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'It is Time to End This Madness': Why the Protect Illinois Communities Act is Constitutional Under the Second Amendment

Kellie Kleitsch
Loyola University Chicago Law School

Comment

"It is Time to End This Madness": Why the Protect Illinois Communities Act is Constitutional Under the Second Amendment

Kellie Kleitsch[*]

The United States is plagued by an epidemic of gun violence. In particular, mass public shootings, perpetrated by gunmen armed with assault weapons, have risen exponentially since the Supreme Court found that the Second Amendment protected an individual's right to bear arms in 2008 and 2010. In an attempt to stem the rising tide of bloodshed, states have passed legislation banning assault weapons within their borders. After a horrific shooting at a local Fourth of July parade in 2022, Illinois became the ninth state to enact a such a ban. However, this ban immediately faced challenges under New York State Rifle & Pistol Association v. Bruen*, a Supreme Court decision handed down just eleven days before the Illinois parade shooting. In* Bruen*, the Court established that, if the regulated conduct—in this case, the possession, sale, and manufacture of assault weapons—is protected by the plain language of the Second Amendment, any regulation that encroaches upon that protection must be in line with the nation's "history and tradition" of weapons regulation.*

In the event the Supreme Court takes up the Illinois assault weapons ban for review; this Comment argues that the law is constitutional under the Court's contemporary interpretation of the Second Amendment. It first argues that assault weapons are not commonly used for lawful self-defense. Self-defense is the pillar upon which the Second Amendment individual right is built; if a weapon is not in common use for that purpose, the Second

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Amendment's protection does not reach that weapon. Next, it argues that assault weapons are "dangerous and unusual," a result of dramatic technological advancement and the impetus of unprecedented social concern. For these reasons, the Court should take a nuanced view when comparing the Illinois ban to regulations of the past. Ultimately, this Comment encourages any court, be it the Supreme Court reviewing the Illinois ban or any other reviewing court considering a challenge to an assault weapons ban, to incorporate these theories when considering Second Amendment challenges moving forward.

INTRODUCTION

The Second Amendment states, in its entirety, "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."[1] Until 2008, this constitutional right was interpreted as a collective right to bear arms in the defense of the state.[2] In 2008 and 2010, however, the Supreme Court established a new paradigm: the Second Amendment was reinterpreted as an individual right to bear arms for self-defense, and incorporated against each of the fifty states by means of the Fourteenth Amendment.[3]

Outside of the courtroom, in the aftermath of these decisions, the incidence of mass shootings—and the use of assault weapons to perpetrate them—has reached unprecedented levels. Assault weapons have been used to commit 60 percent of the mass public shootings occurring from 2020 to 2023, an increase of more than 76 percent from the entire previous decade.[4] As a direct response to one such shooting in Highland Park, Illinois, where seven people were murdered at an Independence Day parade, Illinois became the ninth state in the nation to implement a statewide ban on the sale, purchase, and possession of assault weapons.[5] This ban

1. U.S. CONST. amend. II.

2. Douglas N. Letter et al., *15 Years After* Heller*,* Bruen *is Unleashing Chaos, but There's Hope for Gun Regulations*, ALL. FOR JUST. (Mar. 17, 2023), https://www.afj.org/article/15-years-after-heller-bruen-is-unleashing-chaos-but-theres-hope-for-gun-regulations/ [https://perma.cc/EY6S-KEQD].

3. District of Columbia v. Heller, 554 U.S. 570, 599 (2008); McDonald v. City of Chicago, 561 U.S. 742, 750 (2010).

4. *Key Findings*, VIOLENCE PROJECT, https://www.theviolenceproject.org/key-findings/ [https://perma.cc/G7R9-YYDB] (last visited June 1, 2024). *See also* WILLIAM J. KROUSE & DANIEL J. RICHARDSON, CONG. RSCH. SERV., R44126, MASS MURDER WITH FIREARMS: INCIDENTS AND VICTIMS, 1999–2013, at 2–3 (2015) [hereinafter KROUSE & RICHARDSON, MASS MURDER] ("'[M]ass shooting' is defined as a multiple homicide incident in which four or more victims are murdered with firearms, within one event, and in one or more locations in close proximity. Similarly, a 'mass public shooting' is defined to mean a multiple homicide incident in which four or more victims are murdered with firearms, within one event, in at least one or more public locations, such as a workplace, school, restaurant, house of worship, neighborhood, or other public setting.").

5. *Highland Park Parade Mass Shooting Victims Now Include 7 Killed, 47 Injured*, NBC (Chi). (July 5, 2022, 8:09 PM), https://www.nbcchicago.com/news/local/injuries-in-highland-park-fourth-of-july-parade-mass-shooting-rise-to-38/2873555 [https://perma.cc/QRK9-SRND]; Press Release, State of Illinois, Gov. Pritzker Signs Legislation Banning Assault Weapons and Sale of High-Capacity Magazines (Jan. 10, 2022), https://www.illinois.gov/news/press-release.25890.html [https://perma.cc/E223-TPEE]. While some gun experts restrict the term "assault weapon" or "assault rifle" to a particular set of firearms that are fed ammunition from a detachable magazine and can switch between semiautomatic and fully automatic fire, most laws regulating assault weapons, including the Protect Illinois Communities Act (PICA) at issue in this Comment, use a broader definition that typically applies to any magazine-fed, semiautomatic rifle that can incorporate other design features, such as a second grip. This broad definition will be used in this Comment. Alex Yablon, *How Many Assault Weapons Do Americans Own?*, TRACE (Sept. 22, 2018), https://www.thetrace.org/2018/09/how-many-assault-weapons-in-the-us/ [https://perma.cc/FU3A-PEHU].

was immediately the subject of a slew of court challenges questioning its constitutionality under the Court's contemporary view of the Second Amendment.[6] This question has already resulted in a split between district courts and a divided opinion from the United States Court of Appeals for the Seventh Circuit, indicating a strong possibility that the Supreme Court will take up the Illinois assault weapons ban for review.[7] Yet the Court's decision in *New York State Rifle & Pistol Association v. Bruen* in 2022, setting out its new test for Second Amendment constitutionality, eliminated from judicial consideration any compelling or important interest that the government may have in adopting regulations like the Illinois ban, such as the state's interest in preventing the massacre of its residents in "our parks, our schools, our movie theatres, churches, and communities" by "weapons of war."[8] How, then, can such a ban be sustained under the Second Amendment?

Part I of this Comment provides the background and context of the Illinois ban: the mass public shooting that prompted its passage, the restrictions within the statute, and the immediate challenges the law faced in both state and federal court. Part II discusses the surprisingly short list of cases which compromise the entirety of contemporary Supreme Court jurisprudence on the Second Amendment, culminating in the *Bruen* test. Part III, then, applies this analytical framework to the Illinois law itself. This Comment does not address the question of whether assault weapons are the types of "Arms" protected under the Second Amendment.[9] Instead, this Comment asserts that the Illinois ban is constitutional because assault weapons are not in common use for purposes of self-defense and because assault weapons are both dangerous and unusual weapons. Finally, Part IV encourages incorporating this analysis into any future assessment the Supreme Court may undertake of the Illinois ban, as well as other challenges assault weapons bans face in other states. In so doing, it also promotes ongoing and interdisciplinary historical scholarship of the Second Amendment with an emphasis on understanding diverse perspectives.

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6. *See infra* Section I.C (reviewing both the state and federal court challenges filed after the ban's passage).

7. *See generally* Bevis v. City of Naperville, 567 F. Supp. 3d 1052 (N.D. Ill. 2023); Barnett v. Raoul, 671 F. Supp. 3d. 928 (S.D. Ill. 2023); Bevis v. City of Naperville, 85 F.4th 1175 (7th Cir. 2023).

8. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022) (holding that the government cannot "simply posit that the regulation promotes an important interest" in order to beat back a Second Amendment challenge); Press Release, State of Illinois, *supra* note 5.

9. U.S. CONST. amend. II; *see also Bevis*, 85 F.4th at 1192–98 (concluding that assault weapons are more alike to military-grade weaponry than "the many different types of firearms" used for individual self-defense and are therefore not "bearable Arms").

I. BACKGROUND

This Part will first discuss the mass public shooting that served as the catalyst for the passage of the Illinois assault weapons ban. Next, it will discuss the history of assault weapons bans in this country and the passage of the Illinois ban. Finally, it will delve into legal challenges the ban immediately faced in both state and federal court, as well as the ban's current legal status.

A. Highland Park, Illinois: July 4, 2022

On July 4, 2022, residents of and visitors to Highland Park, Illinois, gathered to watch the city's first Fourth of July parade since the onset of the COVID-19 pandemic more than two years earlier.[10] Many paradegoers had set out lawn chairs along the parade route the night before or arrived early in the morning, ensuring they would get a prime viewing spot.[11] The parade was set to begin at 10:00 a.m.; at 10:14 a.m., after three-quarters of the parade had begun marching, a gunman opened fire into the crowd of spectators.[12] Using a "Smith & Wesson M&P 15" semiautomatic rifle, the shooter[13] fired eighty-three rounds at paradegoers in

10. Ellen Almer Durston et al., *Highland Park Parade Shooting: Suspect in Parade Shooting Charged with 7 Counts of Murder*, N.Y. TIMES (June 30, 2023), https://www.nytimes.com/live/2022/07/05/us/highland-park-shooting [https://perma.cc/Z5BL-EAQP].

11. *Id.*; *see also* Michael Tarm et al., *6 Dead, 30 Hurt in Shooting at Chicago-Area July 4 Parade*, ASSOC. PRESS (July 6, 2022, 9:50 AM), https://apnews.com/article/chicago-july-4-parade-shooting-92b50feb80c19afe7842b9caf08545cb [https://perma.cc/3DJR-FA99].

12. *Independence Day Parade*, ENJOY HIGHLAND PARK, https://www.enjoyhighlandpark.com/calendar/independence-day-parade [https://perma.cc/HL9P-DNF2] (last visited June 1, 2024); Melissa Espana & Alonzo Small, *Highland Park Fourth of July Parade Shooting: Timeline of Events*, WGN (Chi.) (July 18, 2022, 6:25 PM), https://wgntv.com/news/highland-park-parade-shooting/highland-park-fourth-of-july-parade-shooting-timeline-of-events/ [https://perma.cc/RZD3-UVKG]; Tarm et al., *supra* note 11.

13. This Comment and author acknowledge and support the "Don't Name Them" and "No Notoriety" campaigns. Instead of repeatedly and persistently reporting the names, manifestos, social media posts, and more of the perpetrators of mass public shootings, the media should shift its attention to coverage of the victims and survivors. DON'T NAME THEM, https://www.dontnamethem.org/ [https://perma.cc/T5XS-QCG6] (last visited June 1, 2024) (aiming to prevent future mass public shootings by advocating for "responsible reporting"); NO NOTORIETY, https://nonotoriety.com/ [https://perma.cc/TP5S-F7WK] (last visited June 1, 2024); *see also* James N. Meindl & Jonathan W. Ivy, *Mass Shootings: The Role of the Media in Promoting Generalized Imitation*, 107 AM. J. PUB. HEALTH 368, 368 (2017) (describing the theory of "generalized imitation" and how the way in which the media reports a mass shooting can increase the likelihood of another shooting event). No mass shooting perpetrators will be identified by name in the body or parentheticals of this Comment; instead, this author remembers and honors the victims of the Highland Park parade shooting—Nicolas Toledo, Jacki Sundheim, Katherine Goldstein, Stephen Straus, Irina and Kevin McCarthy, and Edwin Uvaldo—as well as every survivor of this horrific event. Ivan Pereira et al., *July 4 Highland Park Parade Shooting: Remembering the Victims 1 Year Later*, ABC NEWS (July 4, 2023, 4:23 AM), https://abcnews.go.com/US/victims-july-4th-highland-park-parade-shooting/story?id=86205738 [https://perma.cc/QRF5-UYKK].

less than a minute, ultimately killing seven people and injuring forty-eight others.[14] As the shooter ran from the scene, the high-powered rifle he had used fell out of his bag and was left behind.[15]

By 6:30 p.m., the shooter had been taken into custody in the neighboring town of Lake Forest, Illinois.[16] At that time, a second semiautomatic, AR-15-style weapon, a "Kel Tec SUB2000," was recovered from his vehicle.[17] It would later be revealed that, in the hours immediately following the Highland Park parade shooting, the shooter had driven to Madison, Wisconsin, and contemplated committing another mass public shooting at the Fourth of July celebration there.[18] The shooter told police that the only reason he had returned to Illinois without carrying out a second attack was because he had not done enough research on the Madison event.[19] On July 27, 2022, the shooter was indicted on 117 counts: twenty-one counts of first-degree murder, as well as forty-eight counts of attempted murder and forty-eight counts of aggravated battery with a firearm—one for each person hit by a bullet, a bullet fragment, or shrapnel.[20]

The State of Illinois, comparatively speaking, has some of the strongest gun control laws in the country.[21] Yet, despite a well-documented history of suicidal ideation and violence, the Highland Park shooter was able to

14. Kathleen Foody, *Smith & Wesson Sued Over Link to July 4 Parade Mass Shooting*, ASSOC. PRESS (Sept. 28, 2022, 5:14 PM), https://apnews.com/article/highland-park-july-4-shooting-gun-violence-chicago-873c61100a4d0a44842e82cd75fd8427 [https://perma.cc/AG3K-3BXW]; Emily Shapiro, *Highland Park Mass Shooting Suspect Indicted on 117 Counts*, ABC NEWS (July 27, 2022, 2:48 PM), https://abcnews.go.com/US/highland-park-mass-shooting-suspect-indicted-117-counts/story?id=87385767 [https://perma.cc/UT6J-DHRS].

15. Travis Caldwell et al., *Highland Park Gunman Admitted to Firing on Parade Crowd and Contemplated Attack in Madison, Wisconsin, Officials Say*, CNN (July 6, 2022, 8:33 PM), https://www.cnn.com/2022/07/06/us/highland-park-illinois-shooting-july-fourth-parade-wednesday/index.html [https://perma.cc/G6ZY-9KGZ].

16. Espana & Small, *supra* note 12; FOX 32 Chi., *Video Shows Arrest of Highland Park Parade Shooting Suspect*, YOUTUBE (July 4, 2022), https://www.youtube.com/watch?v=4JxkBLJaAHk [https://perma.cc/E2VY-JA8D].

17. Caldwell et al., *supra* note 15.

18. *Id.*; Safia Samee Ali & David K. Li, *Suspect Confesses to Highland Park Shooting and Plotted Second Attack in Wisconsin, Prosecutor Says*, NBC NEWS (July 6, 2022, 11:02 AM), https://www.nbcnews.com/news/us-news/highland-park-illinois-shooting-suspect-admits-role-july-fourth-attack-rcna36868 [https://perma.cc/33D7-LEN7].

19. Caldwell et al., *supra* note 15.

20. Shapiro, *supra* note 14.

21. Mitch Smith et al., *Highland Park Shooting Reveals Limits of Illinois's Gun Restrictions*, N.Y. TIMES (July 6, 2022), https://www.nytimes.com/2022/07/06/us/highland-park-shooting-guns.html [https://perma.cc/5KUG-M6MN]; David Schaper, *Illinois' Gun Laws Failed to Stop the Highland Park Shooter from Getting Weapons*, NPR (July 8, 2022), https://www.npr.org/2022/07/08/1110435835/illinois-gun-laws-failed-to-stop-the-highland-park-shooter-from-getting-weapons [https://perma.cc/2ENU-PVRS]. Illinois was the first in the Midwest to ban "ghost guns," and has expanded background checks for firearms sales as well as modernized the state's Firearm Owners Identification (FOID) system. Press Release, State of Illinois, *supra* note 5.

pass four separate background checks and legally purchase five firearms in less than two years, including both of the semiautomatic weapons connected to the July Fourth attack.[22] In April 2019, police responded to an emergency call reporting that the shooter had attempted suicide.[23] Just five months later, police again visited the shooter's home, this time in response to a call from a family member reporting that the shooter had threatened to "kill everybody."[24] Police seized a box of sixteen knives, a twelve-inch dagger, and a twenty-four-inch samurai sword from the shooter's bedroom, but the shooter's family ultimately declined to press charges.[25] The shooter's father told police that the confiscated weapons actually belonged to him and that they had only been placed in his son's closet "for safekeeping," resulting in the weapons' return to the family later that same day.[26]

Nevertheless, police filed a "clear and present danger" report to the Illinois State Police (ISP), the law enforcement body responsible for issuing firearms licenses in Illinois, documenting that the shooter had admitted to having a history of drug use and depression.[27] Illinois police are required by law to file clear and present danger reports when an individual exhibits dangerous behavior that should bar them from having a gun.[28] Despite this report, just four months later in January 2020, the ISP approved the shooter's application for a Firearm Owner's Identification (FOID) card—an application sponsored by his father because, at the time, the shooter was under the age of twenty-one.[29] With this license, the

22. Becky Sullivan, *Highland Park Suspect Legally Purchased 5 Guns Despite Worrying Encounter with Police*, NPR (Or.) (July 5, 2022, 8:37 AM), https://www.opb.org/article/2022/07/06/highland-park-suspect-legally-purchased-5-guns-despite-worrying-encounter-with-police/ [https://perma.cc/UH8G-4CQF]; Tom Hals & Joseph Ax, *Why Illinois' Gun Laws Did Not Stop the Highland Park Shooter from Buying Weapons*, REUTERS (July 7, 2022), https://www.reuters.com/world/americas/why-illinois-gun-laws-did-not-stop-highland-park-shooter-buying-weapons-2022-07-08 [https://perma.cc/VX2R-LE5T].

23. Hals & Ax, *supra* note 22.

24. Sullivan, *supra* note 22.

25. *Id.*; Soo Rin Kim et al., *Police Determined Highland Park Shooting Suspect Posted 'Clear and Present Danger' After Past Threat*, ABC NEWS (July 7, 2022, 11:41 PM), https://abcnews.go.com/US/police-determined-highland-park-shooting-suspect-posed-clear/story?id=86421734 [https://perma.cc/YT4H-RVKV]

26. Sullivan, *supra* note 22.

27. Rin Kim et al., *supra* note 25; *Firearm Owners Identification* (*FOID*), ILL. STATE POLICE, https://isp.illinois.gov/Foid/Foid [https://perma.cc/ZF9C-9B4F] (last visited June 1, 2024).

28. *Office of Firearms Safety FAQs*, ILL. STATE POLICE, https://isp.illinois.gov/FirearmsSafety/FAQs# [https://perma.cc/HYU4-ZQP7] (last visited June 1, 2024).

29. Hals & Ax, *supra* note 22. In February of 2023, a grand jury indicted the shooter's father on seven felony counts of reckless conduct, one for each person killed at the parade in 2022. Julianne McShane et al., *Trial of Highland Park Shooter's Father for Signing Gun Application Can Continue, Judge Rules*, NBC NEWS (Aug. 28, 2023, 10:31 AM), https://www.nbcnews.com/news/

shooter purchased the Smith & Wesson he would use to murder seven people at the Highland Park parade just one month later.[30]

According to the ISP, there was an insufficient basis to deny the shooter's request for a FOID card.[31] At the time of the filing of the clear and present danger report, the shooter did not have a FOID card or a pending application for one that ISP could revoke, nor did he possess any firearms.[32] Because no charges were filed after the September 2019 incident, when ISP reviewed the shooter's criminal history, they only discovered an ordinance violation from January 2016 for being a minor in possession of tobacco.[33] And, because neither law enforcement nor the shooter's family filed for a protective order under Illinois's "red flag" law, there was no restraining order preventing the shooter from acquiring

us-news/case-highland-park-shooters-father-signing-gun-application-can-continu-rcna102143 [https://perma.cc/7RFG-ABGA]. By sponsoring the shooter's FOID application, prosecutors argued that the shooter's father agreed to be liable for any damages resulting from the shooter's use of firearms or firearm ammunition; according to the Lake County State's Attorney, "Parents who help their kids get weapons of war are morally and legally responsible when those kids hurt others with those weapons." *Id.* A motion to dismiss the indictment by the father's defense attorneys was denied, and the shooter's father's bench trial was scheduled to take place in November of 2023. *Id.* In addition to the criminal charges he faced, there is also the question of whether the shooter's father may be civilly liable as well. Melissa Chan & David K. Li, *Highland Park Suspect's Father Could Have Some 'Responsibility' in Attack, Police Say*, NBC NEWS (July 7, 2022, 10:19 AM), https://www.nbcnews.com/news/us-news/highland-park-suspects-father-responsibility-attack-police-said-rcna37093 [https://perma.cc/JDD7-GCMZ]. The shooter's father, a former Highland Park mayoral candidate and proponent of the Second Amendment, has stated that he does not regret sponsoring his son's FOID application. Dennis Romero, *Father of Highland Park Parade Shooting Suspect Charged with Reckless Conduct*, NBC NEWS (Dec. 17, 2022, 10:47 AM), https://www.nbcnews.com/news/us-news/father-highland-park-parade-shooting-suspect-charged-reckless-conduct-rcna62182 [https://perma.cc/GTW4-ZBGC]; Mark Rivera et al., *Accused Parade Shooter's Dad Says He Doesn't Regret Sponsoring FOID Card, Says System Needs Overhaul*, ABC 7 EYEWITNESS NEWS (Chi.) (July 7, 2022), https://abc7chicago.com/highland-park-shooting-parade-robert-crimo-father/12026458/ [https://perma.cc/EEE9-LPGA]. On November 6, 2023, the shooter's father pleaded guilty to seven counts of misdemeanor reckless conduct in a last-minute deal to avoid trial. Matt Masterson, *Father of Alleged Highland Park Gunman Pleads Guilty to Reckless Conduct Charges as Trial Was Set to Begin, Gets 60 Days in Prison*, WTTW (Chi.) (Nov. 6, 2023, 11:45 AM), https://news.wttw.com/2023/11/06/father-alleged-highland-park-gunman-pleads-guilty-reckless-conduct-charges-trial-was-set [https://perma.cc/9K5P-CCY8].

30. Frank Main, *Illinois State Police Director Defends Decision to Give Suspected Highland Park Killer a Gun Permit in 2020*, WBEZ CHI. (July 7, 2022, 7:22 AM), https://www.wbez.org/criminal-justice/2022/07/07/isp-director-defends-giving-suspected-highland-park-killer-a-gun-permit [https://perma.cc/4H9L-RG92].

31. Main, *supra* note 30.

32. Reis Thebault & Timothy Bella, *Highland Park Suspect's Father Sponsored Gun Permit Application, Police Say*, WASH. POST (July 6, 2022, 10:18 AM), https://www.washingtonpost.com/nation/2022/07/06/highland-park-shooting-crimo-gun-application-foid/ [https://perma.cc/64D3-ET2W].

33. Rin Kim et al., *supra* note 25.

or possessing firearms.[34] While ISP can deny a FOID application if an applicant is deemed a clear and present danger, in this case, they found the clear and present danger report that had been filed contained "second-hand" information, and both the shooter and his mother disputed whether a threat had even occurred.[35] As such, the reviewing ISP officer concluded there was insufficient information to warrant a clear and present danger determination, and the FOID card was issued.[36]

One year after the Highland Park parade shooting, ISP Director Brendan Kelly was asked if red flag laws could have prevented that massacre.[37] While he declined to give a definitive answer, Kelly stated that one of the "most troubling" factors was the conflicting information between the facts contained in the clear and present danger report, and the FOID application containing the shooter's father's sponsorship, affirmatively stating that his son was not a threat.[38]

34. Hals & Ax, *supra* note 22. Illinois is one of nineteen states, including Washington, D.C., which has a red flag law on the books that allows for the temporary removal of firearms from an individual believed to be at risk of harming themselves or others. Analisa Trofimuk, *What You Need to Know About Illinois' Red-Flag Gun Law*, PANTAGRAPH (Apr. 21, 2023), https://pantagraph.com/news/state-and-regional/illinois-red-flag-gun-law-enacted/article_adc6c997-267d-5249-a751-b95edca5b789.html [https://perma.cc/AZ7D-KC9T]. In Illinois, a close family or household member, or a member of law enforcement, can petition the court for an ex parte emergency firearm restraining order (FRO) for up to fourteen days, which, if granted, allows the police to remove not only firearms but firearm parts, ammunition, and that individual's FOID card, as well as prohibit them from purchasing new firearms. Alysson Gatens, *Firearm Restraining Orders in Illinois*, ILL. CRIM. JUST. INFO. AUTH. (Mar. 11, 2022), https://icjia.illinois.gov/researchhub/articles/firearm-restraining-orders-in-illinois/# [https://perma.cc/2Y3Q-PXL9]. After the initial emergency period, the court will hold a full hearing, after which it can grant a one-year FRO. *Id.* The FRO can thereafter be renewed for as long as the court finds the individual subject continues to present a danger to themselves or others. *Id.*; 430 ILL. COMP. STAT. 67/40-40(a) (2023).

