No. 129453

IN THE
SUPREME COURT OF ILLINOIS

DAN CAULKINS; PERRY LEWIN; DECATUR JEWELRY & ANTIQUES INC.; and LAW-ABIDING GUN OWNERS OF MACON COUNTY, a voluntary unincorporated association,	)	
Plaintiff-Appellees,	)	Direct Appeal from the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois
v.	)	
Governor JAY ROBERT PRITZKER, in his official capacity; KWAME RAOUL, in his capacity as Attorney General; EMANUEL CHRISTOPHER WELCH, in his capacity as Speaker of the House; and DONALD F. HARMON, in his capacity as Senate President,	)	No. 2023-CH-3
	)	Hon. Rodney S. Forbes, Judge Presiding
Defendant-Appellants.	)	

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* STATE'S ATTORNEYS OF BROWN, CALHOUN, CARROLL, CLARK, CLINTON, EDWARDS, EFFINGHAM, GALLATIN, HAMILTON, HANCOCK, HENDERSON, HENRY, JASPER, JEFFERSON, JERSEY, JO DAVIESS, JOHNSON, MACON, MADISON, MARION, MERCER, MONROE, OGLE, PERRY, PULASKI, RANDOLPH, SCHUYLER, UNION, VERMILION, WARREN, WASHINGTON, WAYNE, AND WHITE COUNTIES, IN SUPPORT OF PLAINTIFF – APPELLEES

The undersigned State's Attorneys, pursuant to Illinois Supreme Court Rule 345(a), respectfully request leave to file a brief in this matter as *Amici*

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CYNTHIA A. GRANT
SUPREME COURT CLERK

Curiae in support of the Plaintiff-Appellees. In support of this Motion, *Amici* state the following:

1. This appeal concerns the constitutionality of Public Act 102-1116 (the so-called "Assault Weapons Ban," and hereinafter, "the Act").

2. The undersigned State's Attorneys are the duly elected and sworn State's Attorney's for thirty-three Counties in the State of Illinois.

3. State's Attorneys like *Amici* are enjoined by their sworn duty to protect and defend the rights of the citizens residing in their respective counties.

4. They each swear the following oath:

> I do solemnly swear … that I will support the constitution of the United States and the constitution of the state of Illinois, and that I will faithfully discharge the duties of the office of state's attorney according to the best of my ability.

55 ILCS 5/3-9001.

5. Therefore, each of the *Amici* has an inherent interest in the constitutionality of criminal statutes like the Act. After all, the Act creates various criminal penalties and rules, for which the duty rests on the offices of *Amici* to enforce in their respective Counties.

6. This brief will assist the Court in understanding the unique perspective of thirty-three of Illinois State's Attorneys on the practical and constitutional implications of the Court's ruling on the Act, thereby providing this Honorable Court with a meaningful professional opinion regarding the

constitutionality of this law from those who are tasked with enforcing the law in their respective Counties.

7. This brief develops the argument that the Act is unconstitutional because it burdens core Second Amendment rights and is not the kind of regulation historically understood to be compatible with the right to "keep and bear arms." This brief supports that argument by a close examination of relevant Supreme Court precedent with a particular review of the recent and decisive move away from balancing tests in favor of historical analysis.

8. In sum, the *Amici* State's Attorneys have a substantial interest in the Act and can assist this Court by presenting ideas and insights not presented by the parties to this case, who do not have the same institutional knowledge and experience.

9. This motion is filed and the proposed brief is submitted in advance of the due date of Defendant-Appellee's brief in this case.

10. A proposed Order and copy of the undersigned's proposed brief as *Amici Curiae* is attached hereto.

11. The following submit this Motion and Brief as *Amici Curiae*.

MICHAEL HILL
State's Attorney of
Brown County

LUCAS FANNING
State's Attorney of
Calhoun County

AARON KANEY
State's Attorney of
Carroll County

KYLE HUTSON
State's Attorney of
Clark County

J.D. BRANDMEYER
State's Attorney of
Clinton County

ERIC ST. LEDGER
State's Attorney of
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AARON JONES
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RACHEL MAST
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JAMES TRECCIA
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SEAN FEATHERSTUN
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BEN GOETTEN
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CHRIS ALLENDORF
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DANIEL JANOWSKI
State's Attorney of
Washington County

KEVIN KAKAC
State's Attorney of
Wayne County

DENTON AUD
State's Attorney of
White County

Wherefore, the aforementioned State's Attorneys respectfully request this Court grant leave to file the proposed brief as *Amici Curiae*, in support of Plaintiff-Appellees in this matter.

Respectfully submitted,

By: _____
Thomas A. Haine
Madison County State's Attorney
Lead Attorney for *Amici Curiae*
ARDC #6306086

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	)	Hon. Rodney S. Forbes, Judge Presiding
Defendant-Appellants.	)	

DECLARATION OF ATTORNEY THOMAS A. HAINE

I, Thomas A. Haine, certify pursuant to 735 ILCS 5/1-109 as follows:

1. I am the duly sworn State's Attorney of Madison County, Illinois and am licensed to practice law in Illinois.

2. I serve as lead counsel to the *Amici Curiae* State's Attorneys of thirty-three Illinois Counties identified herein, whom submit this Brief In Support of Plaintiff-Appellees.

3. I certify that upon information and belief, the facts set forth in the accompanying Motion for Leave to File a Brief as *Amici Curiae* in Support of Plaintiff-Appellees are true and correct.

