No. 23-1010

IN THE
Supreme Court of the United States

GUN OWNERS OF AMERICA, INC. AND
GUN OWNERS FOUNDATION,
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

STEPHEN D. STAMBOULIEH
STAMBOULIEH LAW, PLLC
P.O. Box 428
Olive Branch, MS 38654
601-852-3440
stephen@sdslaw.us

OLIVER M. KRAWCZYK
AMBLER LAW OFFICES, LLC
115 South Hanover Street,
Suite 100
Carlisle, PA 17013
717-525-5822
oliver@amblerlawoffices.com

ROBERT J. OLSON*
WILLIAM J. OLSON
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W.,
Suite 4
Vienna, VA 22180
703-356-5070
rob@wjopc.com

Attorneys for Petitioners
**Counsel of Record*

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REPLY BRIEF

Respondents claim that the Seventh Circuit's decision to disregard this Court's methodological approach in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), in favor of the Seventh Circuit's own pre-*Bruen* approach, somehow constitutes a "good faith" application of this Court's precedents. On the contrary, the Seventh Circuit contrived a factual inquiry untethered from the Second Amendment's plain text. This tactic empowered the judges of that court to substitute their views for the understanding of the people who ratified the Second Amendment.

Rather than applying *Bruen*'s historical framework to illuminate the scope of Second Amendment rights, the Seventh Circuit simply asserted that many of the most popular firearms in America are too "military" in nature to be owned by "civilians." Such backdoor interest balancing demands urgent correction. This Court should reject Respondents' attempt to defer consideration of this critical issue through pleas for further "percolation" and additional "evidence." Neither was needed to apply *Bruen* below, and this Court should grant certiorari to correct the Seventh Circuit's flagrant Second Amendment revisionism.

I. "PERCOLATION" OF BAD LAW ONLY BEGETS MORE BAD LAW.

Recommending that this Court not "short-circuit the ordinary percolation process," Respondents extol the traditional "benefit" the Court "receives from permitting several courts of appeals to explore a difficult question...." Brief in Opposition for the State of Illinois, City of Chicago, and City of Naperville

Respondents 13 (citation omitted) ("IL.Opp"). But no such "benefit" exists here because there is no "difficult question" to "explore." Rather, the Seventh Circuit's contrived comparative "test" (stands in direct conflict with *District of Columbia v. Heller*, 554 U.S. 570 (2008), *Caetano v. Massachusetts*, 577 U.S. 411 (2016), and *Bruen*, none of which ever endorsed convoluted *factual* inquiries into the *legal* question of an arm's Second Amendment protection. *See* Petition for Writ of Certiorari at 11 ("GOA.Pet"). And the Seventh Circuit's radical conclusion – that tens of millions of the most commonly owned firearms in the nation are not "arms" deserving even *presumptive* Second Amendment protection – flies in the face of this Court's repeated promise that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms...." *Bruen* at 28. The Petition therefore presents a straightforward question – one whose answer will guide innumerable cases in the lower courts, but one which the Seventh Circuit got completely wrong. *See* GOA.Pet.31-34. No benefit can come from allowing such a radical departure from this Court's precedents to "further develop[]." IL.Opp.15.

Nor has past "percolation" in the Second Amendment context accomplished anything beyond delayed vindication of an enumerated right. Indeed, leaving the lower courts to their own devices with respect to the "right to keep and bear arms" has previously resulted in a herd-mentality perpetuation of error across the circuits. Prior to *Heller*, the general though erroneous consensus in the lower courts was that the Second Amendment protected only a *collective right* of state militias. *Heller* at 638 n.2 (Stevens, J.,

dissenting). And between *Heller* and *Bruen*, "the Courts of Appeals … coalesced around" an atextual "'two-step' framework for analyzing Second Amendment challenges [using] means-end scrutiny." *Bruen* at 17.

There is no reason to believe this Court will "benefit from further development" (IL.Opp.15) now, as widespread resentment of and hostility towards Second Amendment rights appears to linger in the lower courts. GOA.Pet.24. *See, e.g.*, *Antonyuk v. Chiumento*, 89 F.4th 271, 302 (2d Cir. 2023) (repeatedly distinguishing *Bruen* as "exceptional" and its methodology thus inapplicable); *Hawaii v. Wilson*, 543 P.3d 440, 449 (Haw. 2024) ("No words in … the Second Amendment describe an individual right. No words mention self-defense."); *Mintz v. Chiumento*, 2024 U.S. Dist. LEXIS 61699, at *54-55 (N.D.N.Y. Mar. 20, 2024) ("implor[ing] the Supreme Court … to reconsider its course entirely").

