No. 23-877

In the Supreme Court of the United States

DANE HARREL, *et al.*,

Petitioners,

v.

KWAME RAOUL, ATTORNEY GENERAL OF ILLINOIS, *et al.*,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

Respondents' briefs leave no doubt that the issue in this case is deserving of certiorari. Respondents pile on to the Seventh Circuit's ill-conceived opinion additional (and typical) arguments that fundamentally misunderstand how the "dangerous and unusual" test laid out in *District of Columbia v. Heller*, 554 U.S. 570, 627–28 (2008), works within the framework made explicit by *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022). Though Respondents urge that there are other similar cases pending below and that this Court should delay consideration (in Respondents' view, indefinitely) to let those cases play out, in fact the opposite is true. Delay is likely only to permit existing errors to entrench themselves, as interest-balancing did before *Bruen*, in circuits around the country. To avoid history repeating itself, this Court should grant certiorari now.

I. The Seventh Circuit's decision conflicts with *Bruen* and *Heller*.

Respondents attempt to square the Seventh Circuit's opinion with this Court's decisions in *Bruen* and *Heller*, but that is an impossible task. Beginning at the first stage of the analysis under *Bruen*, *Bevis*'s holding that the "plain text" of the Second Amendment requires both a showing that an arm is "in common use for a lawful purpose" and is not of a type that is "exclusively or predominantly useful in military service," Pet.App.29–30, is directly contrary to *Heller*'s controlling interpretation. Pet. 14. Respondents try to rehabilitate the Seventh Circuit's reading, but they notably do not offer any *textual* support for it. Rather, they claim that *Heller*'s construction would lead

to unacceptable results and that *Heller* "did not mean that the Second Amendment presumptively protects any weapons that a person can bear, like shoulder-fired rocket launchers." BIO 29.[1] But *Heller* quite clearly said just that: "[T]he Second Amendment extends, prima facie, to *all instruments that constitute bearable arms*[.]" 554 U.S. at 582 (emphasis added). That such items are *presumptively* covered, of course, does not mean civilian ownership of them is ultimately protected, but under *Heller* the scope of the text is very broad. That is much less true under *Bevis*.

Bevis was simply wrong to treat "common use" as relevant to the text at all. As Petitioners have explained, common use is relevant only at the historical tradition part of the *Bruen* analysis. Pet. 19. Cook County attempts to show otherwise by claiming that whatever *Heller* said, *Bruen* considered "common use" at the textual level, citing *Bruen*'s discussion at 597 U.S. at 31–32. *See* County BIO 20–21. This is a misreading of *Bruen* that is common in cases like this one. *See, e.g.*, *Nat'l Ass'n for Gun Rights v. Lamont*, No. 3:22-cv-1118-JBA, 2023 WL 4975979, at *15 (D. Conn. Aug. 3, 2023); *Or. Firearms Fed'n v. Kotek*, No. 2:22-cv-01815-IM, 2023 WL 3687404, at *2 (D. Or. May 26, 2023). In fact, that discussion in *Bruen* conclusively *refutes* Cook County's position. There, this Court explained that because handguns are in common use, the type of arm at issue was protected *period*, as a matter of text *and* history, not just as a matter of plain text. Therefore, there was no need in *Bruen* to address further the type of arm at issue *at all*—that arm was protected, because it was in common use. Here,

[1] Petitioners cite to Illinois's Brief in Opposition as "BIO" and to Cook County's Brief in Opposition as "County BIO."

because the arms at issue likewise are in common use, it follows that Illinois's law banning them is unconstitutional.

II. This Court should grant certiorari to make clear that history permits only dangerous and unusual weapons to be banned.