Under penalties as provided by law pursuant to Section 5/1-109 of the Code of Civil Procedure, the undersigned counsel certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

By: _____

Thomas A. Haine
Madison County State's Attorney
Lead Attorney for *Amici Curiae*
ARDC #6306086

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	)	Hon. Rodney S. Forbes, Judge Presiding
Defendant-Appellants.	)	

NOTICE OF FILING

To: See attached service list

PLEASE TAKE NOTICE that on April 5, 2023, State's Attorneys of thirty-three Illinois Counties, as proposed *Amici Curiae*, filed via the Court approved E-File system in the Supreme Court of Illinois the **Motion for Leave to File Brief of *Amici Curiae* State's Attorneys of Brown, Calhoun, Carroll, Clark, Clinton, Edwards, Effingham, Gallatin, Hamilton, Hancock, Henderson, Henry, Jasper, Jefferson, Jersey, Jo Daviess, Johnson, Macon,**

Madison, Marion, Mercer, Monroe, Ogle, Perry, Pulaski, Randolph, Schuyler, Union, Vermilion, Warren, Washington, Wayne, and White Counties in Support of Plaintiff-Appellees and the attached Brief of *Amici Curiae*, in Support of Plaintiff Appellees, a copy of which is hereby served upon you.

By: _____

Thomas A. Haine
Madison County State's Attorney
Lead Attorney for *Amici Curiae*
ARDC #6306086

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that on April 5, 2023, I caused the foregoing **Motion of the State's Attorneys of Brown, Calhoun, Carroll, Clark, Clinton, Edwards, Effingham, Gallatin, Hamilton, Hancock, Henderson, Henry, Jasper, Jefferson, Jersey, Jo Daviess, Johnson, Macon, Madison, Marion, Mercer, Monroe, Ogle, Perry, Pulaski, Randolph, Schuyler, Union, Vermilion, Warren, Washington, Wayne, and White Counties for Leave to File a Brief as *Amici Curiae* in Support of Plaintiff-Appellees and the attached Brief of *Amici Curiae*, in Support of Plaintiff-Appellees** to be submitted to the Clerk of the Supreme Court of Illinois using the Court's electronic filing system. The undersigned further certifies that on April 5, 2023, I caused a copy of the above-referenced Motion and Brief to be served upon the parties listed in the attached service list through the Court approved electronic-filing and service system.

Upon acceptance of the Brief by the Court's electronic-filing system, the undersigned will mail the original Brief, plus twelve copies via the United States Postal Service to:

Clerk of the Supreme Court of Illinois
Supreme Court Building
200 E. Capitol Ave.
Springfield, IL 62701

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

By: _____

Thomas A. Haine
Madison County State's Attorney
Lead Attorney for *Amici Curiae*
ARDC #6306086

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Defendant-Appellants.	)	Hon. Rodney S. Forbes, Judge Presiding

ORDER

Cause coming before the Court on the Motion for Leave to File Brief of *Amici Curiae* State's Attorneys of **Brown, Calhoun, Carroll, Clark, Clinton, Edwards, Effingham, Gallatin, Hamilton, Hancock, Henderson, Henry, Jasper, Jefferson, Jersey, Jo Daviess, Johnson, Macon, Madison, Marion, Mercer, Monroe, Ogle, Perry, Pulaski, Randolph, Schuyler, Union, Vermilion, Warren, Washington, Wayne, and White Counties** in Support of Plaintiff-Appellees, due notice having been given, and the Court having been advised,

IT IS HEREBY ORDERED that this Motion is:

_____ Granted

_____ Denied

Date:_____

ENTERED:

_____
Justice

No. 129453

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BRIEF OF *AMICI CURIAE* STATE'S ATTORNEYS OF BROWN, CALHOUN, CARROLL, CLARK, CLINTON, EDWARDS, EFFINGHAM, GALLATIN, HAMILTON, HANCOCK, HENDERSON, HENRY, JASPER, JEFFERSON, JERSEY, JO DAVIESS, JOHNSON, MACON, MADISON, MARION, MERCER, MONROE, OGLE, PERRY, PULASKI, RANDOLPH, SCHUYLER, UNION, VERMILION, WARREN, WASHINGTON, WAYNE, AND WHITE COUNTIES IN SUPPORT OF PLAINTIFF – APPELLEES

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State's Attorney of
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KEVIN KAKAC
State's Attorney of
Wayne County

DENTON AUD
State's Attorney of
White County

TABLE OF CONTENTS AND POINTS OF AUTHORITY

INTEREST OF *AMICI CURIAE*

This brief is filed on behalf of the State's Attorneys of the following Counties in Illinois: **Brown, Calhoun, Carroll, Clark, Clinton, Edwards, Effingham, Gallatin, Hamilton, Hancock, Henderson, Henry, Jasper, Jefferson, Jersey, Jo Daviess, Johnson, Macon, Madison, Marion, Mercer, Monroe, Ogle, Perry, Pulaski, Randolph, Schuyler, Union, Vermilion, Warren, Washington, Wayne, and White.**

State's Attorneys like *Amici* are enjoined by their sworn duty to protect and defend the rights of the citizens residing in their respective counties. *See* Powers and Duties of State's Attorney, 55 ILCS 5/3-9005(a). They each swear the following oath:

> I do solemnly swear … that I will support the constitution of the United States and the constitution of the state of Illinois, and that I will faithfully discharge the duties of the office of state's attorney according to the best of my ability.