Previously observing precisely this sort of rebellious spirit in the lower courts, Justices Thomas and Scalia once observed that, "[d]espite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts … have failed to protect it." *Jackson v. City & County of San Francisco*, 576 U.S. 1013, 1014 (2015) (Thomas, J., dissenting from denial of certiorari on a denial of a preliminary injunction). The Seventh Circuit, once again, has "failed to protect" the Second Amendment, and this Court should act now, lest this tumor of recalcitrance metastasize.

Respondents demur further that "[i]t has been less than two years since *Bruen*," IL.Opp.2, as if the

recency of a prior decision precludes successive – or even *annual* – review of First,[1] Fourth,[2] Fifth,[3] or even Sixth[4] Amendment cases. *See Silvester v. Becerra*, 583 U.S. 1139, 1149 (2018) (Thomas, J., dissenting from denial of certiorari) ("in this Term alone, we have granted review in at least five cases involving the First Amendment and four cases involving the Fourth Amendment – even though our jurisprudence is much more developed for those rights.").

Yet the Second Amendment "is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" *Bruen* at 70. This Court has never adopted Respondents' recency argument in the Second Amendment arena, as evidenced by this Court's grant of certiorari in *United States v. Rahimi*, No. 22-915 ("[w]hether 18 U.S.C. 922(g)(8) … violates the Second Amendment"), only 12 months after *Bruen* was decided.

This Court's involvement is beneficial where, as here, its instructions can provide guidance to lower courts which now are addressing numerous Second Amendment challenges. As this Court put it, important Second Amendment questions deserve to be

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[1] *See, e.g.*, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022).

[2] *See, e.g.*, *United States v. Jones*, 565 U.S. 400 (2012); *Florida v. Jardines*, 569 U.S. 1 (2013).

[3] *See, e.g.*, *J.D.B. v. North Carolina*, 564 U.S. 261 (2011); *Howes v. Fields*, 565 U.S. 499 (2012).

[4] *See, e.g.*, *United States v. Haymond*, 139 S. Ct. 2369 (2019); *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

answered "if and when" they "come before us." *Heller* at 635.

II. RESPONDENTS' ARGUMENTS AGAINST INTERLOCUTORY REVIEW FAIL.

Respondents offer three additional arguments why this Court should deny the Petition. The first two urge radical departures from settled law while the third addresses arguments these Petitioners did not make. None is availing.

First, Respondents posit that "[t]his Court would benefit from further development of the parties' evidence" – pursuant to an atextual evidentiary requirement which the Seventh Circuit created from whole cloth, and which Respondents now wave before this Court as a talisman precluding review. IL.Opp.15. Yet, try as they might to "explain[]" *why* the purely "legal issues presented here require[] developed evidentiary … records," Respondents do not identify any of this Court's Second Amendment decisions that mandated such factfinding. *Id.* Nor could they.

Heller, for example, saw no need to remand for presentation of evidence on handguns' status as protected arms. Rather, it was "enough to note" the dearth of historical support for a handgun ban – as well as the widespread popularity of handguns – solidifying their *presumptive* protection as bearable instruments into *conclusive* protection. *Heller* at 629, 582. Similarly, this Court saw no need to remand for inquiries into the usefulness of stun guns for self-

defense. *Caetano* at 411-12.[5] And in *Bruen*, this Court saw no need to develop a factual record, even with the case presented on the pleadings. *Compare Bruen* at 95 (Breyer, J., dissenting) ("The parties have not had an opportunity to conduct discovery, and no evidentiary hearings have been held to develop the record."), *with Bruen* at 76 (Alito, J., concurring) ("The record before us … tells us everything we need on this score.").

Second, Respondents advance an indefensible reading of this Court's injunction standard, suggesting that there exist "alternate bases to affirm" because the violation of an enumerated constitutional right does not *necessarily* constitute irreparable harm. IL.Opp.16 (noting that the court below addressed only the likelihood of success prong).[6]

But it is both impossible to recall, and difficult to imagine, a scenario where a court found a likely violation of an enumerated constitutional right, but then found no irreparable harm. Rather, this Court has explained that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Respondents acknowledge as much, but elevate the First

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[5] In fact, it was similarly "enough to note" (*Heller* at 629) that "approximately 200,000 civilians owned stun guns" to find their ban violative of the Second Amendment. *Caetano* at 420 (Alito, J., concurring).

[6] To be sure, Respondents wish their challenged law to be upheld, but that does not render the question presented an unimportant one, unnecessary of this Court's resolution, to avoid confusion and uncertainty in the lower courts.