35. Hals & Ax, *supra* note 22.

36. *Id.*

37. Chuck Goudie et al., *Should Illinois Red Flag Laws Have Prevented the Highland Park Parade Shooting?*, ABC 7 EYEWITNESS NEWS (Chi.) (June 29, 2023), https://abc7chicago.com/highland-park-shooting-victims-robert-crimo-iii-illinois-gun-laws/13442671 [https://perma.cc/T44P-H5SE].

38. *Id.* ("I think it's very difficult to say [if it could have been prevented], but I think one of the factors that is most troubling is that although a clear and present danger was reported, you subsequently had a family member say in writing and sign a document that says this person is not a threat, this person is safe to be able to have a firearm, and that's something very difficult for law enforcement to be able to overcome." (alteration in original) (quoting Brendan Kelly, Ill. State Police Dir.)).

B. The Protect Illinois Communities Act

In the aftermath of the Highland Park parade shooting, Illinois became the ninth state—and the first state in the Midwest—to ban the sale and distribution of assault weapons within the state.[39]

The concept of an assault weapons ban is not a novel one.[40] After two mass shootings in California, one at an elementary school in Stockton and one at a law firm in San Francisco, Congress introduced the Violent Crime Control and Law Enforcement Act of 1994 and its subsection, the Public Safety and Recreation Firearms Use Protection Act, more popularly known as the Federal Assault Weapons Ban.[41] The Federal Assault Weapons Ban, signed into law by President Bill Clinton,[42] made it "unlawful for anyone to manufacture, transfer, or possess a semiautomatic assault weapon"[43] or to "transfer or possess a large capacity ammunition feeding device," defined as "a magazine, belt, drum, feed strip, or similar device that has a capacity of, or that can readily be restored or converted to accept, more than 10 rounds of ammunition."[44] While the Federal Assault Weapons Ban survived a number of court challenges to its constitutionality, including under both the Commerce and Equal Protection Clauses, it faced no substantial challenges under the Second

39. Press Release, State of Illinois, *supra* note 5. As of the publication of this Comment, there are now ten states with assault weapons bans in effect; Washington state passed an assault weapons ban in April of 2023. Melissa Santos, *Washington Becomes 10th State to Ban Assault Weapons Sales*, AXIOS (Apr. 26, 2023), https://www.axios.com/2023/04/25/assault-weapons-washington-state-inslee-ban [https://perma.cc/PE9K-P7WQ].

40. The earliest assault weapons restrictions were enacted in Washington, D.C. in 1932. *Assault Weapons*, GIFFORDS L. CTR., https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/assault-weapons/#footnote_15_5603 [https://perma.cc/HE9J-PAZN] (last visited June 1, 2024) [hereinafter *Assault Weapons*].

41. Public Safety and Recreational Firearms Use Protection Act, 18 U.S.C. § 921 (expired 2004); Ron Elving, *The Nashville School Shooting Highlights the Partisan Divide Over Gun Legislation*, NPR (Apr. 1, 2023, 5:01 AM), https://www.npr.org/2023/04/01/1167467835/school-shooting-assault-weapons-ban-history [https://perma.cc/HBF2-QZ7T]; Associated Press, *Five Children Killed as Gunman Attacks a California School*, N.Y. TIMES (Jan. 18, 1989), https://www.nytimes.com/1989/01/18/us/five-children-killed-as-gunman-attacks-a-california-school.html [https://perma.cc/C55Y-2D4B] (reporting a gunman had murdered five children between the ages of six and nine and wounded more than thirty others at an elementary school); Robert Reinhold, *The Broker Who Killed 8: Gunman's Motives a Puzzle*, N.Y. TIMES (July 3, 1993), https://www.nytimes.com/1993/07/us/the-broker-who-killed-8-gunman-s-motives-a-puzzle.html [https://perma.cc/ZR5T-GGBQ] (reporting that a gunman had murdered eight people and wounded six others at a law office).

42. Ron Elving, *The U.S. Once Had a Ban on Assault Weapons—Why Did It Expire?*, NPR (Aug. 13, 2019), https://www.npr.org/2019/08/13/750656174/the-u-s-once-had-a-ban-on-assault-weapons-why-did-it-expire [https://perma.cc/JRA8-E8HJ] [hereinafter *Why Did It Expire?*].

43. Public Safety and Recreational Firearms Use Protection Act, 18 U.S.C. §§ 922(a)(v)(1), 922(w)(1), (b)(31) (expired 2004).

44. Public Safety and Recreational Firearms Use Protection Act, 18 U.S.C. §§ 922(a)(x)(1), (b)(31)(A)(i) (expired 2004).

Amendment.[45] At the time, organizations like the National Rifle Association (NRA)—now synonymous with the individual right to bear arms—were only just stepping up their Second Amendment efforts with events like their annual "Stand Up for the Second Amendment Essay Contest," and were fearful that the Supreme Court would be hostile to their individual rights theory of the Second Amendment.[46]

After ten years, however, the political landscape had changed. Republicans, who saw a sharp increase in political donations from the NRA after the passage of the federal ban, not only maintained their majority hold on both houses of Congress, but also increased their numbers in both chambers after the 2002 midterm elections.[47] In 2004, the law's ten-year "sunset provision" was triggered and the Federal Assault Weapons Ban expired.[48] Despite several efforts to reinstate the ban in the years following its lapse, every attempt, including the most recent in the winter of 2023, has been unsuccessful.[49]

In the absence of a federal ban, the onus fell upon the states to individually enact their own assault weapons bans. The District of Columbia has the oldest ban on the books, which traces back to a 1932 federal law

45. Tal Kopan, *If Congress, W.H. Wanted to Ban Assault Weapons, Could They?*, POLITICO (Aug. 8, 2012, 12:29 PM), https://www.politico.com/blogs/under-the-radar/2012/08/if-congress-wh-wanted-to-ban-assault-weapons-could-they-131451 [https://perma.cc/SJW9-5ST3]; Navegar, Inc. v. United States, 192 F.3d 1050, 1068 (1999) (holding that the Federal Assault Weapons Ban's prohibition on the manufacture, transfer, or possession of semiautomatic assault weapons does not exceed Congress' authority under the Commerce Clause); Olympic Arms v. Buckles, 301 F.3d 384, 390 (2002) (holding that the Federal Assault Weapons Ban does not violate the Equal Protection Clause of the Fifth Amendment).

46. Kopan, *supra* note 45; German Lopez, *How the NRA Resurrected the Second Amendment*, VOX (May 4, 2018, 12:02 PM), https://www.vox.com/policy-and-politics/2017/10/12/16418524/nra-second-amendment-guns-violence [https://perma.cc/CP59-3GY9]; *see also* Michael Waldman, *How the NRA Rewrote the Second Amendment*, BRENNAN CTR. FOR JUST. (May 20, 2014), https://www.brennancenter.org/our-work/research-reports/how-nra-rewrote-second-amendment [https://perma.cc/5FMP-SZNZ] (describing the development, rise, and impact of the NRA's contemporary theory of a Second Amendment individual right to bear arms).

47. *Why Did It Expire?*, *supra* note 44 (crediting the Republicans' 2002 election success in part to the fear and anxiety that gripped the country after the September 11, 2001 terrorist attacks); Kurtis Lee & Maloy Moore, *The NRA Used to Be a Bipartisan Campaign Contributor, but That Changed in 1994*, L.A. TIMES (Mar. 3, 2018, 3:00 AM), https://www.latimes.com/nation/la-na-pol-nra-spending-20180303-story.html [https://perma.cc/CWE8-N8R2].

48. *Why Did It Expire?*, *supra* note 44 (describing how the Federal Assault Weapons Ban expired automatically after ten years because Congress failed to renew it).

49. *Id.*; Peter Nicholas, *Biden Says He'll Renew Push for Assault Weapons Ban Following Spate of Mass Shootings*, CNBC (Nov. 24, 2022, 2:48 PM), https://www.cnbc.com/2022/11/24/biden-says-hell-renew-push-for-assault-weapons-ban.html [https://perma.cc/48MC-K5G8] (noting that the sunset provision was a concession made by proponents of the ban to secure enough votes for the its initial passage in 1994); Moira Warburton, *US Senate Republicans Block Assault-Style Weapons Ban as Mass Shootings Rise*, REUTERS (Dec. 6, 2023, 3:58 PM), https://www.reuters.com/world/us/us-senate-republicans-block-assault-style-weapons-ban-mass-shootings-rise-2023-12-06/ [https://perma.cc/A86H-YRH7].

and was re-codified in 1975.[50] California was the first state to enact a ban in 1990, with New Jersey quickly following suit.[51] Hawai'i and Connecticut passed their bans prior to the federal ban in 1992 and 1993, respectively; Maryland, Massachusetts, and New York each passed bans during the ten years the federal ban was active.[52] On June 30, 2022, just four days before the Highland Park shooting, Delaware became the eighth state in the nation to ban assault weapons.[53] The parameters of each ban differ from state to state, with varying consideration given to model type, "assaultive" features, and the registration, transferability, and other regulations of so-called "legacy" weapons—assault weapons which were purchased legally prior to the implementation of any ban.[54]

As for Highland Park, the city had first confronted the reality of mass public shootings and assault weapons, albeit tangentially, in 2013.[55] On December 14, 2012, a gunman entered Sandy Hook Elementary School in Newtown, Connecticut, and murdered twenty-six people—twenty of whom were six- and seven-year-old children—with a Bushmaster semi-automatic rifle.[56] Soon after the massacre, the Highland Park City Council voted to approve a city ordinance banning assault weapons and large capacity magazines.[57] The constitutionality of the ordinance was quickly challenged, but the Seventh Circuit handed a decisive victory to Highland Park, upholding the ban that remained in place on the day of the parade shooting nine years later.[58] On August 15, 2022, six weeks after the

50. *Assault Weapons*, *supra* note 40.

51. *Id.*

52. *Id.* (explaining how Maryland passed their ban in 1994, Massachusetts in 1998, and New York in 2000).

53. *Id.*

54. *Id.*

55. Adam Liptak, *Supreme Court Won't Hear Challenge to Assault Weapons Ban in Chicago Suburb*, N.Y. TIMES (Dec. 7, 2015), https://www.nytimes.com/us/supreme-court-will-not-hear-challenge-to-assault-weapons-ban-of-highland-park-ill.html [https://perma.cc/7JMK-949Y].

56. Susan Candiotti et al., *Newtown Shooting Details Revealed in Newly Released Documents*, CNN (Mar. 29, 2013, 9:53 AM), https://edition.cnn.com/2013/03/28/us/connecticut-shooting-documents/index.html [https://perma.cc/EVN2-Q8DC].

57. Liz Nagy, *Highland Park City Council Passes Resolution Calling for Semi-Automatic Weapons Ban*, ABC 7 EYEWITNESS NEWS (Chi.) (Aug. 15, 2022), https://abc7chicago.com/highland-park-shooting-city-council-assault-weapons-ban-gun-laws/12128454/ [https://perma.cc/5CG7-K3U7]; CITY OF HIGHLAND PARK, RESOL. NO. 87-2022, A RESOLUTION CALLING FOR FEDERAL AND STATE ACTION ON ASSAULT WEAPONS, LARGE CAPACITY MAGAZINES, AND GUN VIOLENCE (Aug. 15, 2022) [hereinafter RESOLUTION CALLING FOR ACTION], https://files.constantcontact.com/ef1ab53e301/fad47718-66e4-4b7f-951b-09efa859ba57.pdf [https://perma.cc/D6GE-SWQK].

58. Friedman v. City of Highland Park, 784 F.3d 406, 412 (7th Cir. 2015) (holding that, based on the court's understanding of the Supreme Court's Second Amendment jurisprudence, the Highland Park assault weapons ban did not violate the Second Amendment). The Supreme Court declined to take up the case, effectively allowing the Seventh Circuit's reasoning to stand. Friedman v. City of Highland Park, 577 U.S. 1039 (2015) (mem.).

parade shooting, the Highland Park City Council issued a unanimous resolution calling upon state and federal lawmakers to enact state and federal assault weapons bans.[59] The resolution described assault weapons as "military-grade weapons, designed and configured for combat use with the sole purpose of killing as many people as possible, as quickly as possible."[60] While the resolution did not have any legislative effect, it served as a call for immediate action, "carrying the weight of a town full of mass shooting survivors."[61]

It was against this national backdrop, and in the wake of the Highland Park parade shooting, that the Illinois legislature drafted and introduced the Protect Illinois Communities Act (PICA).[62] After passing the Illinois House of Representatives sixty-eight to forty-one and the Illinois Senate thirty-four to twenty, Governor J. B. Pritzker signed PICA into law on January 10, 2023, for immediate effect, just over six months after the shooting.[63]

PICA is a prodigious piece of legislation.[64] First, it prohibits any person within the state of Illinois from possessing or "manufactur[ing], deliver[ing], sell[ing], import[ing], or purchas[ing]" an assault weapon or assault weapon attachment.[65] Borrowing language from the Federal Assault Weapons Ban, PICA defines an *assault weapon* as certain semiautomatic rifles, pistols, and shotguns that either have "the capacity to accept a detachable magazine" or that have a "fixed magazine with the capacity" to hold more than a threshold amount of ammunition (five rounds for shotguns, ten rounds for rifles, and fifteen rounds for pistols).[66] PICA also identifies a number of features that categorizes certain rifles, pistols, and shotguns as assault weapons; while these

59. RESOLUTION CALLING FOR ACTION, *supra* note 57.

60. *Id.*

61. Nagy, *supra* note 57.

62. Patrick M. Keck, *Supporters of Assault Weapons Ban in Illinois Tell Lawmakers Bill Doesn't Go Far Enough*, STATE J.-REG. (Dec. 30, 2022, 9:32 AM), https://www.sj-r.com/story/news/state/2022/12/16/lawmakers-told-proposal-to-ban-assault-weapons-in-illinois-not-enough/69720372007/ [https://perma.cc/GV2V-G7JC]; *see also* Press Release, State of Illinois, *supra* note 5 (declaring that by passing PICA and by continuing to fight for "effective gun violence legislation," Illinois will fight "to ensure that future generations only hear about massacres like Highland Park . . . in their textbooks").

63. C. Mandler, *Illinois Governor Signs Ban on Assault Weapons and High-Capacity Magazines*, CBS NEWS (Jan. 10, 2023, 10:35 PM), https://www.cbsnews.com/news/illinois-governor-signs-ban-on-assault-weapons-and-high-capacity-magazines [https://perma.cc/C792-8D8P]; Press Release, State of Illinois, *supra* note 5, (announcing the signing of PICA on January 10, 2023).

64. *See generally* Protect Illinois Communities Act, Pub. Act 102-1116; Bevis v. City of Naperville, 85 F.4th 1175, 1182 (7th Cir. 2023) ("The Act is a sprawling piece of legislation made up of 99 sections that cover a vast array of regulatory and record-keeping matters . . . .").

65. 720 ILL. COMP. STAT. 5/24-1.9(b)–(c) (2023); *Id.* § 24-1.9(a).

66. *Bevis*, 85 F.4th at 1183, app. 1207; 720 ILL. COMP. STAT. 5/24-1.9(a)(1)(A)–(I) (2023).

characteristics vary by weapon type, they include such features as a protruding grip for the non-trigger hand, flash suppressors, grenade launchers, and pistol grips.[67] PICA goes on to list more than ninety brands or styles of rifles, more than forty brands or styles of pistols, and more than ten brands or styles of shotguns that are expressly prohibited under PICA.[68]

There are some exceptions to the purchase and possession prohibitions for active and retired law enforcement officers, prison officials, active-duty military servicemembers, and security employees.[69] The law also includes a legacy exception for weapons legally purchased prior to October 1, 2023, but requires that individuals in possession of a legacy weapon or attachment submit an affidavit stating as much under oath by January 1, 2024.[70] Legacy weapons are additionally subject to narrow exceptions on transferability and other regulations concerning where they are permitted to be stored.[71] Furthermore, the statute prohibits the possession and manufacture, delivery, or sale of large capacity ammunition feeding devices (high-capacity magazines) defined as "a magazine, belt, drum, feed strip, or similar device that has a capacity of, or that can be readily restored or converted to accept, more than ten rounds of ammunition for long guns and more than fifteen rounds of ammunition for handguns."[72] Finally, PICA also amended Illinois's red flag law to allow individuals to be restrained by court order from possessing or purchasing firearms for up to one year, whereas the previous version only prohibited possession and purchase for up to six months.[73]

While not identical to assault weapons bans in other states, PICA is substantially similar to many of them. Most of the current assault weapons bans contain a list of banned weapons by name and are based on "assaultive features."[74] Similarly, many regulate legacy weapons on issues such as registration, transferability, and more.[75] PICA, as well as the California and Connecticut bans, incorporate all of these factors.[76]

Illinois lawmakers, particularly majority-party Democrats, celebrated the passage of PICA as a lifesaving measure that would help to prevent mass violence, and hailed PICA as one of the strongest assault weapons

67. 720 ILL. COMP. STAT. 5/24-1.9(a)(1)(A)–(I) (2023).
68. *Id.* § 24-1.9(a)(1)(J)–(L).
69. *Id.* § 24-1.9(e).
70. *Id.* § 24-1.9(d).
71. *Id.* § 24-1.9(d)–(f).
72. *Id.* § 24-1.10(a)–(c).
73. 430 ILL. COMP. STAT. 67/40 § 40(a) (2024).
74. *Assault Weapons*, *supra* note 40.
75. *Id.*
76. *Id.*

bans in the country.[77] Republican lawmakers, on the other hand, argued that PICA was "obviously unconstitutional," and gun rights supporters were outraged at what they maintained was a blatant act of government overreach that exposed responsible gun owners to criminal charges and banned the sale of common firearms.[78] Almost immediately, the law faced numerous challenges in both state and federal court.[79]

C. Court Challenges

Generally, the state court and federal court challenges to PICA proceeded along two different tracks of legal theory. In state court, the challenges to PICA were more procedural in nature, with the plaintiffs arguing that Illinois lawmakers had passed PICA in a manner unconstitutional under the Illinois Constitution and in violation of its Equal Protection Clause.[80] Comparatively, in federal court, the plaintiffs' argument was simple—PICA was flatly unconstitutional under the Second Amendment to the United States Constitution.[81]

1. State Court

At least five lawsuits were filed in rapid succession in Illinois state court following PICA's passage.[82] One of the cases, *Langley v. Kelly*, was ultimately transferred to federal court.[83] The four suits remaining in

77. Mitch Smith, *Illinois Passed a Sweeping Ban on High-Powered Guns. Now Come the Lawsuits.*, N.Y. TIMES (Jan. 20, 2023), https://www.nytimes.com/2023/01/20/us/illinois-gun-ban-second-amendment.html [https://perma.cc/WW85-HY5Q]; Press Release, State of Ill., Gov. Pritzker's Statement on the Passage of Protect Illinois Communities Act Banning Assault Weapons (Jan. 10, 2023), https://www.illinois.gov/news/press-release.25887.html [https://perma.cc/GAW4-KW4J].

78. Mike Flannery, *Pritzker Defends Assault Weapons Ban, Cautions Those Who Bought Military-Style Rifle During Brief Window*, FOX (Chi.) (May 10, 2023, 9:35 PM), https://www.fox32chicago.com/news/pritzker-defends-assault-weapons-ban-cautions-bought-military-style-rifle-brief-window [https://perma.cc/N6GW-87TC] ("While a group of Republican lawmakers told a state capitol news conference that the assault weapons ban is 'obviously unconstitutional,' the 7th U.S. Circuit Court of Appeals has allowed it to remain in force . . . .") ; Smith, *supra* note 77.

79. *See* Smith, *supra* note 77 ("Within days of Gov. J.B. Pritzker signing the Illinois legislation, at least three lawsuits were filed challenging it in state and federal courts.").

80. Caulkins v. Pritzker, 228 N.E.3d 181, 187–88 (Ill. 2023).

81. Bevis v. City of Naperville, 85 F.4th 1175, 1181–82 (7th Cir. 2023).

82. *See* Natalie Martinez, *First Lawsuits Filed Against Illinois Assault Weapons Ban, More to Come*, NBC (Chi.) (Jan. 17, 2023, 10:20 PM), https://www.nbcchicago.com/news/local/first-lawsuits-filed-against-assault-weapons-ban-just-days-after-governor-signs-into-law/3047943 [https://perma.cc/5UZA-4HYC] (discussing two lawsuits); *see also* Greg Bishop, *Macon County Judge Rules State's Gun Ban and Registry Unconstitutional*, EFFINGHAM DAILY NEWS (Mar. 6, 2023), https://www.effinghamdailynews.com/news/local_news/macon-county-judge-rules-state-s-gun-ban-and-registry-unconstitutional/article_1fbffe0a-ba23-11ed-aba7-1786bf6ba220.html [https://perma.cc/URW4-8WJT] (discussing the lawsuits filed following PICA's passage).

83. *Maag Seeks New Weapons Ban Ruling*, TEL. (June 8, 2023), https://www.thetelegraph.com/news/article/maag-asks-judge-deem-illinois-gun-ban.php [https://perma.cc/7RHM-DT77]; *see infra* Section I.C.2 (detailing the federal court challenges to PICA).

state court each resulted in the issuance of temporary restraining orders (TRO) enjoining Governor Pritzker and other state respondents from enforcing PICA upon the individual plaintiffs and businesses listed in each of the four complaints, and quickly propelled PICA to the Illinois Supreme Court.[84]

Three of the state cases were consolidated, with *Accuracy Firearms, LLC v. Pritzker* serving as lead.[85] The consolidated cases challenged PICA on two fronts. First, the plaintiffs asserted that the legislative proceedings leading up to PICA's passage were fatally flawed in that they violated the single subject rule and the three readings clause.[86] Second, plaintiffs argued that the exemptions in PICA permitting certain classes of individuals to continue to purchase and possess assault weapons but barring other classes from doing the same was a violation of the Illinois Constitution's Equal Protection Clause.[87] Just ten days after PICA was signed into law, Judge Joshua Morrison of the Fourth Judicial Circuit Court in Effingham County, Illinois, granted the plaintiffs' request for a TRO, barring enforcement of PICA against them.[88] The Illinois Attorney General immediately appealed but Illinois's Fifth District Appellate

84. Bishop, *supra* note 82; Peter Hancock, *Illinois Supreme Court Grants Expedited Appeal in Assault Weapons Ban Case*, CAP. NEWS ILL. (Mar. 8, 2023), https://www.capitolnewsillinois.com/NEWS/illinois-supreme-court-grants-expedited-appeal-in-assault-weapons-ban-case [https://perma.cc/BU6K-9RKC].

85. *See* Accuracy Firearms, LLC v. Pritzker, 2023 IL App (5th) 230035, 225 N.E.3d 728, *appeal denied, judgment vacated*, 226 N.E.3d 4 (Ill. 2024).

86. *See* Nick Taylor, *Effingham County Judge to Rule on Assault Weapons Ban*, EFFINGHAM DAILY NEWS (Jan. 19, 2023), https://www.effinghamdailynews.com/news/local_news/update-effingham-county-judge-to-rule-on-assault-weapons-ban/article_08737f3e-984e-11ed-a9e9-07a93df869d3.html [https://perma.cc/HX69-3YCJ] (noting that the single subject clause limits a bill to "a single and legitimate subject" and that the three-reading rule requires a reading of a bill on three separate days leading up to a vote); *see also* Patrick Keck, *Effingham County Judge Temporarily Blocks Assault-Style Weapons Ban*, STATE J.-REG. (Jan. 20, 223, 6:09 PM), https://www.sj-r.com/story/news/politics/state/2023/01/21/effingham-county-judge-temporarily-blocks-illinois-assault-weapons-ban/69822361007/ [https://perma.cc/6UUT-KSL8] (reporting that the filing attorney "said action by the Illinois General Assembly on the bill violated the single subject rule and three readings clause, while also violating a state constitutional right of equal protection.").

87. *See* Taylor, *supra* note 86 (observing that PICA allows current and retired law enforcement personnel, as well as active duty military servicemembers to purchase and possess assault weapons, while barring retired military servicemembers from purchase and possession of same); Keck, *supra* note 86 ("The bill exempts current and retired law enforcement officers from purchasing or possessing any of the weapons banned by the bill.").