55 ILCS 5/3-9001. Therefore, each of the *Amici* has an inherent interest in the constitutionality of criminal statutes like Public Act 102-1116 (the so-called "Assault Weapons Ban," and hereinafter, "the Act"). After all, the Act creates various criminal penalties and rules, for which the duty rests on the offices of *Amici* to enforce in their respective counties.

But the Act is also unconstitutional[1] on its face, containing various clear violations of the Second Amendment to the United States Constitution and

[1] Notably, the State's Attorney is conscious of his dual responsibilities both to support the Constitution of the United States and to prosecute offenses committed against the laws of the

Article I, Section 22 of the Illinois Constitution, both of which protect an individual's right to bear arms against infringement. The Act therefore places *Amici* in a difficult ethical and legal quandary. Illinois Rule of Professional Conduct 3.8 provides that "[t]he duty of a public prosecutor is to seek justice, not merely to convict." Committee Comment 1 states "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice[.]" To avoid this dilemma and in the interest of clarity for all, *Amici* encourage this Court to affirm the Circuit Court's judgment and strike down the Act as an unlawful infringement of the fundamental rights of citizens outlined in the Constitutions of the state of Illinois and the United States.

The Circuit Court recognized the Second Amendment as a "fundamental" right, but it struck down the Act on Equal Protection grounds. J. ¶ 3. Nonetheless we focus this Brief on Second Amendment concerns because "a reviewing court can uphold the decision of the circuit court on any grounds which are called for by the record regardless of whether the circuit court relied on the grounds …." *Ultsch v. Illinois Mun. Ret. Fund*, 226 Ill. 2d 169, 192 (2007).

State of Illinois. Until such time as the courts clarify that such restrictions are unconstitutional, the duty to enforce the law remains while each State's Attorney makes prosecutorial decisions based on his or her understanding of the appropriate legal principles at play and the facts and circumstances of each case.

SUMMARY OF ARGUMENT

The Second Amendment to the United States Constitution provides that "[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. Through the Fourteenth Amendment to the United States Constitution (U.S. Const., amend. XIV), this right is "fully applicable to the States." *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010).

The Supreme Court of the United States has declared that when it comes to arms in "common use" for "self-defense" today, a flat ban on an "entire class" of such arms is categorically unconstitutional—quite apart from any "standards of [constitutional] scrutiny" and regardless of whether "the possession of other firearms . . . is allowed." *District of Columbia v. Heller*, 554 U.S. 570, 627–629 (2008). Because the Act challenged here is a flat ban on a large class of firearms—and essential components of firearms—widely used for self-defense today, the Act is unconstitutional under *Heller*. Indeed, the constitutional infirmity is especially clear because the Act's "prohibition" on possession of arms widely used for self-defense "extends . . . to the home, where the need for defense of self, family, and property is most acute." *Id.* at 629.

It is no answer to try to recast the Act as a mere regulation, not a ban, in the hope of subjecting it to a more flexible constitutional test. To be sure, in the past, Illinois precedent has analyzed gun restrictions on a "sliding scale" of scrutiny, balancing Second Amendment rights against various government

interests. *See People v. Chairez*, 2018 IL 121417, ¶ 35. But such balancing tests have been squarely repudiated by the United States Supreme Court in *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111 (2022). *Bruen* rejected reliance on "any means-end test such as strict or intermediate scrutiny" or "*any* judge-empowering interest-balancing inquiry." *Id.* at 2128–29 (emphasis added) (internal citations omitted). In place of any such test, *Bruen* has mandated "a test rooted in the Second Amendment's text, as informed by history." *Id.* at 2127. Specifically, if a law burdens conduct covered by "the Second Amendment's plain text," the law is unconstitutional under *Bruen* unless the law has a "proper analogue" in the "Nation's historical tradition of firearm regulation." *Id.* at 2129–30, 2132. Crucially, it is the government's burden to "affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127. And the most telling historical regulations are those dating to the ratification era or soon thereafter. Thus, *Bruen* found that "post-Civil War discussions of the right to keep and bear arms," which "took place 75 years after the ratification of the Second Amendment, . . . do not provide as much insight into its original meaning as earlier sources." *Id.* at 2137 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 614 (2008)). And *Bruen* simply refused to consider "any of the 20th-century historical evidence" brought to bear in defense of the law challenged there. *See id.* at 2154 n.28.

Bruen's single-step, historical analysis is simple, straightforward, and devastating to the constitutionality of the Act's categorical ban on nearly every modern semi-automatic firearm, including the most commonly owned rifles currently possessed for lawful purposes throughout the United States. As discussed below, only a handful of states currently have similar bans, and none of them are older than the internet. The historical record makes the constitutional conclusion inescapable: the Act violates the Second Amendment and cannot stand.

ARGUMENT

I. PUBLIC ACT 102-1116, AS A BAN ON AN ENTIRE CLASS OF ARMS "IN COMMON USE" FOR SELF-DEFENSE TODAY, IS CATEGORICALLY UNCONSTITUTIONAL UNDER *HELLER*.