A. The oppositions demonstrate the need for certiorari to settle this issue.

Because the text of the Second Amendment applies to any instrument that constitutes a bearable arm, and because any bearable arm that is in common use is necessarily not dangerous and unusual and so cannot be banned under the only relevant historical tradition of firearm regulation, this case is a straightforward one. *See* Pet. 22–23. The banned firearms and magazines are beyond doubt "bearable arms" that are "in common use" so no new textual or historical work needs to be done to resolve this case in their favor. *Id.* at 23. Illinois disputes this, claiming that Petitioners' argument conflicts with "the text and spirit of *Bruen*" and "would effectively eliminate the historical inquiry for cases involving laws prohibiting a type of weapon, if it could be shown that they are in common use." BIO 31–32. This misunderstands Petitioners' argument. It is not that this case is somehow exempt from *Bruen*'s historical analysis requirement but rather, *Heller* already *did* the necessary historical work and all that is left to do now is follow *Heller*. As the Solicitor General recently explained at argument, "once you have the principle locked in" from an analysis of the historical tradition of firearm regulation "then I don't think it's necessary to effectively repeat that same historical analogical analysis." Oral Argument Tr. at 55:18–24,

United States v. Rahimi, No. 22-915 (U.S. Nov. 7, 2023). Following *Heller* and *Bruen*, the principle that only "dangerous and unusual arms" can be banned and that arms "in common use" are necessarily protected is "locked in." Petitioners are respecting this Court's precedent by objecting to further, unnecessary, and conflicting historical analysis by the lower courts.

In defending the opinion below, Respondents' oppositions misconstrue the "dangerous and unusual" analysis in other ways that demonstrate the need for granting certiorari to clarify this issue. Both Illinois's and Cook County's briefs are replete with arguments seeking to demonstrate the alleged "dangerous" nature of the banned firearms and magazines, *see*, *e.g.*, County BIO 1–6, and assertions that the features that define so-called "assault weapons" are not truly necessary or helpful for self-defense, *see, e.g.*, BIO 4–5. As to the former, such evidence is typical of attempts by litigants to sneak in evidence relevant to "means-end scrutiny under the guise of an analogical inquiry." *Bruen*, 597 U.S. at 29 n.7. The latter is similarly typical of attempts by litigants to substitute the judgment of the judiciary for the American people, though this Court made it clear in *Heller* that it is the choices of the American people that are decisive when evaluating whether a type of arm is protected by the Second Amendment—"[w]hatever the reason" the American people choose a particular type of arm for lawful use. *See* 554 U.S. at 629.

Respondents also argue, in line with the Seventh Circuit below, that "common use" cannot be determined "on numbers alone." BIO 32; Pet.App.41. But that is precisely how *Heller* approached the issue, 554

U.S. at 629, and Respondents do not satisfactorily explain what else common use might mean. For its part, the Seventh Circuit tried, suggesting that "common use" must also mean that the firearm in question is a "modern analogue[] to the weapons people used for individual self-defense in 1791, and perhaps as late as 1868[,]" a group which excludes, in the Seventh Circuit's view "weapons used exclusively by the military[.]" Pet.App.41–42. That cannot be right. *Heller* explicitly stated that the text of the Second Amendment reaches *all* modern firearms, regardless of whether they can trace their lineage to the Founding, *see* 554 U.S. at 582, and nothing in the Court's historical analysis suggests that its protection is tied to what was common at earlier periods in American history. And even if *Heller* left some question on this score, *Bruen* eliminated it. In applying the "dangerous and unusual weapons" principle to distinguish colonial laws, *Bruen* acknowledged that handguns, the "quintessential self-defense weapon" in *Heller*, *id*. at 629, may have been "dangerous and unusual" in the colonial period, *Bruen*, 597 U.S. at 47. But that is irrelevant because the status of a given firearm historically does not matter *at all* to its constitutional protection today: "Whatever the likelihood that handguns were considered 'dangerous and unusual' during the colonial period, they are indisputably 'in 'common use' for self-defense today." *Id.* So, although Respondents argue that "there [is not] any merit to petitioners' accusation that the Seventh Circuit derided *Bruen*'s common-use test as 'slippery,' 'circular,' and 'not very helpful[,]' " because the Seventh Circuit was merely casting aspersions on a numbers-centric version of the test, BIO 19, that argument runs aground on the fact that the numbers-centric common use test *is the test*

this Court has prescribed (and of which the Seventh Circuit was unjustifiably critical).