88. Keck, *supra* note 86. A TRO "is an emergency remedy issued to maintain the status quo while the court is hearing evidence to determine whether a preliminary injunction should issue." *Accuracy Firearms*, ¶ 19, 225 N.E.3d at 742 (quoting Delgado v. Board of Election Comm'rs of Chi., 865 N.E.2d 183, 185 (Ill. 2007)). To obtain a TRO in the state of Illinois, plaintiffs are required to demonstrate "(1) a clearly ascertained right in need of protection, (2) irreparable injury in the absence of an injunction, (3) no adequate remedy at law, and (4) a likelihood of success on the merits of the case." *Id.* (quoting Hutsonville Cnty. Unit Sch. Dist. No. 1 v. Ill. High Sch. Ass'n, 2021 IL App (5th) 210308, ¶ 8, 195 N.E.3d 798, 802).

Court upheld the TRO by a two-to-one majority.[89] Bound by this decision, the lower courts would go on to issue TROs in each of the remaining cases prior to their consolidation.[90]

The fourth challenge, *Caulkins v. Pritzker*, remained an independent challenge. While the attorneys in *Caulkins* acknowledged that their arguments would "closely mirror" the winning arguments in *Accuracy Firearms*, they maintained their challenge to PICA was a facial one, as compared to the applied challenges in the *Accuracy Firearms* cases.[91] In addition to their own equal protection claims, plaintiffs in *Caulkins* argued that PICA violated Illinois's Special Legislation Clause.[92] They alleged that the Second Amendment protects an additional right to the commercial and non-commercial sale of arms, and that those sections of PICA which created exemptions to the purchase and possession of assault weapons were unconstitutional "for creating special classifications according to the excepted class."[93] The parties filed cross-motions for summary judgment, and Judge Rodney Forbes of the Sixth Judicial Circuit in Macon County, Illinois, declared PICA unconstitutional under the Illinois

89. *Accuracy Firearms*, ¶¶ 61, 65, 225 N.E.3d at 753–54; Peter Hancock, *Appellate Court Upholds Temporary Restraining Order on Illinois Assault Weapons Ban*, ABC 7 EYEWITNESS NEWS (Chi.) (Jan. 31, 2023), https://abc7chicago.com/assault-weapons-ban-illinois-lawsuit-effingham-county-appellate-court/12755983/ [https://perma.cc/82RS-ELTB].

90. Heather Isringhausen Gvillo, *Effingham County Judge Issues Another Restraining Order for More Than 2,300 Plaintiffs*, ST. CLAIR REC. (Feb. 10, 2023), https://madisonrecord.com/stories/639397202-effingham-county-judge-issues-another-restraining-order-for-more-than-2-300-plaintiffs [https://perma.cc/J9CQ-6RNM]; Brenden Moore, *Plaintiffs in Macon County Lawsuit Ask Judge to Halt Semiautomatic Weapons Ban Statewide*, QUAD-CITY TIMES (Feb. 3, 2023), https://qctimes.com/news/state-and-regional/govt-and-politics/plaintiffs-in-macon-county-lawsuit-ask-judge-to-halt-semiautomatic-weapons-ban-statewide.html [https://perma.cc/U8NH-3JZZ]; Greg Bishop, *Macon County Judge Issues Third Temporary Restraining Order Against Illinois' Gun Ban*, CTR. SQUARE (Chi.) Feb. 8, 2023), https://www.thecentersquare.com/illinois/article_cb3ae2bc-a7e1-11ed-9d4f-1beeb03f03dc.html [https://perma.cc/2F56-579P].

91. *See* Brenden Moore & Tony Reid, *Central Illinois Gun Owners Latest to Sue Over Semiautomatic Weapons Ban*, PANTAGRAPH (Jan. 26, 2023), https://pantagraph.com/news/state-and-regional/govt-and-politics/central-illinois-gun-owners-latest-to-sue-over-semiautomatic-weapons-ban/article_afb49082-9dc9-11ed-bc05-0b98ebb1a02a.html [https://perma.cc/KD9M-SZ3C] (discussing how the fourth challenge, though similar to the prior lawsuit, "you will see some new claims in there"); *see also* Eric Stock, *Rep. Caulkins Plans Lawsuit Against the Assault Weapons Ban After Limited Court Order*, WGLT (Jan. 23, 2023, 3:32 PM), https://www.wglt.org/local-news/2023-01-23/rep-caulkins-plans-lawsuit-against-the-assault-weapons-ban-after-limited-court-order [https://perma.cc/R8AV-EVJV] ("[T]he court filing will 'closely mirror' the arguments [the *Accuracy Firearms* cases] made when the judge ruled in his favor."); Greg Bishop, *Gun Ban Attorneys Differ on Case Desires*, TEL. (Feb. 24, 2023), https://www.thetelegraph.com/news/article/attorneys-differ-challenges-illinois-gun-ban-17801481.php [https://perma.cc/FVY7-TSS3] ("Jerry Stocks, who represents state Rep. Dan Caulkins, R-Decatur, and others in the Macon County case, said they're taking a 'facial' challenge different from [the *Accuracy Firearms*] approach.").

92. Caulkins v. Pritzker, 228 N.E.3d 181, 187–88, 192 (Ill. 2023).

93. *Id.* at 187–88.

Constitution.[94] Again, the Attorney General appealed, and the Illinois Supreme Court took up the case, noting that the disposition of the *Caulkins* case, which would necessarily decide the merits of the equal protection challenge also raised in the *Accuracy Firearms* cases, might obviate the need for the court to address the issues raised by those TROs.[95]

In August 2023, the Illinois Supreme Court found PICA constitutional under the Illinois Constitution.[96] In its decision, the court stated that the threshold question was whether the claimant was "similarly situated" to the comparison group—in this case, those classes of individuals held out in PICA as exempted from the prohibition on the purchase and possession of assault weapons.[97] The court held that the plaintiffs had made no such showing. Despite plaintiffs' argument that PICA created facial classifications between different groups of valid FOID card holders, the common thread of simply holding a FOID card was not sufficient to show that any FOID card holder is similarly situated to the trained professionals PICA exempted from the purchase and possession restrictions.[98]

Most notably, the Illinois Supreme Court found that the plaintiffs, who the court noted had "explicitly and repeatedly" disclaimed any such argument in the circuit court, had waived any claim that PICA was unconstitutional under the Second Amendment, despite raising the issue in briefing.[99] The court held that "[p]laintiffs chose not to present their case to the circuit court in second amendment terms, and we hold them to their decision."[100]

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94. *Id.*; Brenden Moore, *Macon County Judge Finds State Gun Ban Violates Illinois Constitution; State Appeals*, PANTAGRAPH (Mar. 3, 2023), https://pantagraph.com/news/state-and-regional/govt-and-politics/macon-county-judge-finds-state-gun-ban-violates-illinois-constitution-state-appeals/article_525f5a1a-ba0d-11ed-954e-932a5e7d0a89.html [https://perma.cc/LF5P-UF6J].

95. Moore, *supra* note 94; Hancock, *supra* note 84; Greg Bishop, *Illinois Supreme Court Holds Appeal of DeVore Gun-Ban Case Pending Outcome of Caulkins Case*, CTR. SQUARE (Chi.) (Apr. 18, 2023), https://www.thecentersquare.com/illinois/article_b24058ac-de2b-11ed-acf7-cb6a49ae90bf.html [https://perma.cc/Y2VS-8LSH].

96. *See generally Caulkins*, 228 N.E.3d at 198; Peter Hancock, *Case Centers on Narrow Questions of Illinois State Constitution*, CAP. NEWS ILL. (May 16, 2023), https://www.capitolnewsillinois.com/NEWS/state-supreme-court-weighs-assault-weapons-ban [https://perma.cc/R4QE-CJ3R].

97. *Caulkins*, 228 N.E.3d at 192.

98. *Id.* at 196–98.

99. *Id.* at 189, 191, 198.

100. *Id.* at 191 (finding that plaintiffs were procedurally barred from challenging the weapons classifications in PICA as violating the Second Amendment). Caulkins' attorney "vehemently denies" that the Second Amendment argument had been waived prior to the case's arrival at the Illinois Supreme Court. Editorial, *IL Assault Weapons Ban Challenges Dismissed by Downstate Judge After State Supreme Court Ruling*, ABC 7 EYEWITNESS NEWS (Chi.) (Aug. 16, 2023), https://abc7chicago.com/illinois-assault-weapons-ban-gun-laws-supreme-court-effingham-county

On January 8, 2024, the United States Supreme Court denied the plaintiff's petition for certiorari.[101] The Justices gave no reason for their declination, and there were no written dissents.[102] The plaintiffs then petitioned the Illinois Supreme Court to vacate its own decision.[103] That petition was denied on February 5, 2024.[104] As predicted, as a result of the Illinois Supreme Court's decision in *Caulkins,* the *Accuracy Firearms* TROs were vacated.[105] A motion for reconsideration was denied.[106]

2. Federal Court

Just as in state court, there was a flurry of federal case filings challenging PICA in the days after its passage on January 10, 2023. Ultimately, six lawsuits would be consolidated into one case argued before the

[https://perma.cc/3ZHN-NGEZ]. As a result of the Illinois Supreme Court's ruling, the consolidated *Accuracy Firearms* cases in Effingham County were dismissed. *Id.* On September 15, 2023, plaintiffs filed a motion to reconsider the dismissal, arguing that, while the plaintiffs in *Caulkins* did not have the evidence necessary for the Illinois Supreme Court to rule in their favor, the plaintiffs in the consolidated cases did, and they should be allowed to continue. Kaira Willis, *Illinois Attorney to Reconsider Assault Weapons Ban*, ABC NEWS (Sept. 15, 2023), https://newschannel20.com/news/local/illinois-attorney-motions-to-reconsider-assault-weapons-ban [https://perma.cc/U7K2-V7T8].

101. Caulkins v. Pritzker, 144 S. Ct. 567 (2024) (mem.).

102. *Id.*; Peter Hancock, *SCOTUS Denies One Appeal of the Illinois Assault Weapons Ban While Another Waits*, STATE J.-REG. (Jan. 9, 2024, 12:30 PM), https://www.sj-r.com/story/news/politics/state/2024/01/09/scotus-denies-appeal-of-the-illinois-assault-weapons-ban/72160700007/ [https://perma.cc/T4DE-QTUR].

103. Illinois Newswire, *Illinois Lawmaker Petitions Illinois Supreme Court to Vacate Decision on Weapons Ban Law*, WSIU PUB. BROAD. (Jan. 23, 2024, 4:12 PM), https://www.wsiu.org/state-of-illinois/2024-01-23/illinois-lawmaker-petitions-illinois-supreme-court-to-vacate-decision-on-weapons-ban-law [https://perma.cc/PL23-DQGE]. Plaintiffs contend that two of the justices, Justice Elizabeth Rochford and Justice Mary Kay O'Brien, should have recused themselves from the case based on outsized campaign donations they received from Governor Pritzker which resulted in their committing to the outcome of the ban during their election campaigns and subsequently denied plaintiffs their due process right to a fair hearing. *Id.*; Hancock, *supra* note 102.

104. Jerry Nowicki, *State Supreme Court Denies Lawmaker's Bid to Vacate Gun Ban Ruling*, CAPITOL NEWS ILL. (Feb. 6, 2024), https://capitolnewsillinois.com/NEWS/state-supreme-court-denies-state-lawmakers-bid-to-vacate-gun-ban-ruling [https://perma.cc/MGQ7-7W3U].

105. Greg Bishop, *Latest Gun Ban Lawsuit Seeks Court to Declare Plaintiff a Peace Officer*, CENTER SQUARE (Chi.), https://www.thecentersquare.com/illinois/article_c8b55ff0-bbd0-11ee-8e6c-b7e5da3e826c.html [https://perma.cc/2N8A-WVWD]; Accuracy Firearms, LLC v. Pritzker, 2023 IL App (5th) 230035, ¶¶ 36–46, *vacated as moot*, No. 129421, 2024 WL 330592 (Ill. 2024).

106. *Effingham Judge Denies Request to Reconsider His Weapons Ban Ruling*, WMIX 94 (Jan. 19, 2024, 2:41 PM), https://www.wmix94.com/2024/01/19/effingham-judge-denies-request-to-reconsider-his-weapons-ban-ruling/ [https://perma.cc/DFL6-FFTC]. In January of 2024, Accuracy Firearms filed a new state court challenge to PICA, arguing that Illinois's statute allowing for its residents to conduct "citizens arrests" effectively elevated ordinary citizens to peace officers as though they were formally employed by a law enforcement agency and thereby entitling them to the same PICA exception for police officers. Bishop, *supra* note 105. This suit was dismissed with prejudice on May 1, 2024. *See* Effingham County, Ill., JUDICI, https://www.judici.com/courts/cases/case_information.jsp?court=IL025015J&ocl=IL025015J,2024MR2,IL025015JL2024MR2D1 [https://perma.cc/QN2K-ABMK] (last updated May 1, 2024) (dismissal order).

Seventh United States Circuit Court of Appeals, just five days before the one-year anniversary of the Highland Park parade shooting.[107]

In assessing PICA, the district and federal appeals courts were grappling with relatively nascent precedents set out by the Supreme Court.[108] In 2008, the Court, in *District of Columbia v. Heller* first held that the Second Amendment protected an individual's "right to keep and bear arms" for purposes of self-defense in the home.[109] Two years later, in 2010, the Court in *McDonald v. City of Chicago* incorporated this right against the States via the Due Process Clause of the Fourteenth Amendment.[110] Together, *Heller* and *McDonald* were watershed decisions, expanding gun rights beyond membership in a militia.[111] Importantly, neither case provided explicit guidance on what standard of review courts were to apply to Second Amendment challenges. In the years following *Heller* and *McDonald*, the Court only took up one other case addressing Second Amendment rights, which it succinctly resolved by way of per curiam opinion.[112]

With no precedential standard to guide them, the Courts of Appeals developed their own two-step framework to address questions raised

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107. *See* Jon Seidel, *Federal Appeals Court Considering Illinois Assault Weapons Ban Questions 'Popularity Contest' for Guns*, CHI. SUN-TIMES (June 29, 2023, 12:58 PM), https://chicago.suntimes.com/politics/2023/6/29/23778215/federal-appeals-court-illinois-assault-weapons-ban-popularity-contest-for-guns [https://perma.cc/9SH8-RY9C] (reporting that four suits had been filed in the United States District Court of the Southern District of Illinois and two had been filed in the United States District Court of the Northern District of Illinois).

108. *See generally* Bevis v. City of Naperville, 657 F. Supp. 3d 1052 (N.D. Ill. 2023); Barnett v. Raoul, 671 F. Supp. 3d. 928 (S.D. Ill. 2023); Bevis v. City of Naperville, 85 F.4th 1175 (7th Cir. 2023).

109. District of Columbia v. Heller, 554 U.S. 570, 595, 628–29 (2008).

110. *See* McDonald v. City of Chicago, 561 U.S. 742, 750 (2010) ("[W]e hold that the Second Amendment right is fully applicable to the States.").

111. Scott Neuman, *The 'Gun Dude' and a Supreme Court Case That Changed Who Can Own Firearms in the U.S.*, NPR (Aug. 14, 2022, 9:00 AM), https://www.npr.org/2022/08/14/1113705501/second-amendment-supreme-court-dick-heller-gun-rights [https://perma.cc/93MZ-LGGS]; *see also* Bevis v. City of Naperville, 85 F.4th 1175, 1188 (7th Cir. 2023) ("For many years, both the Supreme Court and scholars thought that there was a relation between the prefatory clause, which refers to the Militia, and the operative clause, which refers to the right to keep and bear Arms. But in *Heller* the Supreme Court severed that connection." (citation omitted)).

112. *Amdt2.5 Post*-Heller *Issues and Application of Second Amendment to States*, CONG. RSCH. SERV., https://constitution.congress.gov/browse/essay/amdt2-5/ALDE_00013265 [https://perma.cc/5C79-6ZDZ] (last visited June 1, 2024) ("The plethora of Second Amendment challenges to federal, state, and local gun laws in the years following *Heller* and *McDonald*, coupled with the lack of guidance from the Supreme Court on questions such as what standard of review governs and whether the Second Amendment applies outside the home, led the lower federal courts to develop their own rules and frameworks for analyzing Second Amendment cases."); *see also* Caetano v. Massachusetts, 577 U.S. 411, 412 (2016) (per curiam) (reiterating only that the Second Amendment applies to arms that were not in existence at the time of the founding and that more weapons than those only useful in warfare are protected).

under the Second Amendment.[113] First, the government was required to prove that the regulated conduct was outside of the amendment's original scope.[114] Second, the courts would analyze how closely the law touched upon the core of the Second Amendment right, which would then inform the applicable level of scrutiny.[115] In its 2022 decision in *Bruen*, however, the Court flatly rejected this approach, describing it as "one step too many."[116] Instead, the Court held that the Constitution presumptively protects conduct covered by the plain text of the Second Amendment, and in that instance, the government is required to justify its regulation by demonstrating that it is "consistent with the Nation's historical tradition of firearm regulation."[117] This "history-only" test, as it has been described, is now the standard by which any firearms regulation, including PICA, must be judged.[118]

Two cases challenging PICA, *Bevis v. City of Naperville* and *Herrera v. Raoul*, were filed in the United States District Court of the Northern District of Illinois.[119] Plaintiffs in each moved for the issuance of a TRO and a preliminary injunction, and in both instances, their requests were denied.[120] Judge Virginia Kendall issued the denial in *Bevis* on February

113. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022).

114. *Id.*

115. *Id.*

116. *Id.* at 2127.

117. *Id.* at 2134.

118. *Id.* at 2174–75 (Breyer, J., dissenting).

119. Herrera v. Raoul, 670 F. Supp. 3d 655 (N.D. Ill. 2023); Bevis v. City of Naperville, 657 F. Supp. 3d 1052 (N.D. Ill. 2023). *Bevis* pre-dated PICA's passage, originally filed as a challenge to a Naperville, Illinois ordinance banning the sale of assault rifles within city limits, which was passed in response to the Highland Park parade shooting. Christian Piekos, *Ban on Sale of High-Powered Rifles in Hours-Long Naperville City Council Meeting*, ABC (Chi.) (Aug. 18, 2022), https://abc7chicago.com/naperville-city-council-meeting-assault-weapons-ban-il-illinois/12132706/ [https://perma.cc/7AP2-7VSM]. After PICA was passed, plaintiffs were granted leave to amend their complaint to add the state of Illinois as a party. *Bevis*, 657 F. Supp. 3d at 1058.

120. *Bevis*, 657 F. Supp. 3d at 1077. The federal standards for issuing a TRO and a preliminary injunction, while identical to one another, differ from those which the state of Illinois require to issue a TRO. *Id.* at 1058–59; *but see supra* note 73 (listing the requirements for a TRO to be issued in the state of Illinois). In federal court, a plaintiff seeking a TRO or preliminary injunction "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). The Seventh Circuit has held that the preliminary injunction analysis comes in two parts: first, the movant must demonstrate that they will "suffer irreparable harm," that there is "no adequate remedy at law," and that they stand a "reasonable likelihood of success on the merits" of their claim. Barnett v. Raoul, 671 F. Supp. 3d 928, 936–37 (S.D. Ill. 2023) (quoting Valencia v. City of Springfield, Ill., 883 F. 3d 959, 965 (7th Cir. 2018)). Should the moving party fail to establish all three elements, their request for an injunction should be denied; however, should the moving party meet this initial threshold, the court should then move on to the second "balancing" stage. *Id.* at 937. In this stage,

17, 2023, finding that the plaintiffs were "unlikely to succeed on the merits" of their claims because PICA was "consistent with the Second Amendment's text, history, and tradition."[121] Citing the historic regulation of Bowie knives and other melee-type weapons like "billy" clubs and slingshots, as well as bans on silencers and restrictions on magazine capacities, Judge Kendall likened PICA to other efforts by state governments to regulate "highly dangerous arms (and related [ ] accessories)."[122] Judge Kendall found that both assault weapons themselves, as well as their high-capacity magazines, "pose an exceptional danger, more so than the standard self-defense weapons such as handguns," given their propensity for rapid firing, the severity of the injuries they cause, and their preference by perpetrators of mass public shootings.[123] "Because assault weapons are particularly dangerous weapons and high-capacity magazines are particularly dangerous weapon accessories, their regulation accords with history and tradition," Judge Kendall wrote.[124] Judge Kendall held that Illinois had lawfully exercised its authority to enact a ban on the commercial sale of assault weapons and its choice to do so comported with the Second Amendment.[125]

After the ruling, the plaintiffs petitioned the Seventh Circuit to issue an injunction; their request was denied.[126] A similar petition to the Supreme Court was denied in a single-page order with no dissents.[127] The Justices gave no explanation for their denial.[128]

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the court "must weigh the irreparable harm to the moving party if the injunction were denied against any irreparable harm the nonmoving party would suffer" if the injunction were granted. *Id.* In balancing these factors, the court "should also consider the effect of an injunction on the public interest." *Id.*

121. *Bevis*, 657 F. Supp. 3d at 1059.

122. *Id.* at 1068–73.

123. *Id.* at 1073–75.

124. *Id.* at 1075.

125. *Id.* Reviewing the remaining TRO factors, Judge Kendall likewise found that the plaintiffs had fallen short of demonstrating that the bans would cause them irreparable harm, and that neither the balance of equities nor the public interest decisively favored the plaintiffs. *Id.* at 1076–77.

126. Bevis v. City of Naperville, No. 23-1353, 2023 WL 3190470 (7th Cir. 2023).

127. Nat'l Ass'n for Gun Rights v. City of Naperville, 143 S. Ct. 2489 (2023) (mem.); Devin Dwyer, *Supreme Court Declines to Block Illinois' Assault Weapons Ban*, ABC NEWS (May 17, 2023, 10:37 AM), https://abcnews.go.com/Politics/supreme-court-declines-block-illinois-assault-weapons-ban/story?id=99393982 [https://perma.cc/X5KA-Z4BT]. Justice Amy Coney Barrett, who hears emergency requests from the Seventh Circuit, referred the application to the full court, which declined to issue the injunction. Peter Hancock, *US Supreme Court Keeps Illinois Assault Weapons Ban in Place*, ABC (Chi.) (May 17, 2023), https://abc7chicago.com/illinois-assault-weapons-ban-update-il-2023/13259889/ [https://perma.cc/NV2L-CKCN].

128. *Nat'l Ass'n for Gun Rights*, 143 S. Ct. at 2489; Amy Howe, *Court Rejects Request to Temporarily Block Illinois Assault-Weapon Bans*, SCOTUSBLOG (May 17, 2023, 12:32 PM), https://www.scotusblog.com/2023/05/court-rejects-request-to-temporarily-block-illinois-assault-weapon-bans/ [https://perma.cc/2459-NUAV].

Next, in *Herrera*, Judge Lindsay Jenkins similarly disposed of the request for a TRO and preliminary injunction on April 25, 2023.[129] Judge Jenkins wrote, "This Court agrees with the *Bevis* Court's analysis and incorporates it into this order as applicable."[130] Judge Jenkins concurred with and adopted the *Bevis* court's analysis of the constitutionality of regulating assault weapons, and found that the plaintiff was similarly unlikely to succeed on the merits of his claim because PICA was consistent with the historical tradition of "treating particularly 'dangerous' weapons as unprotected."[131]

Downstate was a different matter. Four cases were filed and consolidated before Judge Stephen McGlynn, who considered a similar request for a preliminary injunction.[132] Despite the Northern District decisions to the contrary, one of which had been issued just three days prior, Judge McGlynn found that the plaintiffs in his cases had met their burden for a preliminary injunction—and, on April 28, 2023, he issued an order blocking enforcement of PICA statewide.[133] In his decision, Judge McGlynn conducted his own historically-informed analysis of PICA, asking rhetorically if PICA could be harmonized with the Supreme Court's jurisprudence on the Second Amendment.[134] The simple answer, he wrote in his opinion, was "likely no."[135] In fact, Judge McGlynn noted, PICA "seems to be written in spite of the clear directives" from the Supreme Court, not in conformity with them.[136] Addressing each of the preliminary injunction factors in turn, Judge McGlynn found that the plaintiffs had been and continued to be harmed by PICA and were likely to succeed on the merits

129. Herrera v. Raoul, 670 F. Supp. 3d 665, 669 (N.D. Ill. 2023).

130. *Id.* at 672.

131. *Id.* at 672, 674–76 (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2132–33 (2022)).