Just as the First Amendment protects modern forms of communication, and the Fourth Amendment applies to modern forms of search, the Second Amendment applies to arms that did not exist at the founding. *Bruen*, 142 S.Ct. at 2132. Specifically, in guarding the "right of the people to keep and bear Arms," U.S. Const. amend. II, the Amendment "protects the possession and use of weapons that are 'in common use [today].'" *Bruen*, 142 S.Ct. at 2128 (2022) (quoting *Heller*, 554 U.S. at 627); *see also Caetano v. Massachusetts*, 577 U.S. 411, 412 (2016) (per curiam) (invalidating the State of Massachusetts' ban on stun guns). "[A]ll instruments that constitute bearable arms, even those that were not in existence at the time of the founding," come within the ambit of the Second Amendment. *See Heller*, 554 U.S. at 582. And finally, whatever the

constitutional status of mere regulations of commonly used firearms, "a complete prohibition of their use is invalid," regardless of whether "the possession of other firearms . . . is allowed," as the Supreme Court has made unmistakably clear. *See Heller*, 554 U.S. at 629. A state simply may not "prohibit[] … an entire class of 'arms' that is overwhelmingly chosen by American society for [the] lawful purpose" of self-defense. *Id.* at 628. So if a class of firearms is "typically possessed by law-abiding citizens for lawful purposes" today, it may not be banned. *See id.* at 625.

Nonetheless, on January 10, 2023, Illinois enacted Public Act 102-1116. *See* Ill. Pub. Act 102-1116 §1; *see also* Bill Status of HB5471, 102nd Gen. Assembly, https://bit.ly/3ZJCslX (last visited March 8, 2023). Public Act 102-1116, now in effect an Illinois statute, bans nearly every modern semiautomatic rifle and pistol as well as all ammunition-feeding devices capable of holding "more than 10 rounds of ammunition for long guns and more than 15 rounds of ammunition for handguns[.]" 720 ILCS 5/24-1.10(a)-(c). With immediate effect, the Act makes it "unlawful for any person within this State to knowingly manufacture, deliver, sell, import, or purchase or cause to be manufactured, delivered, sold, imported, or purchased by another, an assault weapon." 720 ILCS 5/24-1.9(b). And as of January 1, 2024, it will be unlawful just to "*possess* an assault weapon," even within a home for self-defense. *See* 720 ILCS 5/24-1.9(c) (emphasis added). Yet this class of weapon includes the single most popular type of rifle in the country – the AR-15 styled platform –

and many others commonly owned by law-abiding citizens for self-defense and other lawful purposes.

A. Statistics Prove that the Weapons and Magazines Banned by the Act Are in "Common Use"

Statistical data show that both the firearms and the magazines banned by the Act are "in common use" today. To determine what is in "common use," courts have repeatedly "relied on statistical data of some form, creating a consensus that common use is an objective and largely statistical inquiry." *Hollis v. Lynch,* 827 F.3d 436, 449 (5th Cir. 2016) (internal quotation marks omitted). The Second Circuit found "common use" when it concluded that "Americans own millions of the firearms that the challenged legislation prohibits," even though such arms accounted for only two percent of the nation's firearms. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 255 (2d Cir. 2015). The D.C. Circuit found "common use" *for a subset of the very arms at issue here* when it concluded:

> We think it clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in "common use," as the plaintiffs contend. Approximately 1.6 million AR-15s alone have been manufactured since 1986, and in 2007 this one popular model accounted for 5.5 percent of all firearms, and 14.4 percent of all rifles, produced in the U.S. for the domestic market. As for magazines, fully 18 percent of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten rounds, and approximately 4.7 million more such magazines were imported into the United States between 1995 and 2000. There may well be some capacity above which magazines are not in common use but, if so, the record is devoid of evidence as to what that capacity is; in any event, that capacity surely is not ten.

Heller v. District of Columbia, 670 F.3d 1244, 1261 (D.C. Cir. 2011). The Ninth Circuit, in a case involving 11+ round magazines, upheld a district court's conclusion that "at a minimum, [11+ round magazines] are in common use" based on "sales statistics indicating that millions of magazines, some of which … were magazines fitting Sunnyvale's definition of large-capacity magazines, have been sold over the last two decades in the United States." *Fyock v. City of Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015).

Against the backdrop of these cases, the current statistical data on the "common use" of semi-automatic rifles banned by the Act is even clearer. Indeed, it is overwhelming. In 2020 *alone*, nearly 2.8 *million* AR-15-style rifles were produced or imported into the United States. *See* National Shooting Sports Foundation, Inc., *Commonly Owned: NSSF Announces over 24 Million MSRs in Circulation* (July 20, 2022), https://bit.ly/3CRHhQl (citing data) (last accessed March 8, 2023). And AR-15-style rifles accounted for "almost one-half of all rifles (48%) produced in 2018." *Miller v. Bonta,* 542 F. Supp. 3d 1009, 1022 (S.D. Cal. 2021). A recent survey of gun owners found that a staggering 24.6 million Americans have owned or now own one or more AR-15-style rifles. *See* William English, PhD, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* at 2 (May 13, 2022), https://bit.ly/3HaqmKv (last accessed March 8, 2023). In fact, the widespread use of these firearms is precisely what led the sponsors of the Act to target them. *See* January 10, 2023 Press Release, Office of the Governor of the State

of Illinois, "Illinois Becomes Ninth State to Institute Assault Weapons Ban" https://www.illinois.gov/news/press-release.25890.html (last accessed March 8, 2023) ("from ending the sale of assault rifles to stopping the tidal wave of guns flooding into Illinois from surrounding states, the Protect Illinois Communities Act is one of the strongest gun safety laws in the nation … Delivering on this promise - the promise to remove these weapons of war from…communities throughout Illinois" said House Speaker Emanuel "Chris" Welch).

Not only the semiautomatic rifles and pistols, but also the magazines that the Act bans, are protected under the Amendment. Logically, the right to keep and bear arms *necessarily* includes the right to keep and bear the components (such as ammunition and magazines) without which the firearms cannot function. *See United States v. Miller,* 307 U.S. 174, 180 (1939) (citing 17th-century commentary recognizing that "[t]he possession of arms also implied the possession of ammunition"). As the Ninth Circuit put it, "without bullets, the right to bear arms would be meaningless." *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014).