Illinois attempts to undercut the overwhelming evidence of common use by suggesting Petitioners' data sources are unreliable or biased, *id*. at 32–33, though it fails to acknowledge that the Washington Post independently confirmed the key findings of Petitioners' other data sources and estimated that "about 16 million Americans own an AR-15[,]" Emily Guskin et al., *Why do Americans own AR-15s?*, WASH. POST (Mar. 27, 2023), https://wapo.st/3IDZG5I, and entirely ignores that the State's own expert estimates that Americans own over 24 million so-called "assault weapons," *see Miller v. Bonta*, No. 19-cv-1537-BEN-JLB, 2023 WL 6929336, at *33 (S.D. Cal. Oct. 19, 2023) (citing the State's expert, Louis Klarevas, for the proposition that there are over 24 million AR-15 and AK-47 platform and similar rifles). And that is an outdated estimate: the source relied on by the State's expert now puts the number at over 28 million. *Firearm Production in the United States With Firearm Import and Export Data* at 7, NAT'L SHOOTING SPORTS FOUND. (2023), https://bit.ly/42qYo7k. Even if the Washington Post and all of Petitioners' other sources were massively overstating the number of AR-15s in circulation, they would still be "common" by any reasonable metric. *See Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from denial of certiorari) (finding common use because "[r]oughly five million Americans own" AR-15 style rifles); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 255 (2d Cir. 2015) (finding common use because "nearly four million units of a single assault weapon, the popular AR-15, have been manufactured between 1986 and March 2013"); *Heller v. District of*

Columbia, 670 F.3d 1244, 1261 (D.C. Cir. 2011) (finding common use because "[a]pproximately 1.6 million AR-15s alone have been manufactured since 1986").

B. This issue is fully developed and the decision below is representative of a growing body of decisions that conflict with this Court's precedent.

Respondents charge Petitioners with "seek[ing] to short-circuit the ordinary percolation process" because there is currently no circuit split on this issue. BIO 13. That hardly helps Respondents' cause where this is not a new issue but rather the reemergence following *Bruen* of an *old* misinterpretation of *Heller*, *see Kolbe v. Hogan*, 849 F.3d 114, 142 (4th Cir. 2017) (en banc) (upholding ban on firearms pre-*Bruen* under a very similar test to the Seventh Circuit), and there is currently a uniformity of opinion among the circuit courts in flat violation of this Court's binding caselaw. *See Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 41 (1st Cir. 2024); *see also Teter v. Lopez*, 93 F.4th 1150 (9th Cir. 2024) (mem.) (vacating panel opinion properly interpreting *Bruen* and *Heller*); Order, *Bianchi v. Frosh*, No. 21-1255 (4th Cir. Jan. 12, 2024) (sua sponte granting rehearing in similar case over a year after panel heard oral argument). This Court has frequently granted certiorari in the absence of a circuit split when the courts of appeals have taken a position at odds with this Court's precedent. *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (certiorari granted "to resolve an apparent conflict with this Court's precedents"); *United States v. Doe*, 465 U.S. 605, 610 (1984) (certiorari granted "to resolve the apparent conflict between the Court of Appeals holding