132. Complaint for Declaratory and Injunctive Relief, Harrel v. Raoul, No. 23CV00141, 2023 WL 317673 (S.D. Ill. 2023); Barnett v. Raoul, 671 F. Supp. 3d 928 (S.D. Ill. 2023); Complaint for Declaratory, Injunctive, and Other Relief, Federal Firearms Licensees of Ill. v. Pritzker, No. 3:23-cv-215, 2023 WL 374945 (S.D. Ill. 2023); Greg Bishop, *Illinois State Police Look to Consolidate Federal Gun Ban Challenges*, CTR. SQUARE (Chi.) (Jan. 26, 2023), https://www.thecentersquare.com/illinois/illinois-state-police-look-to-consolidate-federal-gun-ban-challenges/article_9020968-577513413.html [https://perma.cc/R4ZX-JBLH]. *Barnett v. Raoul* is an NRA-backed case, while the Illinois State Rifle Association brought *Harrel v. Raoul*. Press Release, Illinois State Rifle Association, Challenge to Illinois Law on 2nd Amendment Now in Federal Court (Jan. 17, 2023), https://www.documentcloud.org/documents/23577733-harrel-et-al-v-raoul [https://perma.cc/ZD7V-GLSW]; John O'Connor, *Lawsuits Challenge Recent Illinois Semiautomatic Gun Ban*, ASSOC. PRESS (Jan. 18, 2023, 5:21 PM), https://apnews.com/article/politics-illinois-state-government-chicago-springfield-237271798243dae01db16377d9a01033 [https://perma.cc/3STP-CCWA].

133. *Barnett*, 671 F. Supp. 3d at 948.

134. *Id.* at 935, 944–46.

135. *Id.* at 935.

136. *Id.*

of their Second Amendment claim.[137] In particular, Judge McGlynn found that assault weapons were "in common use" and not so "dangerous and unusual" that they were excepted from Second Amendment protection.[138] Judge McGlynn was similarly unpersuaded by arguments that PICA was consistent with historical analogues of firearm regulation.[139]

The injunction remained in place for only six days—in a single-page order, Judge Frank Easterbrook of the Seventh Circuit granted Illinois's emergency motion to stay the injunction, pending their appeal.[140] All six cases were then consolidated before the Seventh Circuit, and oral arguments on the Second Amendment question were conducted in a special and extra-long session on June 29, 2023.[141] The case, which was set on an expedited basis, was heard by a three-judge panel comprised of Judges Easterbrook, Wood, and Brennan.[142]

In a divided opinion authored by Judge Wood, the Seventh Circuit affirmed the decisions from the Northern District and vacated the preliminary injunction issued in the Southern District.[143] Acknowledging that the consolidated cases came before the court not as posing the question of PICA's overall constitutionality but rather questioning the appropriateness of preliminary injunctive relief, the court engaged in Second Amendment review to ascertain whether the plaintiffs were likely to succeed on the merits of their claim and whether the plaintiffs faced irreparable harm should preliminary injunction be denied.[144]

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137. *Id.* at 937–38.

138. *Id.* at 939–42, 946 (analyzing prior Second Amendment Supreme Court decisions to find assault weapons were "in common use" and did not meet the "dangerous and unusual" burden).

139. *Id.* at 944–46 (holding that the "how and why" of the historical analogues presented by the state in support of their position did not pass "constitutional muster"). Judge McGlynn also balanced the harm the plaintiffs would suffer should their request for a preliminary injunction be denied with the harm the respondents would experience should the injunction be granted, and found, when all factors were considered, that this balancing, too, favored the plaintiffs. *Id.* at 946–48.

140. Order, Barnett v. Raoul, No. 23-1825 (7th Cir. May 4, 2023); Dave Byrnes, *7th Circuit Lifts Injunction on Illinois Assault Weapons Ban*, COURTHOUSE NEWS SERV. (May 4, 2023), https://www.courthousenews.com/7th-circuit-lifts-injunction-on-illinois-assault-weapons-ban/ [https://perma.cc/MZ4Y-T4EZ].

141. Dave Byrnes, *Appeal on Illinois Assault Weapon Ban Drives a Wedge at 7th Circuit*, COURTHOUSE NEWS SERV. (June 29, 2023), https://www.courthousenews.com/appeal-on-illinois-assault-weapon-ban-drives-a-wedge-at-7th-circuit/ [https://perma.cc/4UEV-SP5E].

142. *See* Lawrence Hurley, *Supreme Court Rejects Challenge to Illinois Assault Weapons Ban*, NBC NEWS (May 17, 2023, 12:49 PM), https://www.nbcnews.com/politics/supreme-court/supreme-court-rejects-challenge-illinois-assault-weapons-ban-rcna83326 [https://perma.cc/4E2R-LXTP] (explaining the Seventh Circuit put that decision on hold). Judges Easterbrook, Wood, and Brennan were appointed by Presidents Reagan, Clinton, and Trump, respectively. Byrnes, *supra* note 141.

143. Bevis v. City of Naperville, 85 F.4th 1175, 1203 (7th Cir. 2023).

144. *Id.* at 1187–88, 1197 (citing Nken v. Holder, 556 U.S. 418, 434 (2009)) ("Second Amendment challenges to gun regulations often require more evidence than is presented in the early phases of litigation.").

First, the court found that assault weapons and large-capacity magazines were not weapons that fell within the scope of "Arms" individuals were permitted to keep and bear under the plain text of the Second Amendment.[145] Citing *Heller*, the court defined "bearable Arms" as those weapons that are commonly used for lawful individual self-defense.[146] As a result, the plaintiffs would have to show that the assault weapons banned by PICA "are Arms that ordinary people would keep at home for purposes of self-defense," instead of as weapons that are solely or even primarily useful "in military service."[147] The court found that the prohibited assault weapons and high-capacity magazines were more akin to machineguns and military-grade weaponry than to the variety of firearms that are commonly used for individual self-defense.[148] As such, they could not be considered the type of "Arms" protected by the Second Amendment.[149]

Even though the plaintiffs had failed at step one of the analysis, for the sake of thoroughness, the court additionally conducted a historical tradition analysis to ascertain whether PICA was consistent with the history and tradition of firearms regulation.[150] The court found justification for PICA in historical regulations that outlawed certain conduct as it related to weapons, or that outlawed certain weapons outright but included carve-out provisions for law enforcement and those connected with the military, just as PICA contained similar exceptions.[151] "[T]here is a long tradition," the court wrote, "supporting a distinction between weapons and accessories designed for military or law-enforcement use, and weapons designed for personal use. The legislation now before us respects and relies on that distinction."[152]

Judge Brennan dissented.[153] Writing that the majority's finding that assault weapons do not constitute "Arms" under the Second Amendment was "remarkable," Judge Brennan maintained that, not only are assault weapons "Arms" for purposes of Second Amendment review, but they are commonly used, not unusual, and not more dangerous than handguns, which had already been afforded constitutional protection.[154] Judge

145. *Id.* at 1197.
146. *Id.* at 1193.
147. *Id.* at 1194.
148. *Id.* at 1195–97.
149. *Id.* ("Indeed, the AR-15 is almost the same gun as the M16 machine-gun. . . . Both weapons share the same core design, and both rely on the same patented operating system.").
150. *Id.* at 1197–1202.
151. *Id.* at 1201–02.
152. *Id.* at 1202.
153. *Id.* at 1206 (Brennan, J., dissenting).
154. *Id.* at 1206–07, 1214–16.

Brennan remained unpersuaded by the historical analogues cited by the majority and asserted that the military versus civilian distinction was not a proper route of analysis under the *Bruen* test.[155] Rather, the proper questions to ask were whether assault weapons were in common use, and if so, whether PICA was consistent with historical tradition of weapons regulation.[156]

A petition to the Seventh Circuit for rehearing and rehearing en banc, as well as an application to the Supreme Court for a writ of injunction pending certiorari, were both denied.[157]

As of this writing, there are six petitions for certiorari challenging PICA pending before the Supreme Court.[158] Many observers expect that the Supreme Court will take up the issue for full review and ultimately make the final determination of PICA's constitutionality under the Second Amendment, throwing into question the future of every assault weapons bans across the country.[159]

II. DISCUSSION

For an issue that has so contentiously divided this country, modern Supreme Court jurisprudence on the Second Amendment is confined to a relatively short list.[160] "For most of its history, the Supreme Court

155. *Id.* at 1222.

156. *Id.* at 1214, 1226.

157. Nat'l Ass'n for Gun Rts. v. City of Naperville, No. 23-1353, 2023 WL 8554177, at *1 (7th Cir. Dec. 11, 2023) ("No judge in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to deny panel rehearing."); Nat'l Ass'n for Gun Rts. v. City of Naperville, 144 S. Ct. 538 (2023) (mem.); Amy Howe, *Justices Won't Block Illinois Ban on Assault-Style Weapons*, SCOTUSBLOG (Dec. 14, 2023, 9:38 PM), https://www.scotusblog.com/2023/12/justices-wont-block-illinois-ban-on-assault-style-weapons/ [https://perma.cc/XJY8-2G6Q].

158. *See Petitions We're Watching*, SCOTUSBLOG, https://www.scotusblog.com/case-files/petitions-were-watching/ [https://perma.cc/2P3U-HBYP] (last visited June 1, 2024) (listing the petitions as "relisted for the next conference"); Petition for Writ of Certiorari, Harrel v. Raoul, No. 23-1826 (Feb. 12, 2024); Petition for Writ of Certiorari, Herrera v. Raoul, No. 23-1793 (Feb. 12, 2024); Petition for Writ of Certiorari, Barnett v. Raoul, No. 23-1825 (Feb. 12, 2024); Petition for Writ of Certiorari, Nat'l Ass'n for Gun Rights v. City of Naperville, No. 23-1353 (Feb. 12, 2024); Petition for Writ of Certiorari, Langley v. Kelly, No. 23-1827 (Feb. 23, 2024); Petition for Writ of Certiorari, Gun Owners of America, Inc. v. Raoul, No. 23-1828 (Mar. 11, 2024).

159. Hancock, *supra* note 102.

160. *Gun Rights Supreme Court Cases*, JUSTIA, https://supreme.justia.com/cases-by-topic/gun-rights/ [https://perma.cc/2BGY-ZDXK] (last visited June 1, 2024); *Bevis*, 85 F.4th at 1181. On June 21, 2024, the Court, in an eight-to-one decision, held that the federal ban on firearms possession by abusers subject to domestic violence restraining orders was constitutional under the Second Amendment. United States v. Rahimi, No. 22-915, 2024 WL 3074728 (U.S. June 21, 2024); *see also* Amy Howe, *Justices Take Up Major Second Amendment Dispute*, SCOTUSBLOG (June 30, 2023), https://www.scotusblog.com/2023/06/justices-take-up-major-second-amendment-dispute/ [https://perma.cc/AJ2K-3QH6].

addressed the Second Amendment only occasionally and in relatively narrow circumstances."[161] Part II.A reviews that history, beginning with the paradigm-shifting cases of *Heller* and *McDonald*. Next, Part II.B reviews the Court's brief per curiam opinion in *Caetano v. Massachusetts*. Finally, Part II.C concludes with an survey of *Bruen*, which established the Court's contemporary test for weapons regulation challenges under the Second Amendment.

A. Heller *and* McDonald

In 2008, Washington, D.C., largely prohibited the possession of handguns—it was illegal to carry an unregistered firearm, the registration of handguns was prohibited, and no person was permitted to carry a handgun without a license, which the chief of police could grant for one-year periods.[162] For those who did lawfully own certain firearms, such as long guns, and who stored them in their homes, they were required to keep the guns unloaded, dissembled, and bound by a trigger lock or similar device.[163] In a five-to-four decision authored by Justice Antonin Scalia, the Court found both D.C.'s prohibition on handgun possession in the home and its trigger-lock requirement unconstitutional under the Second Amendment.[164] Describing *Heller* as the Court's first in-depth examination of the Second Amendment, the majority held for the first time that the Second Amendment enshrined an individual right to keep and bear arms, unconnected with military service.[165]

To reach this conclusion, the Court engaged in an detailed analysis of the Second Amendment's operative clause ("the right of the people to keep and bear Arms") as well as its prefatory clause ("A well regulated Militia, being necessary to the security of a free State") and considered each clause's impact on the reading of the other.[166] The Court found that

161. *Gun Rights Supreme Court Cases*, *supra* note 160; *see generally* United States v. Cruikshank, 92 U.S. 542 (1875); Presser v. Illinois, 116 U.S. 252 (1886); United States v. Miller, 307 U.S. 174 (1939); Lewis v. United States, 445 U.S. 55 (1980).

162. District of Columbia v. Heller, 554 U.S. 570, 574–75 (2008).

163. *Id.* at 575 (quoting D.C. CODE § 7-2507.02 (2007)). Dick Heller, a special police officer authorized to carry a handgun while on duty, was denied a registration certificate to keep a handgun in his home. *Id.* He filed a lawsuit seeking to enjoin D.C. from enforcing on three fronts: (1) its prohibition on the registration of handguns, (2) the city's licensing requirement to the extent that it prohibited individuals from carrying firearms in their homes without a license, and (3) the trigger-lock requirement, which rendered an otherwise operable firearm inoperable for purposes of self-defense in the home. *Id.* at 575–76.

164. *Id.* at 635 ("In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.").

165. *Id.* at 585–86, 595, 635.

166. *Id.* at 579–600; U.S. CONST. amend. II.

the "right of the people," a phrase written in only two other parts of the Constitution, unambiguously referred to individual, rather than "collective," rights, as it also did when used within the First and Fourth Amendments.[167] "Reading the Second Amendment as protecting only the right to 'keep and bear Arms' in the context of an organized militia therefore fits poorly with the operative clause's description of the holder of that right as 'the people.'"[168] The Court held that this interpretation of the operative clause was "strongly confirmed" by the Second Amendment's historical background, which was an important consideration for contemporary understanding of the Amendment because, like the First and Fourth Amendments, the Second Amendment was understood to codify a pre-existing right.[169]

Turning then to the prefatory clause, the Court found that it did not grammatically limit the operative clause—meaning it did not restrict the meaning of "the right of the people to keep and bear Arms" to service in the militia—but rather, announced the Second Amendment's entire purpose: "to prevent elimination of the militia."[170] The Court in *United States v. Miller* had already explained that, at the Founding, the "Militia"

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167. *Heller*, 554 U.S. at 579 ("The unamended Constitution and the Bill of Rights use the phrase 'right of the people' two other times, in the First Amendment's Assembly-and-Petition Clause and in the Fourth Amendment's Search-and-Seizure Clause. . . . All three of these instances unambiguously refer to individual rights, not 'collective' rights . . . .").

168. *Id.* at 579–80 (noting that, while the Preamble, § 2 of Article I, and the Tenth Amendment refer to "the people" acting collectively in the exercise or reservation of powers, "[n]owhere else in the Constitution does a 'right' attributed to 'the people' refer to anything other than an individual" right). Additionally, the Court found that "Arms" was used as a term both historically and contemporarily to describe more types of weapons than those exclusively used and deployed by the military, and asserted that suggesting the Second Amendment protected only those arms in existence in the eighteenth century was an argument "bordering on the frivolous." *Id.* at 581–82. To "keep Arms," was to have weapons, and referred to possessing arms both for those in the militia as well as for everyone else. *Id.* at 582–83. Similarly, presently and as at the founding, to "bear" meant to carry, and when combined with arms, the terms referred to carrying for confrontation, which in no way required participation in a structured military organization. *Id.* at 584.

169. *Id.* at 592 ("Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right."). English monarchs between the Restoration and the Glorious Revolution deployed loyal militias to subdue their dissidents, in part by disarming them. *Id.* American colonists had their own experience with disarmament in the late eighteenth century at the hands of King George III, who sought to disarm the inhabitants of the most rebellious areas in the colonies and which, in turn, prompted the colonists to assert their rights as Englishmen to maintain their arms so that they may defend themselves. *Id.* at 594. Combining this historical background with its interpretation of the operative clause's text, the Court held that there seemed to be "no doubt . . . that the Second Amendment conferred an individual right to keep and bear arms." *Id.* at 595.

170. *Id.* at 595–99 ("A well regulated Militia, being necessary to the security of a free State . . . ." (quoting U.S. CONST. amend. II)).

consisted of "all males physically capable of acting in concert for the common defense."[171] The adjective "well regulated," then, implied "nothing more than the imposition of proper discipline and training" upon that militia.[172] As for the phrase "security of a free State," Justice Scalia wrote that this meant "security of a free polity," not the security of each individual state.[173] While the Court acknowledged that, elsewhere in the Constitution, "State" referred to the individual states, the phrase "security of a free State" appeared to work in eighteenth-century discourse as a term of art meaning a "free country."[174]

The Court then addressed the relationship between the operative and the prefatory clause, asking, "Does the preface fit with an operative clause that creates an individual right to keep and bear arms?"[175] The answer, the Court held, was yes.[176] The Court explained that history had shown that the way that tyrants eliminated political opposition was not by banning the militia outright, but by taking away the arms that the people relied upon to defend against tyranny.[177] In 1788, as Federalists and Anti-Federalists debated the ratification of the Constitution, the Anti-Federalists had expressed fear that the federal government "would disarm the people in order to impose rule through a standing army . . . ."[178]

Finally, the Court acknowledged that the right to keep and bear arms was not unlimited.[179] The Court held that nothing in its decision in *Heller* "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government

171. *Id.* at 595 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).

172. *Id.* at 597.

173. *Id.*

174. *Id.* (noting also that "the other instances of 'state' in the Constitution are typically accompanied by modifiers making clear that the reference is to the several States [such as] 'each state,' 'several states,' [and] 'any state' . . . .").

175. *Id.* at 598.

176. *Id.*

177. *Id.* at 598, 600.

178. *Id.* at 598. Federalists responded by maintaining that because the Constitution afforded Congress no power to curtail the preexisting right of individuals to keep and bear arms, no such military force could so oppress the people. *Id.* at 599 ("It was understood across the political spectrum that the right [to keep and bear arms] helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down."). The purpose of the prefatory clause, therefore, was "to prevent elimination of the militia," not to enshrine a right which solely benefited an organized militia. *Id.* at 599–600. The threat that a new federal government might destroy the citizens' militia by disarming them was the very reason the Second Amendment was ultimately codified in the Constitution. *Id.* at 599 (finding that self-defense "was the central component" of the Second Amendment).

179. *Id.* at 626 ("From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.").

buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[180]

Another significant limitation of the Second Amendment, Justice Scalia wrote, was the "prohibit[ion] against carrying 'dangerous and unusual weapons.'"[181] Weapons that are the most useful in the military, such as M16 rifles, may be banned without offending the Second Amendment.[182]

Given its finding that the Second Amendment enshrined an individual right to keep and bear arms for self-defense, the Court found that D.C.'s laws banning handgun possession in the home were unconstitutional.[183] The handgun ban, Justice Scalia wrote, amounted to the prohibition of a class of arms that is "the most preferred firearm in the nation" for purposes of self-defense.[184] That the ban extended into the home, "where the need for defense of self, family, and property is most acute," ensured that it would fail constitutional muster under any standard of scrutiny.[185] In closing, the Court acknowledged that some may find the Second Amendment archaic in a modern society with a standing army and well-trained police force.[186] While that sentiment may be debatable, Justice Scalia wrote, "[W]hat is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct."[187]

In the case's first dissent, Justice John Stevens maintained that the most natural reading of the Second Amendment was that it "protect[ed] the right to keep and bear arms for certain military purposes" but that it did not restrict the legislature's authority to regulate "the nonmilitary use and ownership of weapons."[188] "Specifically," Justice Stevens wrote,

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180. *Id.* at 626–27.

181. *Id.* at 627 ("*Miller* said, as we have explained, that the sorts of weapons protected were those 'in common use at the time.' We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" (citations omitted)).

182. *Id.* at 627–28 ("It may be objected that if weapons that are most useful in military service . . . may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty . . . . [T]he fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of that right.").

183. *Id.* at 628–30.

184. *Id.* at 628–29 (quoting Parker v. District of Columbia, 478 F.3d 370, 400 (D.C. Cir. 2007)).

185. *Id.*

186. *Id.* at 636.

187. *Id.*

188. *Id.* at 637–38 (Stevens, J., dissenting) ("The view of the Amendment we took in *Miller*—that it protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons—is both

"there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution."[189] In a second dissent, Justice Stephen Breyer agreed with Justice Stevens that the Second Amendment's purpose was to protect militia-related, not self-defense-related, interests, and additionally asserted that the protection provided by the Amendment was not absolute, leaving space for governments to regulate in accordance with the various interests they serve.[190]

One of the questions left unanswered by the Court in *Heller* was whether this individual right applied to the states.[191] In *McDonald v. City of Chicago*, decided just two years later in 2010, the Court answered definitively: the Second Amendment was incorporated against the states through the Due Process Clause of the Fourteenth Amendment.[192]

Chicago municipal code prohibited possession of unregistered firearms; the code then barred registration of most handguns, essentially banning their possession within city limits.[193] The ban, which was enacted to protect residents of Chicago from firearms violence, was challenged by plaintiffs who believed that the law left them vulnerable to criminals and who therefore wanted the ability to keep handguns in their homes for protection.[194] Their lawsuit argued that the handgun ban was a violation of both the Second and Fourteenth Amendments, given the Court's decision in *Heller*.[195]

Justice Alito wrote the Court's plurality opinion.[196] The Court began with reviewing the ratification of the Fourteenth Amendment in the

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the most natural reading of the Amendment's text and the interpretation most faithful to the history of its adoption.").

189. *Id.* at 637. Justice Stevens further asserted that the majority had only found an individual right by reading the Amendment backward, starting with the operative clause and looking back to the prefatory clause to conclude that the Court's reading of the operative clause's ambiguous language was not foreclosed by the Amendment's preamble, wrongly treating the prefatory clause as "mere surplusage." *Id.* at 643–44 ("The preamble thus both sets forth the object of the Amendment and informs the meaning of the remainder of its text. Such text should not be treated as mere surplusage, for '[i]t cannot be presumed that any clause in the constitution is intended to be without effect. . . .' Without identifying any language in the text that even mentions civilian use of firearms, the Court proceeds to 'find' its preferred reading in what is at best an ambiguous text, and then concludes that its reading is not foreclosed by the preamble." (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803))).

190. *Id.* at 681–82 (Breyer, J., dissenting) (maintaining that, while militia and self-defense interests may overlap, self-defense alone was not the Second Amendment's primary concern, and the Amendment "permits government to regulate the interests that it serves").

191. McDonald v. City of Chicago, 531 U.S. 742, 749–50, 791 (2010).

192. *Id.* at 750, 791.

193. *Id.* at 750.

194. *Id.* at 750–51.

195. *Id.* at 752.

196. *Id.* at 748.

aftermath of the Civil War, noting that it "fundamentally altered our country's federal system."[197] The Due Process Clause of the Fourteenth Amendment had since been the primary mechanism by which rights set out in the Bill of Rights had been selectively incorporated against the states.[198] The Court held the standard by which a right was determined to be so fundamental as to be incorporated against the states was to inquire whether a particular Bill of Rights guarantee was fundamental to the American "scheme of ordered liberty and system of justice."[199]

Having laid out this framework, the Court turned to examine whether the Second Amendment was one such fundamental right.[200] The answer, Justice Alito wrote, was made plain in *Heller*: "Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is 'the central component' of the Second Amendment right."[201] To the Court, it was clear that the Framers of both the Second and Fourteenth Amendments "counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."[202] Therefore, Justice Alito wrote, because the Second Amendment protected a right that was "fundamental from an American perspective," that right applied with equal force to state governments by way of the due process clause.[203]

While Justice Clarence Thomas concurred in the judgment of *McDonald*, he argued that it was the Privileges and Immunities Clause, rather than the due process clause, that was the "more faithful" means by which to incorporate the Second Amendment against the states.[204]

197. *Id.* at 754.

198. *Id.* at 754, 758–59, 763 (identifying the process of selective incorporation as when the Court holds that the Due Process Clause of the Fourteenth Amendment fully incorporates particular rights contained within the first eight Amendments of the Bill of Rights against the states).

199. *Id.* at 764 (citing Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968)).

200. *Id.* at 767.

201. *Id.* at 767–68 ("*Heller* makes it clear that this right is 'deeply rooted in this Nation's history and tradition.'" (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997))). In support of its contention that the right to self-defense was one "deeply rooted" in the nation's history and tradition, the Court reviewed some of the same history it cited in *Heller* as the origins of the Second Amendment's individual right guarantee, and explored the perceptions surrounding the right to keep and bear arms that accompanied ratification of the Fourteenth Amendment. *Id.* at 768–78.