As to the detachable magazines banned by the Act, the statistics regarding their "common use" are conclusive: millions of law-abiding American men and women own tens of millions—if not hundreds of millions—of such magazines for use with their legally-owned semiautomatic firearms. In fact, "approximately half of all privately owned magazines in the United

States"—roughly 115 million in total—are capable of holding "more than 10 rounds of ammunition." *Cf. Duncan v. Bonta,* 19 F.4th 1087, 1097 (9th Cir. 2021). After all, every AR-15- style rifle comes standard with magazines with a capacity of 15 or more rounds, as do many popular semiautomatic pistols. For example, the Beretta Model 92, "[a]nother popular handgun used for self-defense … which entered the market in 1976 and comes standard with a sixteen-round magazine." *Duncan v. Becerra,* 970 F.3d 1133, 1142 (9th Cir. 2020).

While one can dispute the precise threshold for establishing common use, no one can deny that semi-automatic rifles and 10-15 round magazines are commonly—indeed "overwhelmingly"—used by law-abiding citizens for "lawful purpose[s]," including for "defense of self, family, and property" in the home, where Second Amendment interests are "most acute." *Heller*, 554 U.S. at 628. This common use mandates Second Amendment protection, making a ban on these arms unconstitutional *per se*—that is, quite apart from "any of the standards of [constitutional] scrutiny," and regardless of whether "the possession of other firearms . . . is allowed." *Id.* at 628–629.

B. Neither Semiautomatic Weapons nor 10+ Capacity Magazines are "Dangerous and Unusual"

While the United States Supreme Court has noted that "dangerous and unusual weapons" are not protected by the Second Amendment, *Heller*, 554 U.S. at 627, that doctrine is no help to the Act here. To count as "dangerous and unusual," a firearm must be *both* dangerous *and* unusual. *Caetano v.*

Massachusetts, 577 U.S. 411, 417 (2016) (Alito, J., concurring). And precisely because they are so commonly used, the semi-automatic rifles, handguns, and magazines banned by the Act are not "unusual."

As the Ninth Circuit explained, "[t]o determine [whether a weapon is 'dangerous and unusual'], we consider whether the weapon has uniquely dangerous propensities *and* whether the weapon is commonly possessed by law-abiding citizens for lawful purposes*." Fyock* 779 F.3d at 997 (emphasis added); *see also Hollis v. Lynch*, 827 F.3d 436, 448–51 (5th Cir. 2016). Therefore, the "dangerous and unusual weapons" question is not an exception to the protection for arms in "common use," but rather a reinforcement of that doctrine from another angle: an "unusual" weapon is simply the opposite of a weapon that is "common." *See Friedman v. City of Highland Park,* 784 F.3d 406, 409 (7th Cir. 2015) (holding that if "the banned weapons are commonly owned . . . then they are not unusual."). Since the guns and magazines banned by the Act are in common use, *see supra* Section I.A, they are not "dangerous and unusual."

C. The Most Common Uses of Weapons Banned by the Act are Lawful

While it is dispositive under *Heller* that this Act prohibits "an entire class of 'arms' that is overwhelmingly chosen by American society for th[e] lawful purpose" of "self-defense," 554 U.S. at 628, *Amici*'s experience suggests that the Act would fare no better if its validity turned on its costs and benefits. In *Amici*'s experience, the AR-15 style rifles that typify the so-called "assault weapons" banned by the Act are *not* the normal choice of criminals in the

commission of gun violence. The use of such "assault" rifles in the violent crimes routinely prosecuted by *Amici* in courtrooms across this state is highly *ab*normal. These rifles are far more often used for lawful purposes—and it is *no surprise* that they are, for they have several features that make them especially suitable for personal and familial self-defense.

Amici's experience that gun crimes rarely involve the use of AR-15 style weapons finds ample empirical support. A study by the United States Department of Justice concluded that such arms "are used in a small fraction of gun crimes." Christopher Koper, *et al.*, *Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003* (2004), U.S. DEP'T OF JUST., https://bit.ly/3hZiy5v (last accessed March 8, 2023). According to FBI statistics in 2019, there were only 364 homicides known to be committed with rifles of *any* type, compared to 6,368 with handguns, 1,476 with knives or other cutting instruments, 600 with personal weapons (hands, feet, *etc.*) and 397 with blunt objects. *See* U.S. Expanded Homicide Table 8, Crime in the United States, U.S. DEP'T OF JUST. (FBI 2019), https://bit.ly/3HdolNd, (last accessed March 8, 2023). These statistics comport with the experience of *Amici*, all of whom prosecute violent crimes in their respective counties. Simply put, gun crimes very seldom are committed by "assault" rifles. Instead, crimes we prosecute overwhelmingly involve handguns and almost always are already illegally owned or possessed.

In addition to being an uncommon choice for those committing violent crime, the rifles banned by the Act are ideal for self-defense, as recognized by those who buy them: "In 2018, … 34% of buyers purchased a modern rifle [predominantly] for personal protection, while 36% purchased [predominantly] for target practice or informal shooting,[2] and 29% purchased [predominantly] for hunting." *Miller*, 542 F.Supp.3d at 1022. Contrast that with *non*-semiautomatic rifles, "only 5% of [which] were bought for personal protection." *Id.* Owners of AR-15s and other similar rifles rated self -defense as over 8 out of 10 in importance for owning them, the second-highest rating after recreational target shooting. *See* NAT'L SHOOTING SPORTS FOUND., INC., *Modern Sporting Rifle: Comprehensive Consumer Report* 18 (July 14, 2022), https://bit.ly/3SSrVjM (last accessed March 9, 2023).