and the reasoning underlying this Court's holding in *Fisher*"). This Court also has often granted certiorari in the absence of a split in cases in which important constitutional rights are at stake. *See Jackson v. City & Cnty. of San Francisco*, 135 S. Ct. 2799, 2802 (2015) (Mem.) (Thomas, J., dissenting from denial of certiorari) (collecting cases). This case has both features. Respondents minimize the conflict between the courts of appeals and this Court as minor "methodological differences on discrete components of a complex analysis." BIO 14. But that is a strange way of saying that the courts of appeals have ignored the controlling reasoning in *Heller* and effectively limited that case to its facts, effectively extinguishing constitutional protection for any firearm *except* for ordinary handguns. That is necessarily what they have done in holding that bans on AR-15-style and similar rifles are constitutional, since the AR-15-style rifle is second *only* to semiautomatic handguns in popularity. *See* Pet. 18–19. If Illinois's ban is valid, then it is hard to see how *any* firearm ban other than a flat ban on handguns would violate the Second Amendment. That is no minor "methodological difference." Indeed, the Seventh Circuit would not even concede that "semiautomatic weapons" are at all protected by the Second Amendment, potentially limiting constitutional protection to revolvers. *Bevis v. City of Naperville*, 85 F.4th 1175, 1190 (7th Cir. 2023).

Respondents cite ten cases currently pending in the courts below as a reason not to take this case and to permit the lower courts to continue to work. *See* BIO 12–13 (collecting cases). But given the ongoing resistance to the core reasoning of *Heller* and *Bruen*, Petitioners respectfully submit that the existence of so many other similar cases cuts *in favor* of granting

certiorari now. This Court has previously recognized the importance of providing guidance on recurring issues that impact constitutional rights. *See, e.g.*, *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 385 (2000) (granting certiorari to review decision regarding statute restricting political contributions "given the large number of States that limit [such] contributions"). There is no reason to think that permitting the issue to "percolate" any longer will add clarity to these issues (which already are clear), and delay threatens to prolong the deprivation of Second Amendment rights in jurisdictions around the country.

Respondent Cook County argues that it would be inappropriate to grant certiorari to correct a conflict with *Heller* and *Bruen* because, it claims, this Court's previous instructions have been so vague and unhelpful that a conflict is practically impossible. *See* County BIO 21–22. As explained above, Petitioners believe this Court has given crystal clear guidance on this issue that currently is being unheeded, but even if the County were right, it would hardly be a reason to deny certiorari. Under *Heller* and *Bruen*, common use is the central issue in any Second Amendment case involving a ban on a type of "arm." If this Court's guidance were as meager as the County claims, that would be all the more reason to grant the petition and provide much needed clarity.

C. These issues can be resolved in an interlocutory posture.

Respondents argue that this case is also premature for certiorari because it comes before the Court in an interlocutory posture. BIO 13. But where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that

would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18 (10th ed. 2013) (collecting cases). This is "particularly" true "if the lower court's decision is patently incorrect and the interlocutory decision … will have immediate consequences for the petitioner." *Id.* That is the case here. As explained, the Seventh Circuit's opinion below, which will govern further conduct in this case and currently is causing burdensome and unnecessary pre-trial proceedings in Illinois district courts as well as a deprivation of Second Amendment rights, is flatly incorrect under *Heller* and *Bruen.*

Respondents are wrong to assert that there are "alternate grounds for affirmance" since Petitioners could possibly lose on one of the other preliminary injunction factors. BIO 16. This Court previously has recognized for cases implicating "similarly intangible and unquantifiable interests[,]" *Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011), that as go the merits, so go irreparable injury and the balance of harms, *see Elrod v. Burns*, 427 U.S. 347, 373 (1976). And even if *Elrod* somehow did not apply just as forcefully in this context, as Justice Kavanaugh recently explained, "not infrequently—especially with important new laws—the harms and equities are very weighty on both sides" so, "likelihood of success on the merits" is effectively the deciding factor. *Labrador v. Poe ex rel. Poe*, No. 23A763, 2024 WL 1625724, at *8 (U.S. Apr. 15, 2024) (Kavanaugh, J., concurring). That would be true here. In any event, if the Court prefers a vehicle on appeal from a final judgment, it should grant and decide *Bianchi v. Brown*, No. 23-863 (Feb. 12, 2024), and grant and hold these cases pending decision there.

CONCLUSION

The Court should grant the petition for certiorari.

April 26, 2024

Respectfully submitted,

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