202. *Id.* at 778.

203. *Id.* at 791 ("In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense . . . . [A] provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States . . . . We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.").

204. *Id.* at 805–06 (Thomas, J., concurring) ("[T]he right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges and Immunities Clause.").

Justice Scalia, in his concurrence, stated that he sought only to respond to the points raised by Justice Stevens in his dissent, in that Justice Stevens condemned the interpretive theory undergirding the plurality decision—a theory which Justice Scalia wrote "makes the traditions of our people paramount."[205] Justice Scalia also asserted that the Court's historical approach intruded less upon the democratic process "because the rights it acknowledges are those established by a constitutional history formed by democratic decisions; and the rights it fails to acknowledge are left to be democratically adopted or rejected by the people . . . ."[206]

Both Justice Stevens and Justice Breyer dissented.[207] Justice Stevens began by stating that the question the Court should have answered in *McDonald* was whether the Second Amendment guaranteed a fundamental right to possess a firearm inside the home.[208] Justice Stevens maintained that, while any one individual may have a "cognizable liberty interest" in owning a handgun, the ability to own a handgun or any type of firearm was not "critical to leading a life of autonomy, dignity, or political equality," unlike other liberty interests the Court had recognized.[209] While firearms may help defend their owners, their family, and their property, Justice Stevens wrote, they can just as easily be the tools of "thugs and insurrectionists."[210] Separately, Justice Breyer contended that relying "almost exclusively upon history to make the necessary showing" that a right is "fundamental to the American scheme of justice" is not only legally wrong, but dangerous.[211] He asserted that it would be more proper to consider other factors, such as the nature of the right, contemporary disagreement about the fundamentality of the right, and whether incorporation would advance the structural aims of the Constitution.[212] Considering these factors, in combination with the "ambiguous" history of the Second Amendment, Justice Breyer, like Justice Stevens, concluded that "the Fourteenth Amendment does not incorporate the Second

205. *Id.* at 791–92 (Scalia, J., concurring).

206. *Id.* at 805.

207. *See id.* at 858–913 (Stevens, J., dissenting); *id.* at 913–41 (Breyer, J., dissenting).

208. *Id.* at 858 (Stevens, J., dissenting) (noting that this would be a much more complex inquiry than the comparatively simpler question of incorporation answered by the plurality).

209. *Id.* at 891, 893 (asserting that firearms have a "fundamentally ambivalent" relationship with liberty).

210. *Id.* at 890–91 ("Hence, in evaluating an asserted right to be free from particular gun-control regulations, liberty is on both sides of the equation. Guns may be useful for self-defense, as well as for hunting and sport, but they also have a unique potential to facilitate death and destruction and thereby destabilize ordered liberty. *Your* interest in keeping and bearing a certain firearm may diminish *my* interest in being and feeling safe from armed violence.").

211. *Id.* at 917 (Breyer, J., dissenting) (quoting Duncan v. Louisiana, 391 U.S. 145, 149 (1968)).

212. *Id.* at 918.

Amendment right to keep and bear arms for purposes of private self-defense."[213]

The Court would not take up another Second Amendment issue for eight years.[214]

B. Caetano v. Massachusetts

In a per curiam opinion issued on March 21, 2016, the Court held steadfast to its decisions in both *Heller* and, by extension, *McDonald* by finding a Massachusetts law that banned "electrical weapons," including stun guns, contradicted the Court's rationale in *Heller*.[215] In this case, appellant Jaime Caetano had been convicted for carrying a stun gun in her purse despite her motion to dismiss the charge on Second Amendment grounds.[216] The Massachusetts Supreme Judicial Court affirmed the conviction, holding that, under its reading of *Heller*, stun guns were not the type of weapon the Founders had intended to protect under the Second Amendment.[217]

In a two-page opinion, the Court dismantled the Massachusetts court's three-part decision.[218] First, the Massachusetts court had found that stun guns were not protected because they were not weapons in common use at the time of the Second Amendment's ratification.[219] The Court held that this finding directly contrasted with *Heller*'s clear statement that the Second Amendment's protection includes weapons that did not exist at the Founding.[220]

Second, the Massachusetts court had cited the "historical tradition" of prohibiting "dangerous and unusual weapons" and concluded that stun guns were unusual because they are "a thoroughly modern invention."[221]

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213. *Id.* at 917, 941.

214. Lyle Denniston, *The Second Amendment Expands, but Maybe Not by Much*, SCOTUSBLOG (Mar. 21, 2016, 3:07 PM), https://www.scotusblog.com/2016/03/the-second-amendment-expands-but-maybe-not-by-much [https://perma.cc/HM4R-4LY2] (noting that the Court first decided the Second Amendment protects an individual right to own firearms for self-defense in 2008 and 2010, and "[s]ince then, the Justices have steadfastly refused to review any among a series of cases filed with it in pursuit of further clarity on how far the right goes").

215. Caetano v. Massachusetts, 577 U.S. 411, 411–12 (2016) (per curiam); *see also* Jake Charles, Caetano*'s Erasure*, DUKE CTR. FOR FIREARMS L., (Jan. 8, 2020) https://firearmslaw.duke.edu/2020/01/caetanos-erasure [https://perma.cc/977C-B2PN] ("[I]ts focus on whether the stun gun was in common use at the founding 'is inconsistent with *Heller*'s clear statement that the Second Amendment 'extends . . . to . . . arms . . . that were not in existence at the time of the founding.'" (quoting *Caetano*, 577 U.S. at 412)).

216. *Id.* at 414–15 (Alito, J., concurring).

217. *Id.* at 411.

218. *Id.* at 411–12.

219. *Id.* at 411.

220. *Id.* at 412.

221. *Id.* (quoting Massachusetts v. Caetano, 26 N.E.3d 688, 693–94 (Mass. 2015)).

The Court found that this, too, was at odds with the same *Heller* pronouncement that the Second Amendment's scope is not limited to weapons originating in the late eighteenth century.[222] Because the Court had already found that the Massachusetts court did not meet the "unusual" threshold, it did not go on to assess whether stun guns were also "dangerous."[223]

Finally, the Massachusetts court had found nothing to suggest that stun guns were adaptable to military use, which would justify their protection under the Second Amendment.[224] Again, the Court found this proposition was in direct contravention with *Heller*, wherein the Court had explicitly rejected the notion that only weapons of war were protected under the Second Amendment.[225] The Court, however, stopped short of finding the Massachusetts law unconstitutional outright; instead, it vacated the Massachusetts judgment and remanded the case for further proceedings consistent with the Court's holding.[226]

Characterizing the Court's per curiam opinion as "grudging," Justice Alito, joined by Justice Thomas, issued a concurring opinion.[227] Justice Alito expounded on the reasons Caetano had been carrying a stun gun in the first place: she had obtained the weapon from a friend to defend herself against an abusive ex-boyfriend who had violated multiple protective orders and whose abuse had put her in the hospital.[228] Justice Alito commended Caetano for "st[anding] her ground" (a now-common phrase often used by gun rights advocates) and exercising her "fundamental right" to self-defense assured to her by the Second Amendment.[229]

Justice Alito conducted a granular analysis of how the three prongs of the Massachusetts decision had incorrectly applied *Heller*'s reasoning.[230] First, Justice Alito pointed out that most weapons commonly used today did not exist at the end of the eighteenth century.[231] He maintained that the Massachusetts court's reliance on the dated language of *United States*

222. *Id.*

223. *Id.* at 417 ("A weapon may not be banned unless it is *both* dangerous *and* unusual. Because the Court rejects the lower court's conclusion that stun guns are 'unusual,' it does not need to consider the lower court's conclusion that they are also 'dangerous.'" (quoting *Caetano*, 26 N.E.3d at 692–94)).

224. *Id.* at 412.

225. *Id.*

226. *Id.*

227. Caetano v. Massachusetts, 577 U.S. 411, 442 (2016) (Alito, J., concurring) ("This Court's grudging *per curiam* now sends the case back to that same court."); *see generally* Denniston, *supra* note 214.

228. *Caetano*, 577 U.S. at 412–13.

229. *Id.* at 413 (Alito, J., concurring); Denniston, *supra* note 214.

230. *See generally Caetano*, 577 U.S. at 414–22 (Alito, J., concurring).

231. *Id.* at 416–17.

v. Miller, while pointedly disregarding *Heller*'s directive that all bearable arms are protected by the Second Amendment, ignored the common thread that the Second Amendment guarantees the right to carry weapons "typically possessed by law-abiding citizens for lawful purpose."[232]

Justice Alito then asserted that, while the Court was correct in assessing that stun guns were not "unusual," they were also most assuredly not "dangerous"—at least not so far as the kind of danger that would exclude them from Second Amendment protection.[233] He declared that any test that found that a weapon was "per se" dangerous if they were "designed and constructed to produce death or great bodily harm" and "for the purpose of bodily defense" would cover virtually any and every sort of weapon that was also commonly used for a lawful purpose—the exact class of weapons which *Heller* had already established were protected.[234]

Finally, Justice Alito, as the Court did, concluded that the Massachusetts court's understanding that *Heller* only protected weapons useful in warfare was "simply wrong."[235] Justice Alito went on to point out that the correct reading of *Miller* and *Heller* together was to acknowledge that militia members reported for duty with whatever lawful weapons they could bring from home, and that these weapons were protected by the Second Amendment regardless of that weapon's actual suitability for military use.[236] All told, Justice Alito made clear that the appropriate question was whether weapons "are commonly possessed by law-abiding citizens for lawful purposes *today*."[237] Any lesser inquiry, he asserted, would allow a state "to ban *all* weapons *except* handguns, because," as *Heller* noted, "handguns are the most popular weapon chosen by Americans for self-defense."[238]

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232. *Id.* at 416 (quoting District of Columbia v. Heller, 554 U.S. 570, 625 (2008)) ("Electronic stun guns are no more exempt from the Second Amendment's protection, simply because they were unknown to the First Congress, than electronic communications are exempt from the First Amendment, or electronic imaging devices are exempt from the Fourth Amendment.").

233. *Id.* at 417–18.

234. *Id.* at 418 (quoting Massachusetts v. Caetano, 26 N.E.3d 688, 692 (Mass. 2015)).

235. *Id.* at 418–419.

236. *Id.* at 419.

237. *Id.* at 420.

238. *Id.* (quoting District of Columbia v. Heller, 554 U.S. 570, 629 (2008)). While less popular than handguns, Justice Alito cited that "[h]undreds of thousands of Tasers and stun guns have been sold to private citizens," clearly demonstrating they are widely owned and accepted as a legitimate means of self-defense across the country. *Id.* at 421 (quoting People v. Yanna, 824 N.W.2d 241, 245 (Mich. Ct. App. 2012)). As such, Justice Alito asserted that the Massachusetts statute, permitted to stand by the Court's own per curiam opinion, posed "a grave threat to the fundamental right of self-defense." *Id.*

Justice Alito wrote a grim close to his concurrence, appearing to reproach the rest of the Court for not finding Massachusetts' stun gun ban unconstitutional outright and vacating Caetano's conviction, while at the same time providing an ominous warning for any other American contemplating arming themselves.[239] He concluded by writing, "If the fundamental right of self-defense does not protect Caetano, then the safety of all Americans is left to the mercy of state authorities who may be more concerned about disarming the people than about keeping them safe."[240] It was a warning that, perhaps, was still ringing in the Court's ears when it granted certiorari to a case out of New York four years later.[241]

C. Bruen

The Supreme Court did not fully review another Second Amendment question after *Heller* and *McDonald* until it took up *Bruen* in 2021.[242] The effect of *Bruen* was twofold. First, the Court considerably expanded the coverage of the Second Amendment from an individual right to "keep and bear" firearms in one's home for purposes of self-defense to a more generalized right to both private and public firearms possession for

239. *Id.* at 421–22 ("The Commonwealth of Massachusetts was either unable or unwilling to do what was necessary to protect Jaime Caetano, so she was forced to protect herself. To make matters worse, the Commonwealth chose to deploy its prosecutorial resources to prosecute and convict her of a criminal offense for arming herself with a nonlethal weapon that may well have saved her life. The Supreme Judicial Court then affirmed her conviction on the flimsiest of grounds. This Court's grudging *per curiam* now sends the case back to that same court. And the consequences for Caetano may prove more tragic still, as her conviction likely bars her from ever bearing arms for self-defense.").

240. *Id.* at 422. Ultimately, Caetano was formally exonerated—more than having her charges dismissed, she was found not guilty—by agreement of the prosecution and the defense. Eugene Volokh, *Charges Dropped in* Caetano v. Massachusetts *Second Amendment Stun Gun Case*, WASH. POST (July 7, 2016, 2:47 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/07/07/charges-dropped-in-caetano-v-massachusetts-second-amendment-stun-gun-case/ [https://perma.cc/7BCP-GMXH]. Thirteen months later after the Court's opinion in *Caetano*, the Massachusetts Supreme Judicial Court—the same court which had initially upheld Caetano's conviction—would unanimously hold that Massachusetts' ban on stun guns was unconstitutional under the Second Amendment. Nate Raymond, *Massachusetts Top Court Declares Stun Gun Ban Unconstitutional*, REUTERS (Apr. 17, 2018), https://www.reuters.com/article/us-massachusetts-stunguns-idUSKBN1HO2MP [https://perma.cc/2DU6-2S2B].

241. *See generally* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

242. N.Y. State Rifle & Pistol Ass'n v. Corlett, 141 S. Ct. 2566 (2021) (mem.). Upon the Court's release of the *Bruen* decision, several media outlets described the decision as the first gun rights case at the Supreme Court in more than a decade, ignoring the role *Caetano* plays in the Court's Second Amendment jurisprudence. *See* Charles, *supra* note 215 (highlighting *Caetano*'s importance in bridging the Court's jurisprudence from *Heller* and *McDonald* to *Bruen*).

individual self-defense, with certain limited exceptions.[243] Second, and perhaps even more significantly, *Bruen* established what the Court now considers to be the proper standard for Second Amendment review of firearms regulations: a "straightforward historical inquiry," eliminating any consideration of the governmental interest in enacting the challenged regulation.[244]

In *Bruen*, the Court considered the constitutionality of "Sullivan's Law," a New York state law that made it a crime to possess any firearm in public without a license granted by a magistrate.[245] While firearms license applicants seeking to possess firearms in their homes needed only to convince a licensing officer that they were individuals of "good moral character," had "no history of crime or mental illness, and that no good cause existed" to deny the requested license, applicants who wanted to carry firearms outside of their homes for purposes of self-defense were required to obtain an "unrestricted license."[246] Applicants seeking an unrestricted license had to additionally prove that "proper cause" existed to issue the license without limitations on carrying firearms in public.[247] New York courts had held that an applicant showed proper cause only if they could demonstrate a special and particularized need for self-protection distinguishable from that of the general community.[248] Without such a showing, an applicant was only entitled to receive a "restricted" license, allowing them to carry a firearm in public for limited purposes, such as hunting or employment.[249]

In the twelve years between the Court's decision in *McDonald* and their taking up *Bruen*, all eleven federal courts of appeals had uniformly settled on a "two-step" framework for analyzing Second Amendment

243. *Bruen*, 142 S. Ct. at 2156. The Court considered it "settled" that certain public yet "sensitive" places, such as schools, government buildings, polling places, and courthouses, are constitutionally subject to restrictions on firearms possession, and its decision in *Bruen* does not disturb those "longstanding" laws which prohibits firearms possession at these locations. *Id.* at 2134 (quoting District of Columbia v. Heller, 554 U.S. 570, 626 (2008)).

244. *Id.* at 2129–31.

245. *Id.* at 2122.

246. *Id.* at 2122–23.

247. *Id.*

248. *Id.* at 2123 (citing Klenosky v. N.Y. City Police Dep't, 428 N.Y.S.2d 256, 257 (1980)).

249. *Id.* at 2123. This "may issue" licensing scheme, wherein licensing authorities had discretion to deny licenses based on a perceived lack of need or suitability, was followed by six other states, as well as the District of Columbia—forty-three other states, however, were "shall issue" jurisdictions, wherein authorities were required to issue public carry licenses whenever applicants satisfy certain threshold terms. *Id.* at 2123–24. The New York law was challenged by two men who had been denied unrestricted public carry licenses despite their desire to carry a handgun for self-defense, and the New York State Rifle and Pistol Association, of which both men were members. *Id.* at 2124–25.

challenges which "combine[d] history with means-end scrutiny."[250] The Court in *Bruen* disagreed with this approach.[251] "Despite the popularity of this two-step approach," Justice Thomas wrote, "it is one step too many."[252] The Court held that its decisions in *Heller* and *McDonald* did not support applying means-end scrutiny in the Second Amendment context; in fact, the Court found that *Heller* and *McDonald* expressly rejected the application of any "judge-empowering 'interest-balancing inquiry.'"[253] Rather, "the government must affirmatively prove that its firearms regulation [was] part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[254] The Court defined the correct standard for applying the Second Amendment to firearms regulation:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."[255]

The Court went on to acknowledge that, while "[h]istorical analysis can be difficult," it was "more legitimate, and more administrable" than asking courts to make the empirical judgments required by means-end scrutiny.[256]

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250. *Id.* at 2125. Under this analysis, the government would first attempt to justify its regulation by establishing that the activity regulated by the challenged law was outside of the scope of the Second Amendment as it was originally understood and intended. *Id.* at 2126 (citing Kanter v. Barr, 919 F.3d 437, 441 (7th Cir. 2019)). Should the government prove that the regulated conduct fell outside of this range, the analysis would stop at the first step and the regulation would be upheld; if, however, the historical evidence was either inconclusive or alternatively suggested that the regulated conduct was not categorically unprotected, the reviewing court would then move to the second step of its analysis. *Id.* at 2126. At the second step, the reviewing court would deploy means-end scrutiny, analyzing how closely the regulation came to the core of the rights protected under the Second Amendment and the severity of that regulation's burden upon those protections. *Id.* The court would apply strict scrutiny if they found that the challenged regulation burdened "a core Second Amendment right," and ask whether the government could prove that the regulation was "narrowly tailored to achieve a compelling governmental interest." *Id.* (first quoting Gould v. Morgan, 907 F.3d. 659, 671 (1st Cir. 2018); and then quoting Kolbe v. Hogan, 849 F.3d 114, 133 (4th Cir. 2017)). In all other challenges, the reviewing court would apply intermediate scrutiny, and consider whether the government could show that the regulation was substantially related to achieving an important governmental interest. *Id.* at 2126–27.

251. *Id.* at 2127.

252. *Id.*

253. *Id.* at 2128–29.

254. *Id.* at 2127.

255. *Id.* at 2129–30 (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 50 n.10 (1961)).

256. *Id.* at 2130 (quoting McDonald v. City of Chicago, 561 U.S. 742, 803–04 (2010)).

At times, analyses would be relatively simple to draw; in other instances, however, such as those cases "implicating unprecedented societal concerns or dramatic technological changes," the Court recognized that a more nuanced approached may be required, involving "reasoning by [historical] analogy."[257] While the Court declined to establish firm parameters by which historical regulations could be compared to contemporary ones, it did articulate that *Heller* and *McDonald* pointed to at least two metrics: "how and why the regulations burden a law-abiding citizen's right to armed self-defense."[258] Ascertaining whether the compared regulations imposed a comparable burden, and then determining whether that burden was similarly justified, were "central" considerations when conducting analogical inquiry.[259] The Court cautioned against engaging in historical review by extremes, writing, "analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check . . . [E]ven if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster."[260]

Turning to the facts of the case, the Court had "little difficulty" finding that the conduct proposed by the appellants—publicly carrying handguns for self-defense—was protected under the plain language of the Second Amendment.[261] The Second Amendment, the Court noted, contained no distinction between the right to keep and bear arms at home versus in public.[262] The Court found that the definition of "bear," as explained in *Heller*, "naturally encompasses public carry," as confining the right to bear arms to the home "would make little sense given that self-defense is 'the *central component* of the [Second Amendment] right'" and confrontation can just as easily take place outside of the home as within it.[263]

Having found that the challenged regulation infringed upon a right clearly protected under the Second Amendment's plain language, the Court then conducted its own review of the purported historical analogues presented by the respondents spanning five historical eras: "(1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and (5) the late-19th and early-20th centuries."[264] It was important to identify categories

257. *Id.* at 2132 (quoting Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993)).

258. *Id.* at 2132–33.

259. *Id.* at 2133 (quoting *McDonald*, 561 U.S. at 767).

260. *Id.*

261. *Id.* at 2134.

262. *Id.*

263. *Id.* (quoting District of Columbia v. Heller, 554 U.S. 570, 626 (2008)).

264. *Id.* at 2135–36.

of historical sources because, as the Court wrote, "when it comes to interpreting the Constitution, not all history is created equal."[265] Given that the Second Amendment was ratified in 1791 and the Fourteenth Amendment was ratified in 1868, the Court noted that historical evidence that came long before or long after either year may not adequately "illuminate the scope" the amendments were understood to have at the time of their adoption.[266]

Nevertheless, after reviewing the historical analogues presented from each of the five identified periods, the Court found that the historical record compiled by the state of New York by and large did not demonstrate a tradition of broadly prohibiting the public carry of handguns for self-defense, nor did it support restricting public carry only to those individuals who demonstrated a special need for self-defense.[267] As such, under the text-and-history standard, the Court found Sullivan's Law unconstitutional under the Second Amendment.[268]

Justices Alito, Kavanaugh, and Barrett each wrote separate concurrences.[269] Justice Alito's concurrence served as a direct response to points raised by the dissent, and he reiterated that the Court had not decided who may possess a firearm, the requirements necessary to buy one, what kinds of weapons people may own, or modify what the Court had previously stated in *Heller* and *McDonald* "about [what] restrictions . . . may be imposed upon the possession or carrying of guns."[270] As such, he questioned whether any of the data cited by the dissent—the number of mass shootings which had occurred in recent years, the use of guns as a method of suicide, the use of guns in cases of domestic abuse, the deaths of children and adolescents by guns, the density of firearms possession in the U.S. and the country's high level of gun violence—was relevant to the question raised and answered in *Bruen*.[271]

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265. *Id.* at 2136.

266. *Id.* (quoting *Heller*, 554 U.S. at 634–35) ("It is one thing for courts to 'reac[h] back to the 14th century' for English practices that 'prevailed up to the period immediately before and after the framing of the Constitution.' It is quite another to rely on an 'ancient' practice that had become 'obsolete in England at the time of the adoption of the Constitution' and never 'was acted upon or accepted in the colonies.'" (internal quotation marks omitted) (quoting Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 311 (2008) (Roberts, C.J., dissenting); and then quoting Dimick v. Schiedt, 293 U.S. 474, 477 (1935))).

267. *Id.* at 2138.

268. *Id.*

269. *Id.* at 2156, 2161–62.

270. *Id.* at 2156–57 (Alito, J., concurring).

271. *Id.* at 2158–59, 2161. Justice Alito likewise discounted the dissent's assertion that the Court decided *Bruen* prematurely, without a fully developed record, and criticized what he saw as

Justice Brett Kavanaugh, joined in his concurrence by Chief Justice John Roberts, wrote separately to acknowledge that, "[p]roperly interpreted, the Second Amendment allowed a 'variety' of gun regulations."[272] Additionally, in her brief concurrence, Justice Amy Coney Barrett highlighted two methodological points that remained unresolved after the Court's majority decision in *Bruen*.[273] She first noted that the Court did not definitively identify the manner and circumstances in which "post-ratification practice may bear on the original meaning of the Constitution," and as such, questions regarding the proper framework for such an analysis may present themselves to the Court in future cases.[274] Second, she cautioned against "freewheeling reliance on historical practices from the mid-to-late 19th century" to support any assertion about "the original meaning of the Bills of Rights," noting that the Court had similarly avoided determining whether the appropriate understanding of the individual right was tied to that right's popular understanding at the time the Second Amendment was ratified in 1791, or to when the Fourteenth Amendment was ratified in 1868.[275]

Justice Breyer opened his dissent with a discussion of a number of U.S. firearms-related statistics, from the millions of civilian-held firearms to the "disproportionately high rate of firearm-related deaths and injuries."[276] He acknowledged that all of this data painted a picture of the

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the dissent's attempt to by-and-large reargue the Court's decision in *Heller*. *Id.* at 290, 292 ("[T]he real thrust of today's dissent is that guns are bad and that States and local jurisdictions should be free to restrict them . . . as they see fit.").