And that is no surprise. As firearm owners know, the specifics matter: these weapons are simple to fire, maintain, and keep from harming loved ones who may be bystanders to a defensive shooting. First, detachable magazines make it easier to reload firearms, which can be critical in the stressful circumstance of being forced to defend "self, family, or property." *Heller*, 554 U.S. at 628. Second, the AR-15 rifle shoots a relatively inexpensive and common cartridge that is particularly well-suited for defense at home, "where the need . . . is most acute," *id.*, because it has sufficient stopping power in the

[2] "During 2018, approximately 18,327,314 people participated nationally in target and sport shooting specifically with [AR-15-style] rifles." *Miller*, 542 F.Supp.3d at 1022.

event of a home intrusion, but quickly loses velocity after passing through a target. This is key, because household members are present for almost a third of all burglaries and become victims of violent crimes in more than a quarter of those cases. *See* Shannon Catalano, *Victimization During Household Burglary*, Bureau of Justice Statistics Special Report, NCJ227379, (2010). Stopping the crime but not injuring others is of fundamental interest to those who buy firearms for home defense.

None of this is an academic exercise, or mere comfort to people unreasonably fearful for their safety. Studies on the frequency of defensive firearm uses in the United States have determined that there are up to 2.5 million instances each year in which civilians used firearms for home defense. Gary Kleck, Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. OF CRIM. L. & CRIMINOLOGY 150, 164 (1995).

The firearms banned by the Act are also well-suited for hunting and sport; a use that is lawful in every state in America and protected by the Second Amendment after self-defense. *See Heller*, 554 U.S. at 599. More than half of all gun owners use a firearm for hunting or sport shooting, and recreational target shooting is a top reason for owning semiautomatic rifles like those banned by the Act. *Miller*, 542 F.Supp.3d at 1022.

In short, the Act is targeted at weapons that are particularly well-suited to lawful purposes, and particularly unpopular for the commission of crimes.

II. ILLINOIS' BALANCING TEST MUST BE REJECTED IN FAVOR OF A HISTORICAL ANALYSIS

It is impossible to salvage the Act by rebranding it as a mere regulation short of an outright ban, in the hopes of getting to invoke some more flexible constitutional test. True, Illinois precedent has in the past applied a balancing test to certain gun laws, upholding them upon a showing of "a very strong public-interest justification and a close fit between the government's means and its end." *People v. Chairez*, 2018 IL 121417, ¶ 50. Using a similar test, the Seventh Circuit upheld in 2015 a local-level ban on semiautomatic arms and standard-capacity magazines, *see Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015), and it reaffirmed that decision four years later, *see Wilson v. Cook Cnty.*, 937 F.3d 1028, 1035-37 (7th Cir. 2019). But the Seventh Circuit cases, like Illinois precedents, applied a two-step framework, "first ask[ing] whether the restricted activity is protected by the Second Amendment," then "inquir[ing] whether the strength of the government's reasons justifies the restriction of rights at issue." *Wilson*, 937 F.3d at 1036. Yet *just last year*, the U.S. Supreme Court explicitly repudiated "this two-step approach[,]" for including "one step too many"—the balancing step. *See Bruen*, 142 S.Ct. at 2127.

Bruen observed that "reliance on history to interpret a constitutional text—especially text meant to codify a *pre-existing* right—is … more legitimate, and more administrable, than asking judges to 'make difficult empirical judgments' about 'the costs and benefits of firearms restrictions,' especially given their 'lack [of] expertise'" in the field. *Bruen,* 142 S.Ct. at 2130 (quoting *McDonald*, 561 U.S. at 790–91 (plurality opinion)). In the *Bruen* Court's view, "federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of 'intermediate scrutiny' often defer to the determinations of legislatures," *id.* at 2118, forgetting that "[t]he Second Amendment 'is the very *product* of an interest balancing by the people' and it 'surely elevates above all other interests the right of law-abiding, responsible citizens to use arms' for self-defense." *Id.* at 2131 (quoting *Heller*, 554 U. S. at 635)). "It is this balance—struck by the traditions of the American people—that demands our unqualified deference." *Id.*

Instead of invoking balancing tests, *Bruen* declared that a government hoping to defend a gun regulation "must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* Under this historical test, regulation of conduct falling within "the Second Amendment's plain text" is unconstitutional unless it has a "proper analogue" in the "Nation's historical tradition of firearm regulation." *Id.* at 2129–30, 2132. And the most telling regulatory traditions

are early ones. Thus, *Bruen* found that "post-Civil War discussions of the right to keep and bear arms," which "took place 75 years after the ratification of the Second Amendment, . . . do not provide as much insight into its original meaning as earlier sources," *id.* at 2137 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 614 (2008)), and *Bruen* set aside altogether certain "20th-century historical evidence," *id.* at 2138 n.28.