Amendment as simply *more worthy* of injunctive relief than the rest of the Bill of Rights. IL.Opp.16 ("If accepted, the theory would effectively merge the likelihood-of-success factor with the irreparable-harm factor...."). [7] But beyond their bald objection, Respondents offer no reason why the Second Amendment should be treated any differently, nor do they grapple with this Court's warning that "[t]he constitutional right to bear arms … is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" *Bruen* at 70. As the Seventh Circuit previously has ruled, "Second Amendment … harm is properly regarded as irreparable...." *Ezell v. City of Chicago*, 651 F.3d 684, 700 (7th Cir. 2011).

Nor does Respondents' theory find allies in other circuits, which overwhelmingly hold that "irreparable harm occurs whenever a *constitutional right* is deprived, even for a short period of time." *Def. Distributed v. U.S. Dep't of State*, 865 F.3d 211, 214 (5th Cir. 2017) (emphasis added). [8] Similarly, courts are in widespread agreement that "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d

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[7] Respondents fail to explain why such merger would be undesirable. Indeed, the balance-of-equities and public-interest factors already "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

[8] *Accord, e.g.*, *Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978); *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009); *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 2 F.4th 330, 346 (4th Cir. 2021).

990, 1002 (9th Cir. 2012).[9] For these reasons, the Seventh Circuit has joined other courts in describing likelihood of success on the merits as "normally the most important[] criterion." *A.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 771 (7th Cir. 2023).

Compounding their error,[10] Respondents claim that Petitioners cannot possibly suffer irreparable harm when they still "can legally possess a wide variety of semiautomatic firearms" that, in Respondents' benevolence, have not yet been banned. IL.Opp.16. But once more, this Court's precedents foreclose that argument, as "[i]t is no answer to say" that alternatives exist. *Heller* at 629. The constitutional principle lost on Respondents and the panel below is that the government has no basis – constitutional, moral, or otherwise – to dictate *just*

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[9] *Accord, e.g.*, *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998); *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 807 (10th Cir. 2019); *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1327 (11th Cir. 2019).

[10] The Cook County Respondents attack Petitioners' challenge to the Seventh Circuit's contrived "military" versus "civilian" distinction, characterizing it as a "new claim … not raised below." Brief in Opposition of Cook County Respondents at 19 n.2 ("Cook.Opp"). For starters, Respondents are wrong on the law. *See Dahda v. United States*, 584 U.S. 440, 450 (2018) ("we may 'affir[m]' a lower court judgment 'on any ground permitted by the law and the record'"). But in any event, Petitioners' claim is not new, as they have argued all along that PICA's banned weapons are protected under the Second Amendment. And it was the Seventh Circuit below that first contrived the military-civilian distinction that Petitioners now challenge. Finally, it is worth noting that Petitioners' challenge was neither brought against Cook County Respondents, nor did it challenge the Cook County ordinance.

how the people get to exercise their preexisting rights. *See Bruen* at 26 ("The Second Amendment 'is the very *product* of an interest balancing by the people' .... that demands our unqualified deference.").

III. THE PANEL OPINION IS DIAMETRICALLY OPPOSED TO THE SECOND AMENDMENT AND THIS COURT'S PRECEDENTS.

Using the Seventh Circuit's false civilian/military dichotomy, Respondents maintain that the Second Amendment has nothing to say about a ban on ubiquitous firearms.[11] But this proposition – that certain common *firearms* are not even presumptively protected "Arms" as a textual matter – is completely untethered from this Court's precedents. *See Heller* at 625 (calling military and civilian weapons "one and the same"). This flagrant methodological error demands correction before it takes hold.

Contrary to the Seventh Circuit's atextual "military veto" (App.94), this Court has made clear 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," and "that general definition covers modern instruments that" so much as "*facilitate* armed self-defense." *Heller* at 582; *Bruen* at 28 ("we use *history* to determine which modern 'arms' are protected....") (emphases added). Even Respondents acknowledge that "[n]othing … would permit a State to ban a

[11] Respondents also discount this Court's acknowledgement of the AR-15's commonality in *Staples v. United States*, 511 U.S. 600 (1994), as "merely a description of the state of federal law at the time." IL.Opp.31.

commonly owned arm that is used by ordinary people for self-defense." IL.Opp.30. Yet PICA bans arms that are "bearable" and, at minimum, "facilitate" armed self-defense. That is all that is needed to gain a presumption of constitutional protection under *Bruen*. It does not matter whether a firearm, in Illinois' estimation, is "best suited" or even "necessary" for "effective" or "moderate" "self-defense." IL.Opp.27, 4; Cook.Opp.9. Such standardless, "freestanding 'interest-balancing'" is incompatible with "the traditions of the American people – that demand[] our unqualified deference." *Heller* at 634; *Bruen* at 26.