272. *Id.* at 2162 (Kavanaugh, J., concurring) (quoting District of Columbia v. Heller, 554 U.S. 570, 636 (2008)). Justice Kavanaugh also emphasized that, in announcing its decision in *Bruen*, the Court was not overturning the existing "shall issue" licensing regimes established in forty-three states, nor was it barring states from establishing licensing requirements for carrying a handgun outright; rather, the Court's decision addressed only the "may issue" regimes that mirrored the New York law which were "constitutionally problematic" because of the discretion it provided to licensing officials and the particularized "special need" requirement that went above and beyond a general desire to be armed for self-defense. *Id.* at 2161–62.

273. *Id.* at 2162–63 (Barrett, J., concurring).

274. *Id.*

275. *Id.* at 2163 (noting that Sullivan's law "lack[ed] [ ] support" from either period). A Petition for Writ of Certiorari currently before the Court is asking the Court to definitively determine which historical era, 1791 or 1868, is proper for conducting an original meaning analysis under the Second Amendment. *See* Petition for Writ of Certiorari, Antonyuk v. James, 23-910 (Feb. 20, 2024) (asking "[w]hether the proper historical time period for ascertaining the Second Amendment's original meaning is 1791, rather than 1866").

276. *Id.* at 2164 (Breyer, J., dissenting). As a preliminary matter, Justice Breyer took issue with the fact that the Court decided *Bruen* based on its pleadings alone, "without the benefit of discovery or an evidentiary record," which may have resulted in a decision rooted in a mistaken understanding of how Sullivan's Law actually worked in practice. *Id.* at 2164, 2170–71. "Without an evidentiary record," Justice Breyer wrote, "there is no reason to assume that New York courts applying this standard fail to provide license applications with meaningful review." *Id.* at 2170. Justice Breyer

intense difficulty of balancing the lawful uses and unlawful dangers that guns present, and asserted that it should therefore be primarily the responsibility of the legislature, with its ability to consider "facts, statistics, expert opinions, predictive judgments, relevant values," and any other circumstances, to "make decisions about how, when, and where" to effectively regulate firearm possession and use.[277] That careful consideration should, in turn, "counsel[] modesty and restraint on the part of judges when they interpret and apply the Second Amendment" to any such regulation.[278] However, by requiring courts to exclusively use a "history-only" approach when reviewing firearms regulation, courts would be forced to ignore the significant dangers posed by guns, leaving states with the inability to address those dangers.[279]

Justice Breyer questioned whether the lower courts would have the resources necessary to undertake the analysis required in a post-*Bruen* Second Amendment case, and asked what historical regulations would make "representative analogues to modern laws" as well as whether the meaning of the Second Amendment would change "if or when new historical evidence" became available.[280] Finally, he asked, "[W]ill the Court's approach permit judges to reach the outcomes they prefer and then cloak those outcomes in the language of history?"[281] Compounding these problems, according to Justice Breyer, the Court "offer[ed] little explanation of how stringently its test should be applied."[282] Justice Breyer elucidated that

> At best, the numerous justifications that the court finds for rejecting historical evidence gives judges ample tools to pick their friends out of history's crowd. At worst, they create a one-way ratchet that will disqualify virtually any "representative historical analogue" and make it nearly impossible to sustain common-sense regulations necessary to our Nation's safety and security.[283]

Justice Breyer feared "history will be an especially inadequate tool when it comes to modern cases presenting modern problems."[284]

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asserted that the Court was able to justify issuing a decision without a fully developed record by rejecting means-end scrutiny outright, despite its universal application among every federal Court of Appeal, instead requiring courts to undergo a "history-only approach," eliminating any consideration of compelling state interest. *Id.* at 2174.

277. *Id.* at 2167.

278. *Id.*

279. *Id.* at 2164, 2168. Justice Breyer also raised the question of the administrability of a history-only test, noting that "[c]ourts are, after all, staffed by lawyers, not historians." *Id.* at 2177.

280. *Id.* at 2177.

281. *Id.*

282. *Id.* at 2179.

283. *Id.* at 2180.

284. *Id.*

Furthermore, Justice Breyer contended that the majority opinion itself demonstrated the practical problems with the history-only approach, namely that it "fail[ed] to correctly identify and analyze the relevant historical facts."[285] In conducting his own historical review of the same periods identified in the majority's opinion, Justice Breyer cited a number of regulations from as early as the thirteenth century, "through the ratifications of the Second and Fourteenth Amendments," and up to the present day which, counter to the majority's conclusion, established the necessary "historical precedent" to uphold Sullivan's Law under the majority's own "history-only" test.[286] Such disparate outcomes, Justice Breyer maintained, counseled against relying on history as the sole metric of Second Amendment constitutionality.[287]

In closing, Justice Breyer wrote that the Court in *Bruen* had gone beyond its holding in *Heller* and had done so "without considering the potentially deadly consequences of its decision."[288]

III. ANALYSIS

Given the number of suits filed in the immediate aftermath of PICA's passage, the sharply divided decision of the Seventh Circuit, and the six petitions for certiorari currently pending before the Supreme Court, it seems inevitable the constitutionality of PICA—and other assault weapons bans like it—is a question that will ultimately be decided by Supreme Court.[289] If it is, this Part asserts that PICA should be found constitutional based on the Court's prevailing interpretation of the Second Amendment in *Bruen*.

For better or worse, the test laid out by the Court in *Bruen* is now the starting point for any Second Amendment review: first, challengers of PICA—or any firearms regulation—must demonstrate that the plain text of the Second Amendment protects the conduct being regulated.[290] Second, if they overcome this hurdle, the burden shifts to the government,

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285. *Id.* at 2164.

286. *Id.* at 2181–89.

287. *Id.* at 2190.

288. *Id.* at 2190–91.

289. *See supra* Section I.C.2 (detailing the federal lawsuits filed after PICA's passage); *ISRA Statement on US 7th Circuit Decision*, ILL. STATE RIFLE ASS'N, (Nov. 4, 2023), https://isra.org/isra-statement-on-us-7th-circuit-decision [https://perma.cc/RAS5-VTJJ] ("We are not surprised by the decision of the U.S. 7th Circuit of Appeals. It has always been and is our intent to take our case to the U.S. Supreme Court where we believe we can get a favorable ruling for law-abiding gun owners in Illinois.").

290. *Bruen*, 142 S. Ct. at 2129–30.

where it must demonstrate that PICA comports with the United States's founding-era historical tradition of regulating "Arms."[291]

This Comment does not question, as some have, whether assault weapons are or should be considered "Arms" under the plain language of the Second Amendment;[292] rather, the questions posed in this Part are twofold: (1) are assault weapons commonly used for lawful self-defense and therefore entitled to Second Amendment protection,[293] and (2) are they sufficiently "dangerous and unusual" that they are subject to regulation analogous with historical tradition?[294] These interrelated questions necessarily form the basis of any *Bruen* analysis.

A. Assault Weapons Are Not Commonly Used for Lawful Self-Defense

Because there was no debate in *Bruen* that the appellants nor the handguns they sought to protect fell within the scope of the Second Amendment's text, the Court did not spell out the exact textual inquiry for identifying "Arms" in much detail.[295] In applying its test to the facts of the case, the *Bruen* Court's articulation—that no party was disputing that "handguns are weapons '*in common use*' *today for self-defense*"—indicated that the "Arms" the Second Amendment covers are those commonly used for self-defense, a limitation that coheres with the Court's repeated emphasis that self-defense is at the core of the individual right

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291. *Id.* at 2130.

292. *See* Bevis v. City of Naperville, 85 F.4th 1175, 1197, 1203 (7th Cir. 2023) (finding that the assault weapons and large-capacity magazines prohibited by PICA are not "Arms" under the plain language of the Second Amendment); *see also* Appellees City of Naperville and Jason Arres' Response in Opposition to Appellant's Opening Brief at 17–21, Nat'l Ass'n for Gun Rights v. City of Naperville (7th Cir. 2023) (No. 21-1353), 2023 WL 3435592, at *17–*21 [hereinafter Response of Appellees City of Naperville] (same). *But see* Reply in Support of Emergency Application for Injunction Pending Appellate Review at 6, Nat'l Ass'n for Gun Rights v. City of Naperville, 143 S. Ct. 2489 (2023) [hereinafter Support of Emergency Application], (No. 22A948), 2023 WL 4394521, at *6 ("The State argues that the banned firearms are not indisputably 'arms' within the Second Amendment's plain text. This is more than just incorrect; it defies all common sense.").

293. *Bevis*, 85 F.4th at 1198 ("There is no consensus on whether the common-use issue belongs at *Bruen* step one or *Bruen* step two."). The Seventh Circuit "assume[d] without deciding" that it was a step two inquiry, where the government bore the burden of proof. *Id.* Judge Brennan, in his dissent, affirmatively asserted that the common-use question is part of the history and tradition analysis. *Id.* at 1209 (Brennan, J., dissenting). This Comment takes no position on this question and addresses the common-use issue merely as an element which informs the overall *Bruen* test.

294. District of Columbia v. Heller, 554 U.S. 570, 627 (2008) (citations omitted) (recognizing that the sorts of weapons protected under the Second Amendment are those "in common use," a metric supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons"); *Bruen*, 142 S. Ct. at 2128 (citing *Heller*, the Court reiterated that historical prohibition against the carrying of dangerous and unusual weapons supported the notion that the Second Amendment protects the possession and use of weapons that are "in common use").

295. Brief of Everytown for Gun Safety as Amicus Curiae in Support of Defendants-Appellees and Intervening Appellee and Affirmance at 6 n.6, Bevis v. City of Naperville, 85 F.4th 1175 (7th Cir. 2023) (No. 23-1353), 2023 WL 3570415 [hereinafter Brief of Everytown for Gun Safety].

protected by the Second Amendment.[296] If that is the case, the question becomes how to quantify the frequency of weapons possession for self-defense purposes.[297]

Those challenging PICA rely consistently on an "industry estimate" released by the National Shooting Sports Foundation (NSSF) in 2022.[298] The NSSF estimated that there are more than twenty-four million assault weapons in circulation in the United States.[299] Challengers assert that because so many millions of assault weapons are in circulation, they must be in common use and, therefore, protected under the umbrella of the Second Amendment.[300] When offered as stand-alone data, however, this statistic, and others like it, fail to address or even acknowledge the second half of the phrase "in common use *for self-defense*."[301] Just because assault weapons may be considered popularly purchased, this does not equate with them being common for the use of lawful self-defense, which appears to be the actual threshold requirement for Second Amendment protection. The test set out by the Court looks to common use, not common ownership.[302]

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296. *Id.* (quoting *Bruen*, 142 S. Ct. at 2134) (emphasis added).

297. *See* Arthur Willinger, *Assault Weapons Bans After* Bruen, DUKE CTR. FOR FIREARMS L. (Aug. 22, 2022), https://firearmslaw.duke.edu/2022/08/assault-weapons-bans-after-bruen/ [https://perma.cc/HJ4K-KQFC] (positing that courts will no longer be able to presume that regulated weapons are protected by the Second Amendment and, as a result, courts will be forced to "grapple" with how to assess whether a weapon is in common use for self-defense—and what the practical reality of using assault weapons for self-defense really means).

298. *See* Complaint at ¶ 30, Barnett v. Raoul, (S.D. Ill. Dec. 22, 2023) (No. 3:23-cv-209), 2023 WL 374946; Emergency Application for Injunction Pending Appellate Review at 7–8, Nat'l Ass'n for Gun Rights v. City of Naperville, 143 S. Ct. 2489 (2023) (No. 22A948) (both citing the industry estimate in support of their argument that assault weapons are in common use). Judge McGlynn also cited this statistic in his decision to grant the preliminary injunction in *Barnett v. Raoul*. *See* Barnett v. Raoul, 671 F. Supp. 3d 928, 945 (S.D. Ill. 2023). Judge Brennan likewise cited the statistic in his dissent. *Bevis*, 85 F.4th at 1214.

299. *Commonly Owned: NSSF Announces Over 24 Million MSRs in Circulation*, NAT'L SHOOTING SPORTS FOUND. (July 20, 2022) [hereinafter *Commonly Owned*], https://www.nssf.org/articles/commonly-owned-nssf-announces-over-24-million-msrs-in-circulation/ [https://perma.cc/P3HB-M44Y]; Yablon, *supra* note 5 (noting that the NSSF uses the term "Modern Sporting Rifle" instead of "assault weapon").

300. *See* Brief of Everytown for Gun Safety, *supra* note 295, at 5–7 (explaining that the challengers failed to meet their burden of proving that assault weapons and large-capacity magazines are in common use).

301. *See* Yablon, *supra* note 5 ("Americans have purchased almost as many assault rifles as they have Nintendo Switch video game consoles, or copies of the book *How to Win Friends and Influence People*—successful products that are nonetheless nowhere near household items."); *see also Barnett*, 671 F. Supp. 3d at 945 (referencing a Fourth Circuit decision which found that the number of AR- and AK-style weapons manufactured and imported into the U.S. in 2012 was more than double the number of the most commonly sold vehicle in the US in the same year).

302. *See* Response of Appellees City of Naperville, *supra* note 292, at 19 ("The phrase 'in common use' in *Heller* does not simply refer to a weapon's prevalence in society, or the quantities manufactured or sold." (quoting District of Columbia v. Heller, 554 U.S. 570, 627 (2008))).

Initially, there are questions about the validity of this statistic in the first place; not only does the NSSF estimate include the numbers of weapons produced for use by law enforcement, the NSSF has not provided the methodology by which it reached its final numbers.[303] Instead, NSSF only cites their source data and its own "NSSF research."[304] It is very difficult—though not impossible—to obtain accurate data regarding gun ownership in America because the federal government is prohibited from collecting firearms sales records in any central repository; "no definitive database of gun sales exists" in the United States, despite the fact that federal law requires licensed firearms dealers to maintain records of gun sales for the life of their business.[305] Additionally, private, unlicensed sellers are not required to maintain any records of their sales whatsoever.[306] Without clear means or an explanation to support the method that resulted in the NSSF's twenty-four million estimate, it is a figure that cannot be trusted on its face.

Further, the NSSF estimate fails to consider the greater landscape of firearms possession in the United States. Assuming arguendo the NSSF's twenty-four million estimate could be accurate, it is a drop in the bucket when compared to nationwide possession of all firearms. According to the Small Arms Survey, a Swiss organization dedicated to reducing illicit arms flows and armed violence, there are over 393 million firearms in civilian possession in the United States, meaning that assault weapons comprise just 6.1 percent of the total number of firearms in the United States.[307] Using NSSF's own data, which in 2020 estimated that the

303. *See* Yablon, *supra* note 5 ("'The NSSF gave no methodology,' noted Aaron Karp . . . ."); *see also Commonly Owned*, *supra* note 299 (failing to indicate the method by which the NSSF arrived at its listed estimates).

304. *See Commonly Owned*, *supra* note 299 (stating that its estimate is derived from its own research as well as from the Bureau of Alcohol, Tobacco, Firearms and Explosives and the US International Trade Commission, in cooperation with manufacturers, importers, and exporters of certain types of assault weapons).

305. Harmeet Kaur, *What Studies Reveal About Gun Ownership in the US*, CNN (June 2, 2022 4:13 PM), https://www.cnn.com/2022/06/02/us/gun-ownership-numbers-us-cec/index.html [https://perma.cc/LQF3-WEGP]; *see also Maintaining Records of Gun Sales*, GIFFORDS L. CTR., https://giffords.org/lawcenter/gun-laws/policy-areas/gun-sales/maintaining-records/ [https://perma.cc/N3R2-KMMT] (last visited June 1, 2024) (noting that, without a centralized database of all firearms sales, gun tracing is a slow and cumbersome process). Peer countries such as Canada, Australia, Israel, and the United Kingdom all utilize some form of firearms registration. Jonathan Masters, *U.S. Gun Policy: Global Comparisons*, COUNCIL ON FOREIGN RELS. (June 10, 2022), https://www.cfr.org/backgrounder/us-gun-policy-global-comparisons#chapter-title-0-5 [https://perma.cc/KEY7-D9YF].

306. *Maintaining Records of Gun Sales*, *supra* note 305.

307. *Global Firearms Holdings*, SMALL ARMS SURVEY, https://www.smallarmssurvey.org/database/global-firearms-holdings [https://perma.cc/V6UW-2G3B] (last visited June 1, 2024) (Interactive Map Illustration); *Vision and Mission*, SMALL ARMS SURVEY, https://www.smallarmssurve

number of overall firearms possessed by civilians was 433.9 million, that would reduce the percentage of assault weapons to approximately 5.5 percent.[308] This data suggests that even among gun owners, assault weapons are not commonly owned.

The NSSF estimate also does not provide any insight into who owns assault weapons. On the whole, gun ownership is most common among Caucasians and among men, with 40 percent of men stating they owned a gun compared to 25 percent of women.[309] Republicans, particularly conservative Republicans, are also "far more likely" than Democrats to say they own a gun, with 51 percent of conservative Republicans reporting that they own a gun as compared to 38 percent of "moderate and liberal" Republicans, 24 percent of "conservative and moderate" Democrats, and 16 percent of liberal Democrats.[310] While less data has been collected on the narrower topic of assault weapons ownership, the *Washington Post* and "Ipsos" conducted survey of AR-15 owners specifically, citing the AR-15 as the "best-selling rifle in the United States."[311] This data, limited as it may be, at least suggests that AR-15 ownership, if not assault weapon ownership, is concentrated among a niche group, not widely nor commonly owned by a representative population of either gun owners or Americans.

The NSSF data, standing alone, also fails to account for overlapping gun ownership.[312] The Small Arms Survey estimates that there are 120

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y.org/who_we_are/vision_mission [https://perma.cc/TAB7-PZNX] (last visited June 1, 2024). The City of Naperville estimated that the NSSF's 24 million figure approximated "just 5 percent of the approximately 462 million firearms in circulation nationwide." Response of Appellees City of Naperville, *supra* note 292, at 18.

308. *Firearm Production in the United States with Firearm Import and Export Data*, NAT'L SHOOTING SPORTS FOUND. 18, (2020), https://www.nssf.org/wp-content/uploads/2020/11/IIR-2020-Firearms-Production-v14.pdf [https://perma.cc/348Q-TN65].

309. Carroll Doherty et al., *For Most U.S. Gun Owners, Protection is the Main Reason They Own a Gun*, PEW RSCH. CTR. (2023), https://www.pewresearch.org/wp-content/uploads/sites/20/2023/08/PP_2023.08.16_gun-owners_REPORT.pdf [https://perma.cc/DPG6-6CVN] (showing that 38 percent of gun owners identify as white versus 24, 20, and 10 percent identifying as Black, Hispanic, and Asian, respectively).

310. *Id.*

311. Emily Guskin et al., *Why Do Americans Own AR-15s?*, WASH. POST (Mar. 27, 2023), https://www.washingtonpost.com/nation/interactive/2023/american-ar-15-gun-owners/ [https://perma.cc/7NPY-3TMR]. The *Washington Post* identified its poll as "one of the most detailed nationally representative surveys to date focused on the opinions of AR-15 owners." *Id.* Here, AR-15 ownership was even more disproportionate: 81 percent of AR-15 owners were men and 74 percent were white, as compared to 11 percent Hispanic, 9 percent Black, and 5 percent other. *Id.* Ipsos is a multinational consulting firm that conducts market research. IPSOS, https://www.ipsos.com [https://perma.cc/3DZG-Q97P] (last visited May 29, 2024).

312. Response of Appellees City of Naperville, *supra* note 292, at 18.

guns per 100 people in the United States.[313] Studies show that a majority of those guns are owned by a minority of people.[314] A 2017 study showed that respondents who owned guns owned an average of 4.8 firearms; approximately half of gun owners reported owning one to two guns, accounting for 14 percent of the guns in the United States, while those who owned ten or more owned 39 percent of the gun stock.[315] "Put another way, half of the gun stock (approximately 130 million guns) is owned by approximately 86 percent of gun owners, and the other half is owned by 14 percent . . . or 3 percent of the adult US population."[316] Additionally, while national polls indicate that gun ownership has declined modestly since the 1970s, FBI background checks demonstrate that gun purchases are higher than ever, suggesting that, while the share of gun owners is decreasing, those who already own guns are buying even more of them.[317] Ownership of assault weapons is unusually concentrated:

> [O]n average, each civilian owner of an assault weapon owns 3.8 such weapons, and the total estimated number of people who own assault weapons is only 6.4 million—less than 2 percent of the current population of approximately 330 million Americans. There are 124 million households in America today; even on the demographically dubious assumption that no assault weapon owner shares a household with another owner, that would mean only 5 percent of American households own an assault weapon, less than one-tenth of the 50 to 60 percent of household ownership considered "common" in the Founding era.[318]

Altogether, when the data is contextualized, assault weapons cannot be said to be in common use from a purely numerical point of view.

Even if the Court were to find the twenty-four million estimate worthy of some consideration, this number alone does nothing to prove that popular possession of assault weapons is related to lawful self-defense in any way. "[O]wnership and manufacture estimates prove nothing about the relevant question: whether the instruments regulated by [PICA] are commonly used for self-defense."[319] What, then, is the proper inquiry?[320]

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313. *Global Firearms Holdings*, *supra* note 307; *see also* Kaur, *supra* note 305 ("There are about 393 million privately owned firearms in the US, according to an estimate by the Switzerland-based Small Arms Survey—or in other words, 120 guns for every 100 Americans.").

314. Kaur, *supra* note 305.

315. Deborah Azrael et al., *The Stock and Flow of U.S. Firearms: Results from the 2015 National Firearms Survey*, 3 RUSSEL SAGE FOUND. J. SOC. SCIS. 38, 43 (2017); Kaur, *supra* note 305.

316. Azrael et al., *supra* note 315; Kaur, *supra* note 305.

317. Kaur, *supra* note 305 (citing data published in 2016).

318. Response of Appellees City of Naperville, *supra* note 292, at 18 (citations omitted).

319. Brief of Amicus Curiae Giffords Law Center to Prevent Gun Violence in Support of Defendants-Appellees and Intervening Appellee at 12, Bevis v. City of Naperville, No. 23-1353 (7th Cir. May 10, 2023), 2023 WL 3570414, at *12 [hereinafter Brief of Giffords Law Center].

320. Willinger, *supra* note 297.

It certainly does not seem as though assault weapons are the practical choice, or even a suitable one, to defend oneself. The *Heller* Court found that a handgun's utility is part of what made it "the quintessential self-defense weapon."[321] Among other considerations, due to their size, handguns are "easier to store" in a readily accessible location in the event of an emergency, they are not "easily . . . wrestled away by an attacker," they do not require the arm or "upper-body strength" a long gun might necessitate, and they "can be pointed at" an intruder or "burglar with one hand while the other dials the police."[322] Assault weapons, on the other hand, bear few, if any, of these hallmarks. In fact, as Illinois pointed out in its brief to the Seventh Circuit, the very features that make assault weapons effective military weapons make them a poor fit for typical individual self-defense scenarios.[323] Many require two hands to aim and shoot effectively, meaning that it is impossible to use the weapon defensively while simultaneously calling 911 or assisting others in an emergency, options that the *Heller* Court found inextricably tied to the popular appeal of a handgun as a means of self-defense.[324] Similarly, smaller magazines, as compared to large-capacity magazines, are preferable for self-defense because they are easier to carry, shoot, and conceal.[325]

Additionally, the features of assault weapons were designed for military use in combat, not for self-defense of the home or person.[326] While technically manufactured for the civilian market, assault weapons and their accompanying magazines were designed as offensive weapons of war, notable for their long range, rapid rate of fire, and their destructive capabilities.[327] Features such as the ability to fire "high-velocity rounds . . . at a high rate of delivery" and maintaining "a high degree of accuracy at long range" are unnecessary for individual self-defense, where most conflict which might "involv[e] gunfire" occurs at "close range."[328] In fact, these features are inherently dangerous in a self-

321. District of Columbia v. Heller, 554 U.S. 570, 629 (2008).

322. *Id.*

323. Brief of Intervening Appellee at 19, *Bevis*, No. 23-1353 (7th Cir. May 3, 2023), 2023 WL 3435590, at *19 ("In fact, the very features that render assault weapons and LCMs effective military weapons—including their high rate of fire, long-range and sustained accuracy, and destructive capabilities—make them a poor fit for typical individual self-defense scenarios . . . .").

324. Response of Appellees City of Naperville, *supra* note 292, at 19; Brief of Intervening Appellee, *supra* note 323, at 24.

325. Brief of Intervening Appellee, *supra* note 323, at 24–25.

326. *Id.* at 44.

