D. Mass. 2023) (suggesting same). And one court below purported to divine from *McDonald* a historical tradition of "'bann[ing] altogether the possession of especially dangerous weapons'"—but did so by quoting Justice Stevens' *dissent*. Herrera.App.119 (quoting 561 U.S. at 899-900 (Stevens, J., dissenting)).

and. Illinois.BIO.16. In their view, courts apparently should not bother to remedy Second Amendment violations at all unless a law is so extreme as to ban firearms entirely. *Id.* Respondents make no effort to square that argument with *Heller*'s explicit rejection of the claim "that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed," 544 U.S. at 629, let alone with *McDonald*'s admonition that the Second Amendment right is not "a second-class right," 561 U.S. at 780 (plurality op.). Nor do they appear to appreciate the irony of claiming that people no longer need the most popular *long guns* because this Court rejected efforts to ban *handguns*. Protecting constitutional rights should not be a game of whack-a-mole.

Against that backdrop, respondents' pleas for "percolation" fall flat. Illinois.BIO.13. This Court did

not let the lack of a post-*Bruen* circuit split stop it from taking up a petition arguing that Second Amendment rights had been interpreted too broadly. *United States v. Rahimi*, No. 22-915 (U.S.). It should not let that stand in the way of ensuring that Second Amendment rights are not interpreted too narrowly —especially when, as 26 of Illinois' sister states (plus the legislatures of two more) aptly put it, "[f]urther percolation will only result in more instances of Second Amendment violations." States.Amicus.20. There is no reason to give the same states and lower courts that defied *Heller* for a decade the chance to defy *Bruen* for another one.[1]

[1] At a minimum, the Court should hold this petition pending *Rahimi* so it can consider whether whatever guidance that case may offer about Second Amendment analysis warrants vacatur and remand.

5. CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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