A. There is No "Historical Tradition" in America of Banning Semiautomatic Rifles or Handguns

Even if the Act could be passed off as a mere regulation that did *not* "amount[] to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for . . . lawful purpose[s]," *Heller*, 554 U.S. at 628, the Act would fail muster unless it were consistent with "the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Bruen*, 142 S. Ct. at 2127. And "the burden falls on [the state] to show that [its] requirement is consistent with this Nation's historical tradition of firearm regulation"—*i.e.*, that it has a "proper analogue" in some historically prominent regulation. *See id.* at 2135, 2132. In short, it is not Appellee's burden to show that laws analogous to the Act were long *rejected*. It is the State's burden to show that a ban like the Act was long *accepted*. *See Heller v. District of Columbia,* 670 F.3d 1244, 1253 (D.C. Cir. 2011) (that "a regulation that is 'longstanding' [and thus presumptively lawful under *Heller*] … necessarily means it has long been accepted by the public").

Illinois cannot make that showing. There were no restrictions on firing capacity, reloading mechanisms, or the kinds of attachments the state has singled out, anytime near 1791, "the critical year for determining the [Second Amendment's] historical meaning." *See Moore v. Madigan,* 702 F.3d 933, 935 (7th Cir. 2012). And these types of arms were not new even then: "[T]he first firearm that could fire more than ten rounds without reloading was invented around 1580," and several such handguns and long guns "pre-date the American Revolution." *Duncan v. Becerra*, 970 F.3d 1133, 1147 (9th Cir. 2020), *reh'g en banc granted, opinion vacated*, 988 F.3d 1209 (9th Cir. 2021), *and on reh'g en banc sub nom. Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021), *cert. granted, judgment vacated*, 142 S.Ct. 2895 (2022), *and vacated and remanded*, 49 F.4th 1228 (9th Cir. 2022). Indeed, "[p]rior to the 1990's, there was no national history of banning weapons because they were equipped with furniture like pistol grips, collapsible stocks, flash hiders, flare launchers, or barrel shrouds." *Miller*, 542 F.Supp.3d at 1024.

Most tellingly, the federal government had no nation-wide restrictions on "assault weapons" until 1994—a law that it subsequently let expire. Such bans in the states remain exceedingly rare. When the Act took effect in Illinois, only eight other states[3] singled out so-called "assault weapons" for

[3] Prior to 1990, only three states had imposed some restrictions on *semi*automatic firearms, all subsequently repealed: Michigan (1927, repealed in 1959); Rhode Island (1927, repealed in 1975); Ohio (1933, repealed in 2014). *See Duncan v. Becerra*, 970 F.3d 1133, 1150 & n.10 (9th Cir. 2020).

special restrictions, and all those state restrictions are newer than the internet: California (Jan. 1, 1990); New Jersey (Sept. 1, 1990); Hawaii (July 1, 1992, assault pistols only); Connecticut (Oct. 1, 1993); Maryland (June 1, 1994, assault pistols only, expanded to include long guns effective Oct. 1, 2013); Massachusetts (codification of federal assault weapons ban effective July 23, 1998, with new state licensing requirements effective Oct. 21, 1998); New York (Nov. 1, 2000); and Delaware (June 30, 2022).

To be sure, a District of Columbia ban on "machinegun[s]" also banned those that shot "semiautomatically" and dates to 1932. *See Miller v. Bonta*, 542 F. Supp. 3d 1009, 1025 (S.D. Cal. 2021). This ban has been re-codified by the District various times and in its current version continues to prohibit assault weapons. *See* 56 D.C. Reg. 3438 (May 1, 2009); D.C. Code §§ 7-2502.02(a)(6), 7-2501.01(3A)(A). But D.C.'s 1932 regulation of "semiautomatic" weapons is an obvious historical outlier and still far too new to reflect anything like a tradition of similar firearm regulation relevant for Second Amendment purposes. *See Miller,* 542 F. Supp. at 1025 (stating "this Court finds that the District of Columbia regulation is insufficient to demonstrate a longstanding prohibition on semiautomatic modern firearms")

In short, a tradition of state laws dating only to 1990 come far too late in the record to serve as an indicator of a "historical tradition." *Bruen*, 142 S.Ct at 2126. If a "handful of late 19th-century" laws cannot make for a tradition, *id.* at 2138, a handful of state laws only in effect for the last 40 surely cannot.

Moreover, Illinois can point to no "dramatic technological change[]" or "unprecedented societal concern[]" regarding such weapons since 1990. *See Bruen*, 142 S.Ct. at 2132. As detailed above, semiautomatic firearms have been around for more than a century, while the compelling "societal concern" regarding safeguarding the lives of innocent civilians from violence is as old as any weapon known to man, was undoubtedly shared by those who drafted and ratified the Second Amendment, and has been shared by all upstanding Americans since. Furthermore, the Supreme Court has explicitly recognized that semiautomatic rifles like the AR-15 are "civilian" firearms and are included in the category of those firearms "traditionally … widely accepted as lawful possessions." *Staples v. United States*, 511 U.S. 600, 603, 612 (1994).

In short, there is no "enduring American tradition of state regulation" forbidding the purchase or possession of semiautomatic rifles and pistols by law-abiding citizens for lawful purposes. *See Bruen*, 142 S.Ct. at 2155. To the contrary, the American tradition is one of *protecting* the right of the people to possess firearms that, like semiautomatic rifles and pistols, are "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 624-25. Because Illinois cannot "affirmatively prove" that such an extensive regulation "is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms," *Bruen*, 142 S.Ct. at 2127, the Act unconstitutionally infringes upon Second Amendment rights. *See id.* at 2130.

B. There is No "Historical Tradition" in America of Banning 10+ Capacity Magazines

The same holds true for the Act's ban on magazines that hold 10+ rounds. Such arms are "presumptively protect[ed]" by the Second Amendment, so Illinois would have to "affirmatively prove that its [magazine ban] is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127.

Illinois cannot make that showing. As the Ninth Circuit found, "when the Founders ratified the Second Amendment, no laws restricted ammunition capacity despite multi-shot firearms having been in existence for some 200 years." *Duncan v. Becerra*, 970 F.3d 1133, 1150 (9th Cir. 2020). At the earliest, such laws "emerged in 1927." *Id.* at 1150-51. But laws enacted for the first time in the twentieth century "come too late to provide insight into the meaning of [the Constitution]." *Bruen*, 142 S.Ct. at 2137 (alteration in original) (quoting *Sprint Communs. Co., L.P. v. APCC Services*, 554 U.S. 269, 312 (2008) (Roberts, C.J., dissenting)); *see also Bruen*, 142 S.Ct at 2138 (rejecting reliance on "late-19th-century [laws]").

Even if the history of magazine restrictions could be dated to earlier than 1927 (which it cannot) such laws would remain highly unusual in America today. The federal government did not restrict magazine capacity until 1994—and Congress likewise allowed that law to expire in 2004 after the DOJ study revealed that it had produced "no discernible reduction" in gun violence. Koper *et al.*, *supra*, at 96. Currently, only 13 other states have laws analogous to

Illinois's magazine capacity limit, with four of them only dating to 2022. *See Large Capacity Magazines, Summary of State Law,* Giffords Law Center, https://tinyurl.com/5n82cbn8 (last accessed March 23, 2023).

The absence of historical laws restricting firing capacity does not mean that recent history has witnessed some "dramatic technological change[]" or "unprecedented societal concern[.]" *Bruen*, 142 S.Ct. at 2132. Firearms capable of firing more than 10 rounds long predate the Founding. *See Duncan*, 970 F.3d at 1147. They were marketed to and bought by civilians from the start. *See Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Atty. Gen. of N.J.*, 974 F.3d 237, 255 (3d Cir. 2020) (Matey, C.J. dissenting). It cannot be denied that "magazines of more than ten rounds ha[ve] been well established in the mainstream of American gun ownership" for a very long time. David B. Kopel, *The History of Firearm Magazines* and Magazine Prohibitions, 78 Alb. L. Rev. 849 (2015) at 862.

In sum, once again, there is no "enduring American tradition of state regulation" forbidding the purchase or possession of magazines capable of holding more than 10 rounds by law-abiding citizens for lawful purposes. *Bruen*, 142 S.Ct. at 2155. Our American tradition is one of *protecting* the right of the people to possess arms that, like these ubiquitous magazines, are "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 624-25. Because Illinois cannot "affirmatively prove that its … regulation is part of the historical tradition that delimits the outer bounds of

the right to keep and bear arms," *Bruen*, 142 S.Ct. at 2127, the magazine ban unconstitutionally infringes upon Second Amendment rights, *id.* at 2130.

III. CONCLUSION

Many Americans of good will continue to debate the merits of our Country's broad-based culture of gun ownership. Some fear that broad gun rights facilitate violence by criminals. Others contend that while the law should take aggressive steps to stop criminals, it must also respect responsible citizens' right to own commonplace firearms as an effective means of self-defense against those very same criminals, making the public *more* secure, not less. While this debate will undoubtedly endure, at least this much has been settled since 1791: The Second Amendment—"the very *product* of an interest balancing by the" Founding generation, which ratified it—"elevates above all other interests the right of law-abiding, responsible citizens to use arms" for self-defense. *Bruen,* 142 S.Ct. at 2131 (citing *Heller*, 554 U.S. at 635). Therefore, no state may "prohibit[] … an entire class of 'arms' that is overwhelmingly chosen by American society for [a] lawful purpose." *Heller*, 554 U.S. at 628. Yet the Act bans entire categories of firearms and firearm components (i.e., magazines) obviously in common use for lawful purposes today. It is unconstitutional under the Second Amendment, as authoritatively read by *Heller* and *Bruen* both.

Certain firearms – like the AR-15 – may seem strange and menacing to those with little experience with firearms, but they are quite normal and

valuable to many millions of responsible, law-abiding Americans. In fact, it is the experience of *Amici* as the chief law-enforcement officers of our respective Counties that the typical use of such firearms is self-defense and recreation—for which they are quite well-suited—and not violent crime.

Like all Americans, *Amici* are horrified by the mass shootings and urban violence our nation has experienced. These are heartbreaking reminders of how much pain and sorrow violent individuals with evil intentions can cause. As prosecutors, we go to work every day to deter such crimes, do justice for victims, put those who would do harm to our communities behind bars, and protect everyone by strengthening the justice system and the rule of law.

It is in service to that same rule of law that we urge this Honorable Court to support all the rights enshrined in our Constitution, including the right of the people to own commonplace firearms so they can defend hearth and home and live freely with the means to secure their own ultimate safety.

WHEREFORE, *Amici* pray that the Honorable Court affirm the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois, and hold the Act unconstitutional under the Second Amendment to the U.S. Constitution, thus securing the constitutional rights of law-abiding, responsible citizens in the counties represented by *Amici*, and throughout Illinois.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 25 pages.

/s/ Thomas A. Haine
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CERTIFICATE OF FILING & SERVICE

The undersigned certifies under penalty of law as provided in 735 ILCS 5/1-109 that the statements in this instrument are true and correct and that the foregoing brief was electronically filed with the Illinois Supreme Court using the court's Odyssey eFileIL system, and was served on all counsel of record, listed below, via Odyssey eFile system on April 5, 2023.

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