327. *Id.* at 19; *Assault Weapons*, VIOLENCE POL'Y CTR., https://vpc.org/regulating-the-gun-industry/assault-weapons/ [https://perma.cc/F2RZ-QMTD] (last visited June 1, 2024).

328. Response in Opposition to Emergency Application for Injunction Pending Appellate Review at 20, Nat'l Ass'n for Gun Rights v. City of Naperville, 143 S. Ct. 2489 (2023) (No. 22A948),

defense scenario, particularly within a home, as the rounds assault weapons fire pose a serious risk of blasting through home construction materials, posing a life-threatening danger to other individuals within the home or to neighbors in adjoining units.[329] "[I]t is 'widely accepted' that handguns and shotguns, which remain legal to manufacture and sell in Illinois, are preferable for self-defense."[330] NSSF maintains that assault weapons, while appearing visually similar to military rifles, are different from military weaponry because they fire only one round with each pull of the trigger.[331] However, organizations such as the Violence Policy Center assert that this is "a distinction without a difference," as the actual structure and mechanisms of assault weapons closely mirror military firearms and allow even novice shooters to fire dozens of rounds within seconds.[332] The similarities between certain assault weapons and military M16s, which are unprotected under the Second Amendment, was one of the reasons the Seventh Circuit found that the assault weapons and high-capacity magazines prohibited under PICA were likewise not protected "Arms" in *Bevis*.[333] The court in *Bevis* held that because assault weapons are more akin to machineguns (already banned in the U.S.[334]) and "military-grade weaponry" than they are to the multitude of firearms that are already used for "individual self-defense," such as handguns, the Illinois

2023 WL 3325849 [hereinafter Opposition to Emergency Application for Injunction]; Brief of Intervening Appellee, *supra* note 323, at 23–24.

329. Opposition to Emergency Application for Injunction, *supra* note 328, at 19; *see also* Brief of Intervening Appellee, *supra* note 323, at 23–24 (arguing that handguns and shotguns are preferred for self-defense in part because "there is a 'low probability of over penetration' resulting in unintended death or injury to others").

330. Opposition to Emergency Application for Injunction, *supra* note 328, at 20; *see also* Brief of Intervening Appellee, *supra* note 323, at 25 ("Indeed, it is 'widely accepted' that handguns and shotguns are preferable for self-defense.").

331. *Modern Sporting Rifle Pocket Fact Card*, NAT'L SHOOTING SPORTS FOUND., https://www.nssf.org/wp-content/uploads/2022/08/MSRFactCard-22.pdf [https://perma.cc/X5MW-2R2E].

332. *Assault Weapons*, *supra* note 327; *see also Assault Weapons and Large Capacity Magazines*, EDUC. FUND TO STOP GUN VIOLENCE, https://efsgv.org/learn/policies/assault-weapons-and-large-capacity-magazines/ [https://perma.cc/Y6U7-P9NY] (last visited June 1, 2024) (describing various features of assault rifles that "mirror military firearms" which are "unnecessary for hunting, target shooting, or home defense").

333. Bevis v. City of Naperville, 85 F.4th 1175, 1195–96 (7th Cir. 2023) (citing *Heller*'s confirmation that M16s are not covered by the Second Amendment and noting that the only meaningful distinction between an AR-15 and an M16 is that the AR-15 is a semiautomatic, instead of fully automatic, weapon—a distinction made less meaningful by the simple modifications a user could make to convert the weapon into a fully automatic one).

334. 18 U.S.C. § 922(a)(4), (b)(4), (o)(1); *see also Machine Guns, Trigger Activators & 50 Caliber Weapons*, GIFFORDS L. CTR., https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/machine-guns-50-caliber/#footnote_0_5658 [https://perma.cc/3XGG-5CFL].

legislature was entitled to conclude that such weapons do not enjoy Second Amendment protection and "may be regulated or banned."[335]

Furthermore, it is exceedingly rare to find documented use of an assault weapon actually being used for self-defense.[336] Estimates about defensive gun use generally vary wildly, with little consensus about how frequently guns are actually used for self-defense.[337] While it is difficult to track down to the specific type of gun used for self-defense, the Gun Violence Archive has documented only 195 instances of defensive use with an assault weapon, from present day back to its founding more than ten years ago.[338] These results could arguably be narrowed even further by removing (1) incidents where someone other than the immediate victim used an assault weapon; (2) incidents where a question was raised as to whether the weapon was actually used or who it belonged to; and (3) incidents where the weapon was used by someone who was prohibited, by age or otherwise, from possessing an assault weapon.[339] Firearms may be regularly deployed as a means of self-defense, and the Court has already found that handguns are constitutionally protected for this purpose, but there appears to be limited complete and reliable data

335. *Bevis*, 85 F.4th at 1195, 1197 ("Based on the record before us, we are not persuaded that the AR-15 is materially different from the M16. *Heller* informs us that the latter weapon is not protected by the Second Amendment, and therefore may be regulated or banned. Because it is indistinguishable from that machinegun, the AR-15 may be treated in the same manner without offending the Second Amendment.").

336. Jennifer Mascia, *How Often Are AR-Style Rifles Used for Self-Defense?*, TRACE (Aug. 29, 2023), https://www.thetrace.org/2023/08/ar15-rifle-self-defense-shooting-data/ [https://perma.cc/WX6Y-VYYC].

337. Accurate reporting on defensive gun use is made difficult because there is no consensus on what the actual definition of defensive gun use is; some common factors, however, include protection against humans, gun use by civilians, and the actual use of a gun, such as visual display or verbal threat. *The Challenges of Defining and Measuring Defensive Gun Use*, RAND CORP. (Mar. 2, 2018) [hereinafter *Challenges*], https://www.rand.org/research/gun-policy/analysis/essays/defensive-gun-use.html [https://perma.cc/7R3J-685E]; Mascia, *supra* note 336. Although defensive gun use has been subject to extensive study, there is no consensus regarding the definition of "defensive gun use." *Challenges*, *supra*. Additionally, differences in the methodology of these studies, ranging from variances in the scope and sample sizes of surveys to response rates, result in inconsistent ranges in the reported estimates. *Id.* Some studies estimate a low figure of 116,000 incidents annually, while others report values above 2.2 million annually. *Id*. The true answer is likely somewhere in between. *Id.*

338. *Search Results (Incidents)*, GUN VIOLENCE ARCHIVE, https://www.gunviolencearchive.org/query/240684ae-12f6-4201-ac83-ef7e6f1d9687 [https://perma.cc/JB3W-6P6Q] (last visited June 1, 2024) (defining an assault weapon as "AR-15, AK-47, and ALL variants defined by law enforcement"). The *Gun Violence Archive* is an independent data collection and research group founded in 2013 and dedicated to providing accurate and comprehensive information about gun violence in the United States. *Id.* An identical search, which yielded 190 results, was conducted by the *Trace* in August of 2023. Mascia, *supra* note 336.

339. Mascia, *supra* note 336. When the *Trace* did eliminate such incidents, it was left with only fifty-one instances of defensive assault weapon use in a nine-and-a-half-year span, averaging out to approximately five incidents per year. *Id.*

supporting the assertion that assault weapons in particular are used at all for self-defense, let alone commonly so.[340]

Finally, the most significant data sets that may support the assertion that assault weapons are in common use for lawful self-defense are arguably those surveys that track respondents' own statements about why they own an assault weapon. The *Washington Post* survey of AR-15 owners revealed that 33 percent of those surveyed claimed they owned an AR-15-style weapon for purposes of self-defense; of the fifteen categories of possible answers, self-defense had the greatest density of affirmative responses, with no other category of answer exceeding 15 percent.[341] Another survey of AR-15-style weapons owners found that, while 66 percent of respondents cited recreational shooting as the number one reason they owned such a weapon, home defense came in a close second at 61.9 percent.[342] However, while this interest is worth acknowledging, the standard that the Court has set is not *interest* "in common use" for self-defense but rather "*in* common use" for self-defense.[343] Simply expressing a desire to own an assault weapon for self-defense, no matter how earnest that intent may be, does not overcome the reality that assault weapons are both impractical for self-defense and are very rarely actually utilized for that purpose.

The Court has held, without defining, that the Second Amendment protects those "Arms" that are in common use for self-defense.[344] Empirical data suggests that, despite appearances that there are a purportedly high number of assault weapons in circulation, these firearms are actually owned by a small, non-diverse group of people. Furthermore, assault weapons are impracticable for self-defense, and appear to be very rarely used for that purpose, as any intent to do so is not borne out in reality. Therefore, under any of these inquiries, it cannot be said that assault weapons are commonly used for self-defense.

B. Assault Weapons Are "Dangerous and Unusual"

Should the plaintiffs overcome the first part of *Bruen* analysis, the burden would shift to the state of Illinois, which would have to demonstrate that PICA comports with the United States's historical tradition of

340. District of Columbia v. Heller, 554 U.S. 570, 629–30 (2008).

341. Guskin et al., *supra* note 311.

342. William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* 33–34 (Geo. McDonough Sch. of Bus. Rsch. Paper No. 4109494) (May 13, 2022). Interestingly, defense outside of the home was only cited by 34.6 percent of respondents. *Id.*

343. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2128, 2143 (quoting *Heller*, 554 U.S. at 627; United States v. Miller, 307 U.S. 174, 179 (1939)).

344. *Heller*, 554 U.S. at 627.

regulating arms.[345] As the Court acknowledged in *Bruen*, "[t]he regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868."[346] Weapons and regulations that implicate "unprecedented social concern" or that represent "dramatic technological changes" require that reviewing courts take a more nuanced approach when holding up a modern-day regulation against those from our nation's past.[347] When viewed in this light, PICA clearly comports with our history and tradition of regulating "dangerous and unusual" weapons—a limitation on the Second Amendment the Court has already sustained in *Heller*.[348]

At the Founding, "Americans typically owned muskets for militia service and fowling pieces to hunt birds and control vermin."[349] These were "single-shot firearms" the required manual reloading "through the muzzle before each shot."[350] These Revolutionary-era muskets (1) "could hold just one round at a time;" (2) "had a maximum accurate range of 55 yards;" (3) "had a muzzle velocity of approximately 1,000 feet per second; and" (4) "took half a minute to load a single shot."[351] "By contrast, a typical AR-15 rifle: (i) can hold 30 rounds" of ammunition, "(ii) can shoot accurately from around 400 yards," "(iii) attains a muzzle velocity of around 3,251 feet per second" and "(iv) can be reloaded with full magazines in as little as 3 seconds."[352] "Reliable rifles capable of firing more than one round . . . did not appear in significant numbers until after the Civil War, and even then lacked semiautomatic capabilities."[353] Advances in technology "have allowed for the near-instantaneous reloading

345. *Bruen*, 142 S. Ct. at 2126.

346. *Id.* at 2132.

347. *Id.*

348. *Heller*, 554 U.S. at 627 (acknowledging that an important limitation on the right to keep and bear arms is the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons'"); *see also Bruen*, 142 S. Ct. at 2128.

349. Opposition to Emergency Application for Injunction, *supra* note 328, at 24–25; Brief of Intervening Appellee, *supra* note 323, at 37.

350. Response of Appellees City of Naperville, *supra* note 292, at 18, 33.

351. Brief of Giffords Law Center, *supra* note 319, at 8; *see also* Christopher Ingraham, *What 'Arms' Looked Like When the 2nd Amendment Was Written*, WASH. POST (June 13, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/06/13/the-men-who-wrote-the-2nd-amendment-would-never-recognize-an-ar-15/ [https://perma.cc/M2FV-B9QV] (comparing a typical Revolutionary-era musket with a modern AR-15 and finding that, where the musket had a magazine capacity of one round, an effective rate of fire of three rounds per minute, a muzzle velocity of one thousand feet per second, and a maximum accurate range of fifty meters, the AR-15 had a magazine capacity of thirty rounds, and effective rate of fire of forty-five rounds per minute, a muzzle velocity of 3,260 feet per second, and a maximum accurate range of 550 meters).

352. Brief of Giffords Law Center, *supra* note 319, at 8.

353. Opposition to Emergency Application for Injunction, *supra* note 328, at 24–25.

of an assault weapon," making it "materially different" than the weapons of these eras.[354]

Assault weapons are dangerous and unusual, both in their capabilities and the injuries they cause. Assault weapons like the AR-15—which the NRA markets as "America's Rifle"—were originally developed as weapons of war during the Cold War, and versions of the AR-15 have been "standard-issue" in the military in every war since Vietnam.[355] In response to declining gun sales in the 1980s, gun manufacturers began marketing assault weapons that were virtually identical to these military weapons to the American civilian public, with the only modification being their conversion from automatic to semiautomatic in order to sidestep federal law prohibiting automatic weapons sales.[356] The features of modern-day assault weapons, which mirror their military counterparts, make them exceptionally dangerous as offensive weapons.[357] They are capable of firing high-powered rounds designed for "maximum wound effect," with bullets that travel nearly three times the speed of sound (as compared with bullets fired from a handgun, which travel at approximately 800 miles per hour), they are exceptionally lightweight and highly maneuverable with low recoil, and they are extremely accurate from long distances.[358]

The muzzle velocity—the speed of a bullet at the moment it leaves the muzzle of a gun—of assault weapons is also four times greater than that of a handgun; each round fired from an assault weapon inflicts exponentially greater harm than that caused by a handgun.[359] Bullets fired by a handgun will typically travel in a straight line and cause clear entrance

354. *Id.* at 25.

355. Tom Dickinson, *All-American Killer: How the AR-15 Became Mass Shooters' Weapon of Choice*, ROLLING STONE (Feb. 22, 2018), https://www.rollingstone.com/politics/politics-features/all-american-killer-how-the-ar-15-became-mass-shooters-weapon-of-choice-107819 [https://perma.cc/R6GE-KB6V]; Response of Appellees City of Naperville, *supra* note 292, at 22; Brief of Giffords Law Center, *supra* note 319, at 13–14.

356. *Assault Weapons and Large Capacity Magazines*, *supra* note 332; Brief of Giffords Law Center, *supra* note 319, at 14 ("Besides the capability of automatic fire, the AR-15 is functionally the same as the M16, an automatic weapon designed for military combat.").

357. Response of Appellees City of Naperville, *supra* note 292, at 22 (citation omitted); Brief of Giffords Law Center, *supra* note 319, at 14.

358. Response of Appellees City of Naperville, *supra* note 292, at 22; Brief of Giffords Law Center, *supra* note 319, at 15. *See also* Scott Pelley, *What Makes the AR-15 Style Rifle the Weapon of Choice for Mass Shooters?*, CBS NEWS (June 23, 2019), https://www.cbsnews.com/news/ar-15-used-mass-shootings-weapon-of-choice-60-minutes-2019-06-23/ [https://perma.cc/BQQ9-H9W2] (describing how a handgun bullet travels at about 800 miles an hour).

359. *Muzzle Velocity*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/muzzle velocity [https://perma.cc/CA2L-A4F5] (last visited June 1, 2024); *Prohibit Assault Weapons*, EVERYTOWN FOR GUN SAFETY, https://www.everytown.org/solutions/assault-weapons/ [https://perma.cc/T4LY-V5WL] (last visited June 1, 2024).

and exit wounds of roughly the same size.[360] The injuries that assault weapons cause, however, are catastrophic.[361] "In describing the difference between gunshot wounds inflicted by a semiautomatic rifle and a 9mm handgun, Peter Rhee, a trauma surgeon at the University of Arizona, stated: 'One looks like a grenade went off in there," while "[t]he other looks like a bad knife cut."[362] Bullets fired from assault weapons can "yaw" or "tumble" before striking a person, meaning the bullet does not travel in a linear path and the tissue damage its impact causes is greater.[363] This impact is particularly devastating for children, given their diminutive size and the relative proximity of their vital organs.[364]

Despite the fact that assault weapons are owned by a minority of the population, that percentage still likely reflects numbers in the millions.[365] The proliferation of assault weapons has put weapons of war in the hands of civilians, with unusually catastrophic effects, and their dangerous capabilities, coupled with their power and rapidity of fire have made assault weapons the weapon of choice for mass public shooters.[366] According to the state of Illinois:

> The first known mass shooting by a single individual resulting in 10 or more deaths occurred in 1949; it took 17 years (until 1966) for another comparably lethal shooting to occur, another nine (to 1975) before the third such shooting, and an additional seven before the fourth (in 1982). But in recent years—and especially since the expiration of the federal assault weapons ban in 2004—the frequency and cumulative lethality

360. Mary Kekatos, *Why Semi-Automatic Rifles Like Those Used in Recent Shootings Can Cause So Much Damage*, ABC 7 EYEWITNESS NEWS (Chi.) (Apr. 11, 2023), https://abc7.com/why-ar15-semi-automatic-weapons-dangerous/13051721/ [https://perma.cc/S33S-LGJW].

361. Brief of Giffords Law Center, *supra* note 319, at 15 ("When traveling through the body, bullets fired from semiautomatic rifles cause 'cavitation,' whereby a swatch of tissue several inches from the bullet's path ripples away from the bullet and then settles back, creating a large cavity. Bullets do not need to hit an artery to cause catastrophic bleeding. Exit wounds can be the size of oranges.").

362. *Id.* The *Washington Post* developed a 3D model demonstrating the physical carnage caused by a bullet fired from an AR-15. N. Kirkpatrick et al., *The Blast Effect: This is How Bullets from an AR-15 Blow the Body Apart*, WASH. POST (Mar. 27, 2023), https://www.washingtonpost.com/nation/interactive/2023/ar-15-damage-to-human-body [https://perma.cc/5VS9-PADT] ("The AR-15 fires bullets at such a high velocity—often in a barrage of 30 or even 100 in rapid succession—that it can eviscerate multiple people in seconds. A single bullets lands with a shock wave intense enough to blow apart a skull and demolish vital organs. The impact is even more acute on the compact body of a small child.").

363. Kekatos, *supra* note 360.

364. Opposition to Emergency Application for Injunction, *supra* note 328, at 21; Kirkpatrick et al., *supra* note 362; Kekatos, *supra* note 360.

365. *See* Guskin et al., *supra* note 311 (estimating that one in twenty, or sixteen million Americans, own an AR-15); *see also supra* notes 347, 349–50 and accompanying text (analyzing the NSSF's estimate that there are twenty-four million assault weapons in circulation in the US).

366. Response of Appellees City of Naperville, *supra* note 292, at 23; Opposition to Emergency Application for Injunction, *supra* note 328, at 6.

> of mass shootings has increased dramatically. From 1949 to 2004, there was "a total of 10 mass shootings resulting in double-digit fatalities." Since 2004, however, there have been 20 such mass shootings, and the average rate of such shootings "has increased over six-fold." And when the definition of mass shootings includes six or more casualties (as opposed to 10), there were a total of 93 between 1991 and 2022.[367]

All told, mass public shootings are occurring more frequently, and they are becoming more deadly for the American public: half of the thirty-six deadliest mass shootings in the past 120 years have occurred just in the last decade.[368]

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367. Brief of Intervening Appellee, *supra* note 323, at 39 (citations omitted). As with many other terms, there are inconsistencies in the definition of mass shooting across publications. Josiah Bates, *What Counts as a Mass Shooting? Why So Much of America's Gun Violence Gets Overlooked*, TIME (Mar. 30, 2021, 4:59 PM), https://time.com/5947893/what-constitutes-a-mass-shooting/ [https://perma.cc/RWN4-SZJC]. While the FBI does not define "mass shooting," it defines a "mass murderer" as someone who kills four or more people in a single location. *Id.* By extension, the most accepted definition of a mass shooting is a single incident in which four or more people are shot or killed. *Id.* This definition is used by several leading organizations in the area of firearms-related violence, including the Gun Violence Archive, the Giffords Law Center, and Everytown for Gun Safety. *Id.*; KROUSE & RICHARDSON, MASS MURDER, *supra* note 4, at i; *Mass Shootings in the United States*, EVERYTOWN FOR GUN SAFETY, https://everytownresearch.org/mass-shootings-in-america/ [https://perma.cc/46HF-37DF] (last visited June 1, 2024).

368. *Key Findings*, *supra* note 4. As the frequency of mass public shootings has increased, so too has the incidence of assault weapons in their perpetration. *Id.* The Violence Prevention Projection, a nonpartisan research-based nonprofit that tracks mass shootings, provides a comprehensive database of mass public shootings in the United States. *About Us*, VIOLENCE PROJECT, https://www.theviolenceproject.org/about-us/ [https://perma.cc/X9WB-JUV7] (last visited June 1, 2024). The *Violence Project*'s database tracks mass shooters from 1966 to present day. *Methodology*, VIOLENCE PROJECT, https://www.theviolenceproject.org/methodology/ [https://perma.cc/HP4X-Q6RR] (last visited June, 2024) (defining mass shooting as "a multiple homicide incident in which four or more victims are murdered with firearms—not including the offender(s)—within one event, and at least some of the murders occurred in a public location or locations in close geographical proximity (e.g., a workplace, school, restaurant, or other public settings), and the murders are not attributable to any other underlying criminal activity or commonplace circumstance (armed robbery, criminal competition, insurance fraud, argument, or romantic triangle)." (quoting KROUSE & RICHARDSON, MASS MURDER, *supra* note 4, at i)). This means that the *Violence Project* excludes most domestic homicides, as well as instances of gang or other criminal-related violence. *Id.* Handguns have been used in 78 percent of all mass public shootings, while assault weapons have only been used in 28 percent—however, to read this data without its proper context would be an error. Sharon Shahid & Megan Duzor, *VOA Special Report, History of Mass Shooters* (2021), https://projects.voanews.com/mass-shootings/ [https://perma.cc/GF8N-LCW5]; *Key Findings*, *supra* note 4 (documenting that fifty-five of the 193 mass public shootings to have taken place since 1966 were perpetrated with assault weapons). In many mass public shootings, perpetrators arm themselves with multiple weapons. Mascia, *supra* note 336. For instance, of those 28 percent of shooters who used an assault weapon, 73 percent of those perpetrators also carried a handgun. *Id.* Additionally, the prevalence of assault weapons in connection with mass public shootings has steadily risen since the federal ban expired in 2004. *Key Findings*, *supra* note 4. From 1966 through 2009, the percentage of mass public shootings in which assault weapons were used ranged from 0 to 26 percent. *Id.* From 2010 to 2019, however, assault weapons have been used in fifteen out of twenty-five mass public shootings, or 34 percent, and from just 2020 through to the present day, assault

Considering the noted public reticence to purchase assault weapons when they first hit the market in the 1980s,[369] that they were banned at the federal level until 2004, and that they have been responsible for sixty percent of the mass public shootings that have occurred in the past four years alone, assault weapons and their proliferation are the source of a sudden, dramatic and unprecedented increase in violence and terror ripe for government regulations such as PICA—so long as those regulations comport with *Bruen*'s "historical tradition" standard. As the *Bruen* Court pointed out, the analogical reasoning required does not mandate that the government produce an exact historical twin to support its proposed regulation; a historical regulation may still be sufficiently analogous to pass constitutional muster even if it is not a "dead ringer."[370] Important considerations when making this comparison include, but are not limited to, "how and why the regulations burden a law-abiding citizen's right to armed self-defense."[371] This nuanced approach, then, allows for governments to find a comparable law to support their modern-day regulation, based in attempts to address a comparable problem, such as the significant threat a new weapon poses to the public at large.[372]

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weapons have been used in fifteen out of twenty-five mass public shootings, or a whopping 60 percent. *Id.* Mass public shootings committed with assault weapons also result in high lethality: one estimate even goes so far as to assert that "an assailant with an assault rifle is able to kill and injure twice the number of people compared to an assailant with a non-assault rifle or handgun." Brief of Intervening Appellee, *supra* note 323, at 40 (citation omitted). Half of the deadliest mass public shootings have been committed with assault rifles. *Key Findings*, *supra* note 4. This data is borne out from other sources as well, including one study that estimated that assault weapons accounted for nearly 86 percent of all mass shooting fatalities from 1981 to 2017. *Assault Weapons and High-Capacity Magazines*, EVERYTOWN FOR GUN SAFETY 1 (2019), https://everytownresearch.org/wp-content/uploads/sites/4/2020/07/EFGV02_Assault-Weapons-and-High-Capacity-Magazines_Rd2_6-1.pdf [https://perma.cc/U2RK-8XE9] (citing Charles DiMaggio et al., *Changes in US Mass Shooting Deaths Associated with the 1994–2004 Federal Assault Weapons Ban: Analysis of Open-Source Data*, 86 J. TRAUMA & ACUTE CARE SURGERY 11 (2019)).