Respondents' brief illustrates why the government is "ill-suited" to decide how the people should best exercise their enumerated rights. IL.Opp.4. Respondents claim that firearms with PICA's features are "ill-suited for civilian self-defense but appropriate for offensive, combat-specific uses." *Id.* But self-defense *is combat*,[12] and no victim of a violent crime has ever wished for *less* capability when her life was in jeopardy. Moreover, as the Petition explains, self-defense includes armed resistance against "an oppressive military force if the constitutional order broke down." GOA.Pet.16 (citing *Heller* at 600). No colonist would have grabbed a snub-nose revolver to repel the Redcoats if an AR-15 had been available.

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[12] Respondents fail to remember history's repeated lessons on this front, even those in recent memory. *See* D. Cloud, "When Hamas Attacked, This Israeli Kibbutz Fought Back and Won," *Wall Street Journal* (Oct. 17, 2023), https://tinyurl.com/ywnd6yvb.

Respondents' reliance on ballistic data to identify what they consider to be dangerous military weapons is incoherent. Purporting to demonstrate some great disparity between the muzzle velocities and kinetic energies of "civilian" *handguns* versus purportedly "military" *rifles* (Cook.Opp.3), Respondents seem unaware that many featureless rifles remain legal under PICA, yet are *far more powerful and accurate* than banned "assault weapons." Indeed, the semi-automatic M1 Garand – a quintessential *military rifle* – remains legal under PICA, even though its .30-06 cartridge delivers *greater* muzzle velocity and *more than double* the kinetic energy of the M16,[13] while maintaining a greater "effective range" and a comparable mechanical "rate … [of] … fire" to the AR-15. Cook.Opp.4. If it is true (it is not) that the AR-15 causes bodies to "explode," severs limbs, and causes "'instantaneous' death" (*id.*),[14] then it must be assumed that the M1 Garand simply vaporizes its targets on contact (it does not). Respondents' irrational and sensationalistic rhetoric illustrates how

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[13] *See, e.g.*, "30-06 Springfield Ballistics Chart," Ballistics101, https://tinyurl.com/ybefd553 (last visited Apr. 29, 2024).

[14] To fully appreciate the patent absurdity of Respondents' claims, one need look no further than Illinois' hunting regulations, which flatly *prohibit* the use of the ubiquitous AR-15 calibers, .223 Remington and 5.56 NATO, for deer hunting, because they are *too anemic* and thus considered inhumane. *See* "Legal Cartridges," Illinois Department of Natural Resources, https://tinyurl.com/yh4m4mwn (last visited Apr. 29, 2024). Illinois describes such intermediate cartridges as lacking even "[b]arely sufficient terminal energy." *Id.* Thus, it cannot also be the case that these very same calibers have "uncommon lethality" and cause "instantaneous death." Cook.Opp.2, 4.

many laws are passed, but should never form the basis for how cases are decided.

Finally, Respondents' reliance on purported historical "analogues" to justify PICA is deeply flawed. Claiming that "18th- and 19th-century laws[,] many of which restricted concealed carry," are sufficient analogues to an *ownership* ban, Respondents misstate *Bruen*'s "more nuanced approach" to suggest anything goes when "instruments … did not exist during the Founding or Reconstruction eras...." IL.Opp.7, 28. *Contra Bruen* at 28 (protecting "even those [arms] that were not in existence at the time of the founding"). Rather, gauging the "how" and "why" metrics of relevant similarity ***is*** the "more nuanced approach" when modern developments render direct comparisons impossible. *See Bruen* at 28-29. But here, direct comparisons *are* possible, as the proper question is whether the Founders ever banned firearms by virtue of their usefulness in "military" service. They did not. *See* GOA.Pet.16-20, 29-30. Moreover, even if reasoning by analogy were appropriate, bans on "bear[ing]" certain arms utterly fail *Bruen*'s "how" metric, as PICA bans the mere "keep[ing]" of disfavored firearms. Respondents accordingly cannot cobble together a "tradition" from disparate and anachronistic half-bans to justify a *whole* ban today.

CONCLUSION

For the reasons set out above and previously, this Court should grant the petition for certiorari.

Respectfully submitted,

STEPHEN D. STAMBOULIEH
STAMBOULIEH LAW, PLLC
P.O. BOX 428
Olive Branch, MS 38654
601-852-3440
stephen@sdslaw.us

OLIVER M. KRAWCZYK
AMBLER LAW OFFICES, LLC
115 South Hanover Street,
Suite 100
Carlisle, PA 17013
717-525-5822
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ROBERT J. OLSON*
WILLIAM J. OLSON
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W.,
Suite 4
Vienna, VA 22180
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