369. Todd C. Frankel et al., *The Gun That Divides a Nation*, WASH. POST. (Mar. 27, 2023), https://www.washingtonpost.com/nation/interactive/2023/ar-15-america-gun-culture-politics [https://perma.cc/8CCJ-9REC] ("The AR-15 wasn't supposed to be a bestseller . . . [F]ew gunmakers saw a semiautomatic version of the rifle—with its shrouded barrel, pistol grip, and jutting ammunition magazine—as a product for ordinary. It didn't seem suited for hunting. It seemed like overkill for home defense . . . . The [NRA] and other industry allies were focused on promoting traditional rifles and handguns. Most gun owners also shunned the AR-15 . . . 'We'd have NRA members walk by our booth and give us the finger,' said Randy Luth, the founder of . . . one of the earliest companies to market AR-15s.").

370. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133 (2022).

371. *Id.* at 2132–33 ("[W]hether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*' considerations when engaging in analogical inquiry." (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010))).

372. Response of Appellees City of Naperville, *supra* note 292, at 29.

Given that assault weapons are the result of dramatic changes in firearms technology as compared to the Founding, and that assault weapons are more and more frequently being used to perpetrate mass public shootings, something that can only be described as an unprecedented social concern, a nuanced approach is appropriate when looking to history to find historical analogues for the regulations promulgated in PICA.[373] Rising to the occasion, parties before the Seventh Circuit and the District Courts marshaled a host of compelling historical analogues from a number of the historical eras identified by the Court in *Bruen* as pertinent to its review of the law at issue there.[374]

For example, in the early days of the United States and through the period of the Second Amendment's ratification, even though firearms violence was not a significant social problem due to the technological limitations of guns at the time, laws were still enacted to restrict particularly dangerous weapons, especially when they were associated with interpersonal violence.[375] In the late eighteenth and early nineteenth centuries, there were widespread bans on the carrying of blunt instruments such as clubs and other melee weapons, which were frequently used in fights.[376] When novel and dangerous ways of using firearms did develop, legislatures responded accordingly, with eight states outlawing the use of trap guns due to the likelihood that they would kill or injure innocent people.[377] Bowie knives were also strictly regulated because they were viewed as being especially dangerous since they were specifically designed for fighting.[378] Both their possession and sale were often criminalized, and even when these regulations were challenged, they were upheld by the courts.[379]

Looking to the nineteenth century, the practice established in the Founding era of restricting dangerous new weapons technology when it

373. Brief of Giffords Law Center, *supra* note 319, at 9 ("The motivation behind the Challenged Laws—their ('why')—is, fundamentally, to promote public safety.").

374. *Bruen*, 142 S. Ct. at 2138–56.

375. Response of Appellees City of Naperville, *supra* note 292, at 33; Brief of Intervening Appellee, *supra* note 323, at 37.

376. Response of Appellees City of Naperville, *supra* note 292, at 33–34 (noting that six states or soon-to-be states passed anti-club laws between 1750 and 1799, and that Massachusetts and Maine also passed laws prohibiting people from assembling in groups while armed with clubs); Bevis v. City of Naperville, 657 F. Supp. 3d 1052, 1070 (N.D. Ill. 2023).

377. Response of Appellees City of Naperville, *supra* note 292, at 33–34 (noting that trap guns were also viewed as an "arbitrary and excessive" means of doling out justice, even to intruders); *Bevis*, 657 F. Supp. 3d at 1070–71.

378. Response of Appellees City of Naperville, *supra* note 292, at 35–36.

379. *Id.*; *Bevis*, 657 F. Supp. 3d at 1068–70 (reviewing the regulatory history of the Bowie knife).

began to pose social dangers continued.[380] As multiple-shot firearms spread among civilians after the Civil War, legislation emerged to address rising gun violence.[381] While some statutes limited the concealed carry of such weapons given the danger they posed, some states, including Illinois, barred their possession outright.[382]

Finally, given the similarity already established between assault weapons and the military weapons from which they were derived, it is valuable to look to the firearms regulations of the twentieth century, some of which have already been tacitly approved by the Court.[383] While it is true that the Court in *Bruen* expressed its skepticism about analogues which are too far apart in time from the ratification of either the Second or Fourteenth Amendments, it did not say that these analogues were wholly impermissible, so long as they are not inconsistent with the original meaning of the text in the first instance.[384] World War I saw "advancements in weapons technology [leading] to the invention of hand-held semiautomatic and automatic weapons," such as the Thompson submachinegun (a.k.a. the Tommy gun).[385] Like modern assault weapons, the Tommy gun was first developed as a weapon of war before reaching civilians in large numbers in the late 1920s.[386] Such weapons, when deployed, "exacted a devastating toll and garnered extensive national attention."[387] In less than ten years, at least thirty-two states had implemented anti-machinegun laws, and ultimately, Congress enacted the National Firearms Act, which to this day severely restricts the sale, transfer, and transport of machineguns and other firearms.[388]

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380. Response of Appellees City of Naperville, *supra* note 292, at 36.

381. *Id.* at 36–37.

382. *Id.* at 37.

383. District of Columbia v. Heller, 554 U.S. 570, 642 (2008) ("We may as well consider at this point (for we will have to consider eventually) *what* types of weapons *Miller* permits. Read in isolation, *Miller*'s phrase 'part of ordinary military equipment' could mean that only those weapons useful in warfare are protected. That would be a startling reading of the opinion, since it would mean that the National Firearms Act's restrictions on machineguns . . . might be unconstitutional, machineguns being useful in warfare in 1939.").

384. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2137 (2022).

385. Opposition to Emergency Application for Injunction, *supra* note 328, at *27–28; Response of Appellees City of Naperville, *supra* note 292, at 38 ("The early 20th century saw the emergence of the first true handheld semi-automatic and automatic weapons. For example, the Thompson machine gun (the 'Tommy' gun), an automatic weapon, became popular following its introduction in World War I." (citations omitted)).

386. Response of Appellees City of Naperville, *supra* note 292, at 38.

387. *Id.* at 39 (citation omitted).

388. *Id.*; Brief of Intervening Appellee, *supra* note 323, at 35 (noting that machineguns, when used by criminals, "exacted a devastating toll and garnered extensive national attention," and as a result, Congress ultimately banned machineguns and enacted the National Firearms Act (citations omitted)).

Each of these analogues is worthy of greater time and attention than the confines of this Comment allow. Exploration of the historic statutes has already been conducted by some of the interested parties to this issue, and it's likely that even more research will be undertaken as PICA looks now to the Supreme Court. Suffice it to say, however, that, "[b]y prohibiting the manufacture and sale of weapons and magazines increasingly used in the deadliest mass shootings, [PICA] comfortably fits within this pattern of regulation in response to new forms of violent crime perpetrated with technologically advanced weapons."[389] Not only are the public safety justifications—the *why*—analogous to the purpose of the regulations set forth by the legislations in the eighteenth, nineteenth, and twentieth centuries, the regulations themselves—the *how*—accomplish their purpose without impacting one's ability to engage in the core value of the Second Amendment: lawful self-defense.[390]

IV. PROPOSAL

The Court's decision in *Bruen* has inspired a spate of lawsuits challenging not only assault weapons bans but a variety of gun control regulations, including some that have long been thought settled.[391] In the first year after *Bruen*, one study counted "326 Second Amendment opinions ruling on 464 claims."[392] The National Association for Gun Rights,

389. Opposition to Emergency Application for Injunction, *supra* note 328, at *28.

390. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2132–33 (2022).

391. *See, e.g.*, Nat'l Ass'n for Gun Rights v. Lamont, No. 3:22-1118, 2023 WL 4975979 (D. Conn. Aug. 3, 2023) (rejecting a challenge to the Connecticut assault weapons ban enacted after the Sandy Hook Elementary School mass public shooting in 2013); Press Release, Bob Ferguson, Att'y Gen. Wash., AG Ferguson Defeats Third Attempt to Block Washington's Ban on the Sale of Assault Weapons (Sept. 1, 2023), https://www.atg.wa.gov/news/news-releases/ag-ferguson-defeats-third-attempt-block-washington-s-ban-sale-assault-weapons [https://perma.cc/H4MV-LRQN] ("A Thurston County Superior Court judge today . . . rejected another attempt to block Washington's new law banning the sale of assault weapons. This is the third time in less than three months a judge has ruled that the ban should remain in place while legal challenges continue."); Miller v. Bonta, No. 19-cv-01537, 2023 WL 6929336 (S.D. Calif. Oct. 19, 2023) (finding, for the second time, that California's 1989 law banning assault weapons is unconstitutional); Capen v. Campbell, No. 22-11431, 2023 WL 8851005 (D. Mass. Dec. 21, 2023) (denying plaintiffs' request for a preliminary injunction against Massachusetts' assault weapons ban, active since 1998); United States v. Rahimi, No. 22-915, 2024 WL 3074728, at *11 (U.S. June 21, 2024) (8-1 decision) ("Rather than consider the circumstances in which Section 922(g)(8) was most likely to be constitutional, the panel instead focused on hypothetical scenarios where Section 922(g)(8) might raise constitutional concerns. That error left the panel slaying a straw man." (citations omitted)); Garland v. Cargill, No. 22-976, 2024 WL 2981505, at *3 (U.S. June 14, 2024) ("This case asks whether a bump stock—an accessory for a semiautomatic rifle that allows the shooter to rapidly reengage the trigger (and therefore achieve a high rate of fire)—converts the rifle into a 'machinegun.' We hold that it does not and therefore affirm.").

392. Eric Ruben et al., *One Year Post-Bruen: An Empirical Assessment*, 110 VA. L. REV. ONLINE 20, 22 (2024).

self-described as "the nation's largest 'no compromise' pro-gun organization," announced its launch of a coordinated effort to overturn assault weapons bans after the *Bruen* decision was released in 2022.[393] So far, these challenges have been rebuffed in Connecticut, Massachusetts, and Illinois; as of this writing, PICA remains in full force and effect.[394] However, given the single-minded determination of organizations such as National Association for Gun Rights, the NRA, and other like-minded groups within the gun lobby, these challenges seem unlikely to end with the Courts of Appeal, and PICA is now poised to present the question of the constitutionality of assault weapons bans across the nation to the Supreme Court.[395]

Much of the analysis in this Comment has focused on presenting a framework by which the assault weapons prohibited under PICA can readily be classified as both not in common use for purposes of self-defense and dangerous and unusual such that they can and should be subject to regulation comparable to Founding-era historical tradition.[396] Without meeting these thresholds, challenges to PICA cannot be sustained, and for this reason, this Comment posits the Court should find PICA constitutional under the Second Amendment. Beyond PICA itself, however, the proposals included here find applicability and should be deployed in all instances where firearms regulations, assault weapons bans or otherwise, are challenged in court. After all, it was Justice Kavanaugh who advised, "the Second Amendment allows a 'variety' of gun regulations."[397] This Comment proposes that we, the American public, who are threatened every day by the proliferation of firearms and mass public shootings, take him at his word and do just that: regulate firearms,

393. *See generally* Bevis v. City of Naperville, 85 F. 4th 1175 (7th Cir. 2023); *NFGR Files Seven Lawsuits Nationwide to End Magazine and "Assault Weapon" Bans*, NAT'L FOUND. FOR GUN RTS., https://gunrightsfoundation.org/awb-mag-ban-lawsuits/ [https://perma.cc/2KZ5-S5GR] (last visited Feb. June 1, 2024); *see also* Press Release, Nat'l Ass'n for Gun Rts., NAGR Launches Coordinated Legal Effort to Overturn Unconstitutional Gun Controls (Sept. 8, 2022), https://nationalgunrights.org/resources/press-releases/nagr-launches-coordinated-legal-effort-to-overturn-unconstitutional-gun-controls/ [https://perma.cc/EY22-SE6N].

394. *Bevis*, 85 F. 4th at 1182; *Lamont*, 2023 WL 4975979 at 2; *Capen*, 2023 WL 8851005 at 1.

395. Press Release, Nat'l Ass'n for Gun Rts., Supreme Court Denies Emergency Appeal in NAGR Case to Overturn Illinois' Gun Ban (Dec. 14, 2023), https://nationalgunrights.org/resources/press-releases/supreme-court-denies-emergency-appeal-in-nagr-case-to-overturn-illinois-gun-ban/ [https://perma.cc/L5KW-SVAS] ("We will be back to the Supreme Court as soon as our legal team finishes drafting our cert petition, and they will have to decide if they really meant what they said in *Heller* and *Bruen*.").

396. *See, e.g.*, Sections III.A, III.B, and accompanying footnotes (arguing that assault weapons are exempted from Second Amendment protection because they are not in common use for self-defense purposes and because they are both dangerous and unusual weapons).

397. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2162 (2022) (Kavanaugh, J., dissenting) (quoting District of Columbia v. Heller, 554 U.S. 570, 636 (2008)).

including assault weapons.[398] As Illinois Governor Pritzker said, "It is time to end this madness."[399]

First, if the Court decides to review PICA, it should contextualize the data it will inevitably be presented to engage meaningfully with the reality of assault weapons possession and use in modern society. This should be the case for any challenged firearms regulation the Court chooses to examine. The data presented here demonstrates that assault weapons are not in common use for self-defense and are both dangerous and unusual weapons. Because the Court has established at least two metrics for finding relevant historical analogues (the how and why a statute burdens one's Second Amendment rights), empirical data is essential to understanding "the prevailing conditions in both modern and historical American society."[400] "Such empirical research helps courts contextualize modern and historical laws and the prevailing social backdrop against which those laws were passed, as required by *Bruen*."[401] This is not a return to "means-end scrutiny," which required the balancing of costs and benefits of a regulation under the Second Amendment, but rather the important provision of context to understanding the burdens placed upon one's Second Amendment right, a foundational requirement of the Court's *Bruen* test.[402]

Second, because assault weapons are the result of dramatic technological change and implicate unprecedented social concerns, the Court should apply a nuanced approach in any historical review it may conduct of PICA, acknowledging the long history of government response to developing weapons threats to the general public. Increased firing power, coupled with advanced ballistics, has made it possible for even an inexperienced shooter to kill more people more quickly than ever before in American history.[403] A lone individual armed with just a single assault weapon can carry out mass murder in a matter of minutes. A shooter, firing from the thirty-second floor of the Mandalay Bay Resort and Casino in Las Vegas and armed with twenty-three firearms, including a dozen semiautomatic rifles which had been converted into fully automatic weapons by means of a bump stock—an accessory that is also prohibited under PICA—massacred sixty people in ten minutes, firing more

398. *Past Summary Ledgers*, GUN VIOLENCE ARCHIVE, https://www.gunviolencearchive.org/past-tolls [https://perma.cc/HYM4-N6VB] (last visited June 1, 2024) (noting that in 2023, the United States experienced 655 mass shootings).

399. Flannery, *supra* note 78.

400. Brief of Giffords Law Center, *supra* note 319, at 3.

401. *Id.*

402. *Id.*

403. *Id.* at 7–8.

than 1,000 rounds.[404] This would have been unprecedented in the Founding era, when a typical musket could hold only one round with an "effective rate of fire" of three rounds per minute.[405] As Justice Breyer pointed out, similar difficulties abound when considering the constitutionality of regulations targeting "ghost guns," "smart guns," or laws which impose "additional criminal penalties for the use of bullets capable of piercing body armor."[406] Restricted by the Court's history-only analysis, nuance, flexibility, and open-mindedness in searching for and comparing historical analogues to present-day regulations is the only meaningful path forward in what is likely to become an "increasingly tortured" exercise in "analogical reasoning."[407]

Next, given the Court's repeated statements that the Second Amendment's core function is to protect an individual's right to engage in lawful self-defense, the Court should not retreat from this standard to a more generalized "lawful purpose" standard. The Court has time and again affirmed that self-defense is the "central component" of the Second Amendment individual right to bear arms.[408] Meanwhile, PICA's opponents have repeatedly mischaracterized the weapons protected by the Second Amendment as simply "arms . . . in common use for lawful purposes."[409] This argument is disingenuous based upon the Court's

404. *Id.* at 7–9; *see also* Alex Horton, *The Las Vegas Shooter Modified a Dozen Rifles to Shoot Like Automatic Weapons*, WASH. POST (Oct. 3, 2017, 10:37 PM), https://www.washingtonpost.com/news/checkpoint/wp/2017/10/02/video-from-las-vegas-suggests-automatic-gunfire-heres-what-makes-machine-guns-different [https://perma.cc/XR6Q-8JN9]; Malachy Browne et al., *10 Minutes. 12 Gunfire Bursts. 30 Videos. Mapping the Las Vegas Massacre.*, N.Y. TIMES (Oct. 21, 2017), https://www.nytimes.com/video/us/100000005473328/las-vegas-shooting-timeline-12-bursts.html [https://perma.cc/FG4C-WRQ9]; Dave Lawler & Orion Rummler, *The Deadliest Mass Shootings in Modern U.S. History*, AXIOS (Oct. 26, 2023), https://www.axios.com/2017/12/15/deadliest-mass-shootings-modern-us-history [https://perma.cc/SK4R-YRPQ] (noting that the Las Vegas massacre is the deadliest mass shooting in America to date).

405. Ingraham, *supra* note 351.

406. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2180–81 (2022) (Breyer, J., dissenting).

407. *Id.* at 2181.

408. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 599 (2008) ("[S]elf-defense . . . was the *central component* of the right itself."); McDonald v. City of Chicago, 561 U.S. 742, 767 (2010) ("Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is 'the *central component*' of the Second Amendment right."); *Bruen*, 142 S. Ct. at 2133 ("As we stated in *Heller* and repeated in *McDonald*, 'individual self-defense is the *central component* of the Second Amendment right.' . . . Therefore, whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*' considerations when engaging in analogical inquiry." (cleaned up)).

409. Support of Emergency Application, *supra* note 292, at 3–6, 12–13 ("Thus, the Second Amendment protects those arms 'typically *possessed* by law-abiding citizens for law purposes.'" (quoting *Heller*, 554 U.S. at 625)); Brief for Amicus Curiae National Shooting Sports Foundation

holdings and reasonings in *Heller*, *McDonald*, and *Bruen*. Should the Court choose to accept this interpretation as the appropriate umbrella of the Second Amendment's individual right, it would undermine the entire foundation upon which *Heller* was built, implicating stare decisis principles.[410] Any additional expansion of the Second Amendment guarantee would wholly unmoor the already tenuous connection the Court's contemporary Second Amendment jurisprudence has to the actual language of the Amendment itself. Regardless of the Court's decision to review PICA, the Court should disavow such a far-reaching and untethered interpretation of the Second Amendment's individual right.

In addition to the suggestions presented here for the Supreme Court to find PICA constitutional under the Second Amendment, there are opportunities for assault weapons bans and other firearms regulations to survive constitutional challenges. First, the courts of appeal should continue to exercise their considerable discretion to sustain similar bans that take into account the significant threat to the public caused by assault weapons, as well as the mounting challenges to other firearms regulations.[411] Applying the analyses above, the courts of appeal, who are likely to hear the greatest number of challenges to the Second Amendment, can sustain constitutionally-drafted regulations across the nation, not all of which will be petitioned to or accepted by the Supreme Court.[412] This does raise the specter of partisan policymaking at the bench: Will politically-appointed judges "reach the outcomes they prefer and then cloak those outcomes in the language of history?"[413] The answer, it seems, is yes. One post-*Bruen* study of 392 "judge votes" found a thirty-one percentage-point gap between Republican and Democratic district court appointees, with 33 percent of Republican-heard challenges succeeding compared to just 2 percent of Democratic-heard challenges.[414] At the appellate level,

in Support of Applicants at 9–13, Nat'l Ass'n for Gun Rights v. City of Naperville, 143 S. Ct. 2489 (2023), (No. 22A948), 2023 WL 3321742, at *9–13 (arguing that the majority in *Heller* held that whether arms are constitutionally protected "turns . . . on whether law-abiding citizens commonly own and use them for lawful purposes").

410. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2261–62 (2022) ("*Stare decisis* . . . . protects the interests of those who have taken action in reliance on a past decision. It 'reduces incentives for challenging settled precedents,' . . . . It fosters 'evenhanded' decisionmaking by requiring that like cases be decided in a like manner. It 'contributes to the actual and perceived integrity of the judicial process.' And it 'restrains judicial hubris and reminds [the Court] to respect the judgment of those who have grappled with important questions in the past." (first citing Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 856 (1992); then quoting Kimble v. Marvel Enter., LLC, 576 U.S. 446, 455 (2015); and then quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991))).

411. Letter et al., *supra* note 2.

412. *Id.*

413. *Bruen*, 142 S. Ct. at 2177 (Breyer, J., dissenting).

414. Ruben, *supra* note 392, at 44.

of fifty-four observations, 37 percent of Republican-appointed judges voted for relief compared to 21 percent of Democratic-appointed judges.[415] Even in the face of a politically compromised bench, however, the stakes—the lives of our children, parents, siblings, neighbors, friends, and more—are too high to simply avoid the issue outright. A political decision that does not properly account for contextualized data, which provides a thin historical veneer for its opinion, or which fails to honor the narrow scope of the Second Amendment's individual right, can be appealed to the Supreme Court where, faced with national scrutiny, that decision has at least some hope of being corrected.

Finally, continuing scholarship in this area for the benefit of every reviewing court is essential. The Court's contemporary understanding of Second Amendment rights was only established fifteen years ago; the *Bruen* history-only test is two years old.[416] In between, there was essentially a thirteen-year gap where the Court provided very little guidance on how its new precedence was to be understood and applied, and after *Bruen*, much of that understanding was abrogated. Expanding contemporary understanding of the history of the Second Amendment, particularly via interdisciplinary scholarship of diverse perspectives, may provide even further support for the sustainment of regulations such as PICA and more. As Justice Breyer noted, there are legitimate questions to be raised about whose telling of history decides the proper understanding of the Second Amendment.[417] Considering the emphasis the *Bruen* Court placed on historical analysis, combined with this nation's history with racism, sexism, classism, and more, "Second Amendment issues need to be explored . . . with an eye toward subcultures in American society who have been less able to rely on state protection."[418] Regardless of what this endeavor might reveal, the Second Amendment's historical review should incorporate the history of all of us, not just some of us. Perhaps additional scholarship in this area may cause the Court to confront another question: "Will the meaning of the Second Amendment change if or when new historical evidence becomes available?"[419]

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415. *Id.* at 45.

416. *See generally* District of Columbia v. Heller, 554 U.S. 570 (2008); *Bruen*, 142 S. Ct. 2111.

417. *Bruen*, 142 S. Ct. at 2177 (Breyer, J., dissenting) ("How will judges determine which historians have the better view of close historical questions?").

418. Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 319 (1991).

419. *Bruen*, 142 S. Ct. at 2177 (Breyer, J., dissenting).

CONCLUSION

Should the United States Supreme Court take up the question, the Court can and should find Illinois's assault weapons ban constitutional under the Second Amendment. First, the data shows that, despite the many assault weapons that may be owned or in circulation, the test for "in common use for self-defense" is not satisfied by merely proving that "Arms" are popularly owned.[420] Under any inquiry—whether assault weapons are practical for self-defense, whether they are commonly deployed as a means for self-defense, or whether there is the mere intent to use an assault weapon for self-defense, should the need arise—it cannot be demonstrated that assault weapons are "in common use for self-defense."[421]

Second, assault weapons are both dangerous and unusual, and there are several analogues from throughout this nation's history that demonstrate that PICA is constitutional based on the deeply rooted tradition of restricting or outright banning dangerous and unusual weapons. Given the dramatic technological advancement that assault weapons represent, as well as the unprecedented threat that they pose to public safety, a nuanced review of such analogues is appropriate. When viewed through such a lens, PICA finds support in centuries of historic American regulation.

Ultimately, this Comment demonstrates that, even with the *Bruen* Court's insistence on a history-only analysis of Second Amendment questions, contemporary data, appropriately contextualized, and contemporary dangers, such as the dire threat posed by assault weapons when they are deployed in mass public shootings, can and should inform the historical analysis of Second Amendment question. The Second Amendment, properly interpreted, allows for a variety of firearms regulations—including restrictions and outright bans.[422] Simply because means-end scrutiny is no longer a part of the equation does not mean that the modern-day problems related to firearms should be eliminated from consideration altogether; rather, they have only shifted position in their application to the equation. Legislatures are well within their right to regulate guns, and should continue to effect policy and enact legislation to protect the public from the dangers posed by assault weapons and other firearms. In the face of mass public shootings, it is not only imperative that they do so—it is constitutional under the Second Amendment.

420. District of Columbia v. Heller, 554 U.S. 570, 627 (2008).

421. *Id.*

422. *See Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring).