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IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

DELAWARE STATE SPORTSMENS ) Case Nos. 23-1633  
ASSOCIATION, INC., ET AL. ) 23-1634  
) 23-1641

Appellants,

v. ) 1:40 p.m.  
)

DELAWARE DEPARTMENT OF ) March 11, 2024  
SAFETY AND HOMELAND SECURITY, )  
ET AL. )

Appellee. )

ON APPEAL FROM THE  
UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE  
HON. EVAN J. WALLACH, UNITED STATES DISTRICT JUDGE  
CASE NOS. 23-1633, 23-1634, 23-1641

BEFORE APPELLATE PANEL:

HON. STEPHANOS BIBAS, Circuit Judge  
HON. TAMIKA MONTGOMERY-REEVES, Circuit Judge  
HON. JANE RICHARDS ROTH, Circuit Judge

APPEARANCES (see next page)

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Transcribed By: Bridget Hearne

1 P R O C E E D I N G S

2 THE CLERK: Judge Roth, can you hear and see us?

3 JUDGE ROTH: Yes, I can.

4 THE CLERK: Very well. With thanks for the parties'  
5 patience, the first case to be called this afternoon is  
6 Delaware State Sportsmens Association, et al.; numbers 23-1633,  
7 1634, and 1641.

8 Mr. Ohlendorf for Appellants Gray, et al.

9 MR. OHLENDORF: Good afternoon, Your Honor. May it  
10 please the Court, John Ohlendorf for the Gray and Graham (ph.)  
11 appellants. With the Court's permission, I would like to  
12 reserve two minutes of time for rebuttal.

13 THE CLERK: Great.

14 MR. OHLENDORF: Your Honor, under the supreme  
15 court's decisions in Heller and Bruen, this is a  
16 straightforward case. As a matter of the Second Amendment's  
17 plain text and this Court's decision in the ANJRPC case, the  
18 firearms and magazines at issue plainly qualify as bearable  
19 arms. And under Bruen, that shifts the burden to Delaware to  
20 justify its bans as consistent with historical tradition.

21 Now, in Heller, the supreme court already looked at  
22 the history and determined that a flat ban on certain types of  
23 arms is consistent with historical tradition only if those arms  
24 are not in common use for lawful purposes. But the district  
25 court here held that Delaware's laws do ban arms in common use.

1 Indeed, the semi-automatic rifles banned by Delaware's law are  
2 the second most popular firearm type on the market today and  
3 the most popular rifle of all time. That should have been the  
4 end of the matter, and the district court's decision upholding  
5 Delaware's bans anyway should be reversed.

6 JUDGE BIBAS: Counsel, you have the burden of proof in  
7 this proceeding, don't you?

8 MR. OHLENDORF: We have the burden of proof, Judge  
9 Bibas, on the initial Bruen text step. I would submit that the  
10 State has the burden on the second Bruen history inquiry,  
11 even -- although the fact -- we're here on a preliminary  
12 injunction.

13 JUDGE BIBAS: Have the burden of proof on the  
14 preliminary injunctive factors?

15 MR. OHLENDORF: Well, under this Court's decision in  
16 Reilly v. City of Harrisburg, the burden in a preliminary  
17 injunction case tracks the burdens as they would lie at summary  
18 judgment or trial. And under Bruen, those burdens are  
19 allocated such that we have the burden on the text step; they  
20 have the burden on the history step.

21 JUDGE BIBAS: Even if that's true as to the likelihood  
22 of success on the merits, you have the burden on the other  
23 injunctive factors?

24 MR. OHLENDORF: That's correct, Judge Bibas. That is  
25 true for --

1 JUDGE BIBAS: And you put in no evidence, apart from  
2 some declarations here?

3 MR. OHLENDORF: On the irreparable harm factor, Judge  
4 Bibas?

5 JUDGE BIBAS: On irreparable harm, on balance of  
6 equities of public interest, all you put in were four  
7 declarations?

8 MR. OHLENDORF: Yes, Judge Bibas. And our  
9 declarations show that our plaintiffs wish to obtain these  
10 firearms and magazines.

11 JUDGE BIBAS: Plaintiffs who already have firearms,  
12 three of whom already have some of the assault weapons, so  
13 called; and a large capacity of magazines, so called.

14 MR. OHLENDORF: I don't know that our -- all of our  
15 plaintiffs have the rifles or pistols that are banned by  
16 Delaware, but they certainly want to acquire them.

17 JUDGE BIBAS: Okay. But all of them aver that they  
18 currently do have firearms?

19 MR. OHLENDORF: They do have firearms. I wouldn't  
20 dispute that, Judge Bibas.

21 JUDGE BIBAS: So how are we supposed to infer from  
22 these declarations that they're suffering an irreparable  
23 injury?

24 MR. OHLENDORF: Because the Second --

25 JUDGE BIBAS: The only way we could do that is if we

1 adopt a blanket rule that any deprivatation of a Second Amendment  
2 right for any period of time automatically counts as  
3 irreparable injury.

4 MR. OHLENDORF: I mean, I don't know if I would cast  
5 it in those absolute terms, Judge Bibas. But I would say that  
6 a law preventing someone from obtaining arms protected by the  
7 Second Amendment to keep and to bear -- I mean, this is a  
8 going-forward ban, so I don't know we can call it temporary.  
9 But yes, that law we would submit to you is a, per se,  
10 violation of the Second Amendment, and per se, irreparable  
11 injury. Just as this Court --

12 JUDGE MONTGOMERY-REEVES: Well, the moment you satisfy  
13 the likelihood of success prong -- and there really is no  
14 irreparable harm prong, right? That's what you're essentially  
15 telling us?

16 MR. OHLENDORF: I'm essentially saying, Judge  
17 Montgomery-Reeves, that just as in the First Amendment context,  
18 if someone says, I would like to speak, this law is preventing  
19 me from speaking. I've spoken in the past, maybe I can speak  
20 in other ways. But I want to say this, the law prevents me  
21 from saying it, this Court need not proceed any further in  
22 determining whether there is irreparable harm, no. And that is  
23 common across the constellation of constitutional rights.

24 JUDGE BIBAS: It's common across the constellation of  
25 constitutional right. I could find -- I found a Fourth

1 Amendment case from half a century ago, and that was it. So I  
2 think that's an overstatement to say it's common across rights.  
3 What, apart from First Amendment cases and that Fourth  
4 Amendment case from 1973, applies such a conclusive  
5 presumption?

6 MR. OHLENDORF: Your Honor, I don't know about this  
7 Court's case law. Certainly, in other cases -- in other  
8 courts, due process violations equal protection violations;  
9 those would all qualify for this, per se.

10 JUDGE BIBAS: Okay. Why should we collapse the four  
11 factors into likelihood of success on the merits? What about  
12 all that language about PIs being extraordinary remedies being  
13 granted sparingly? What about the history of equity? And what  
14 about eBay v. MercExchange which suggests that we're not  
15 supposed to adopt presumptions like that in the equitable -- I  
16 mean, that was a permanent, not a preliminary injunction. But  
17 it does suggest that we're not supposed to just jump to the  
18 merits.

19 MR. OHLENDORF: In the great bulk of cases, Judge  
20 Bibas, that is correct. But in cases involving -- I mean, all  
21 of those objections you have just raised would apply equally in  
22 a First Amendment case. And yet, the settled precedent is, in  
23 First Amendment cases, we presume a constitutional violation --

24 JUDGE BIBAS: We can --

25 MR. OHLENDORF: -- where there's likelihood of success.

1 JUDGE BIBAS: We can presume. We don't require the  
2 district court to. And a lot of First Amendment cases involve  
3 some very time-sensitive -- either you're going to speak --  
4 during this election, or the election will be passed. But this  
5 dispute wouldn't go away. You could have gone ahead to your  
6 trial in November '23, and you chose not to. We would have had  
7 a trial record by now.

8 MR. OHLENDORF: I mean, this case, yes, it's not going  
9 to go away. But every second of every day that Delaware's law  
10 is enforced, it is preventing my plaintiffs from exercising  
11 their Second Amendment rights.

12 JUDGE MONTGOMERY-REEVES: Focusing on your argument --  
13 your likelihood of success argument, not delving into the  
14 substance of it -- but it's a legal argument, right?

15 MR. OHLENDORF: That's correct, Judge Montgomery-  
16 Reeves.

17 JUDGE MONTGOMERY-REEVES: So if we agree with you on  
18 the irreparable harm, wouldn't that mean that there is no  
19 discretion? I mean, if it's a legal argument, the answer is  
20 just, yes, we think -- yes, they're going to win; or no,  
21 they're not. I mean, there's no discretion for the Court on a  
22 preliminary injunction, is there?

23 MR. OHLENDORF: I think, Judge Reeves, that is -- the  
24 Court has discretion to determine whether there's a likelihood  
25 of success. But if they determine there's a likelihood of



1 success, then it just follows from that determination. And --

2 JUDGE BIBAS: Then why do we have an abuse of  
3 discretion standard of review?

4 MR. OHLENDORF: Well, because -- I mean, many cases  
5 involving requests for preliminary injunction, Judge Bibas,  
6 don't involve constitutional rights or don't involve  
7 constitutional rights that protect intangible interests like  
8 this one.

9 JUDGE MONTGOMERY-REEVES: So when it's a  
10 constitutional right issue, then it's not discretionary. Only  
11 question is, answer the legal question, that's it. Don't look  
12 at the other prong.

13 MR. OHLENDORF: I mean, the Court does have to  
14 determine, of course, that the plaintiffs would like to  
15 exercise their constitutional rights. But yes, I mean, if the  
16 plaintiffs can make that showing, which our declarations have  
17 averred and have not been disputed, then no, I don't think  
18 there is any discretion to conclude that the violation of  
19 Second Amendment rights, just as in the First Amendment  
20 context, does not constitute irreparable harm.

21 JUDGE MONTGOMERY-REEVES: Let me ask you another  
22 question. So as I understand your argument, it's that Heller  
23 decided that the government couldn't ban arms that are commonly  
24 held for self-defense purposes. But then Bruen went on and  
25 devoted thirty-five pages in the United States Reporter and

1 more than twenty pages in the Supreme Court Reporter to  
2 analyzing the history and tradition; whether or not the New  
3 York law was consistent with the history and tradition. If  
4 Heller held the government can't ban arms that are commonly  
5 held for self-defense, why did Bruen need to spend all that  
6 time?

7 MR. OHLENDORF: A very simple answer, Judge  
8 Montgomery-Reeves. Bruen did not involve a ban on possession  
9 of arms. Bruen involved a restriction on carrying firearms  
10 outside the home. It was disputed the extent to which that was  
11 protected by the Second Amendment, the limits on the State's  
12 ability to curtail that if it was protected under the Second  
13 Amendment. So yes, Bruen went through great lengths to  
14 determine whether there was a historical tradition that would  
15 allow greater infringements on the right to bear arms than  
16 Heller countenanced of the right to keep them. That question  
17 wasn't resolved in Heller. But it simply does not follow that  
18 in a case involving an arms ban, a ban on certain types of  
19 arms, that the Heller test does not apply.

20 JUDGE BIBAS: Judge Roth, anything?

21 JUDGE ROTH: I have nothing at this point.

22 JUDGE BIBAS: All right. Let's hear from Ms. Murphy,  
23 and we'll get you back on rebuttal.

24 MS. MURPHY: Good afternoon, Your Honor. Erin  
25 Murphy on behalf of the DSSA plaintiffs and Amicus - NSSF. And

1 with the Court's permission, I'd like to reserve four minutes  
2 for rebuttal.

3 JUDGE BIBAS: Granted.

4 MS. MURPHY: Thank you.

5 Millions of law-abiding Americans own semi-automatic  
6 rifles, pistols, and shotguns that Delaware has newly banned;  
7 and millions more own the magazines that Delaware has  
8 forbidden. Under the supreme court's decision in Bruen, that  
9 forecloses the State's effort to prohibit them, because Bruen  
10 teaches that our historical tradition is one of protecting the  
11 right of the people to keep and bear arms that are in common  
12 use for lawful purposes like self-defense. The State's efforts  
13 to resist that conclusion rest on arguments that are just  
14 fundamentally incompatible with Bruen, including many of the  
15 same arguments that Bruen itself considered and many of the same  
16 historical laws that Bruen itself considered.

17 To the extent the State begins by suggesting and the  
18 State -- or its amici suggests that the firearms or  
19 magazines here don't qualify as arms at all, that answer -- the  
20 answer to that question comes from Heller and Bruen, both of  
21 which teach that arms constitute anything that is a bearable  
22 arm that can be used for self-defense. And there's just not  
23 any argument to be made that a firearm ceases to be an arm  
24 simply because it has features, like semi-automatic  
25 functionality and a detachable magazine.

1 JUDGE ROTH: Let me ask you a question. Is to be used  
2 in self-defense a integral part of any arm? In other words,  
3 are arms used in self-defense not simply arms used in any  
4 legal -- for any legal purpose?

5 MS. MURPHY: So for purposes of the threshold textual  
6 inquiry, I think all that matters is that something is capable  
7 of being used for self-defense. It's a bearable arm. It  
8 doesn't matter if it's commonly used, if it's predominantly  
9 used, if that's its best use; it just has to be something  
10 that's capable of being used for self-defense. And when we get  
11 to the historical tradition test, which we absolutely agree  
12 with what you just heard, that common use --

13 JUDGE ROTH: That does not -- that does not agree with  
14 the language of Bruen and Heller, does it? Bruen talks about a  
15 arm -- an arm commonly used in self-defense. Don't we have to  
16 consider that description as one integral description of what  
17 we're dealing with, not just capable of being?

18 MS. MURPHY: I don't think that's part of the  
19 threshold textual inquiry because Bruen says that the  
20 definition of the word "arms" simply includes any bearable  
21 arms. Now, you are absolutely correct that common use becomes  
22 relevant, and we would say dispositive, when you're analyzing  
23 the historical tradition aspect of the Second Amendment  
24 analysis. Once something is an arm, that just tells you it's  
25 presumptively protected by the Second Amendment. You still

1 have to then go on to answer the question of whether it's the  
2 type of arm that, though qualifying as an arm, may be  
3 restricted -- or here, banned -- consistent with the Second  
4 Amendment. And what Bruen and Heller teach is that whatever  
5 else the States can do in terms of regulation, they cannot ban  
6 arms that are in common use today for lawful purposes like  
7 self-defense. So we agree that when you get to historical  
8 tradition, you have to look --

9 JUDGE ROTH: Again, you're sliding off my question,  
10 which is, which are used for lawful purposes like self-  
11 defense, as opposed to which are used for self-defense. I  
12 think the distinction between those two is very important.

13 MS. MURPHY: As I read Heller and Bruen, they say  
14 lawful purposes like self-defense, including self-defense. So  
15 I don't think it's the only one, but I'm happy to take self-  
16 defense as the one we need to prove because I think it's  
17 easily, easily satisfied here, even setting aside the fact that  
18 this is actually the State's burden of proof, not ours.  
19 Because the types of arms and magazines that we're talking  
20 about are commonly held. They're owned by millions of  
21 Americans -- millions of law-abiding Americans. And the most  
22 common reason that law-abiding Americans identify for owning  
23 them is for self-defense and/or using them at things like  
24 shooting ranges, where they are honing their skills.

25 JUDGE ROTH: Are they in fact being used for self-

1 defense? I understand from some of the reading I've done that  
2 the percentage of times that these automatic weapons are used  
3 for self-defense is miniscule compared to the other -- like,  
4 for instance, handguns -- the other weapons that are used in  
5 self-defense. The fact that it's -- an atom bomb is capable of  
6 being used in self-defense, but no one would use it. And I  
7 think that -- I feel that it is necessary, not just that they  
8 are capable of being used in self-defense, but they actually  
9 are being used in self-defense. And I'm not sure about these  
10 automatic assault weapons, whether they are being used in self-  
11 defense.

12 MS. MURPHY: Well, just to be clear, we're only  
13 talking about semi-automatic arms here. But I think it all  
14 depends on what you mean by the term "use". The State wants to  
15 cabin it to how many times do I fire a particular arm or fire a  
16 particular amount of rounds at a would-be attacker. And that  
17 is not a conception of use that's consistent even with the text  
18 of the Second Amendment. The Second Amendment protects a right  
19 to "keep" and "bear" arms for lawful purposes, which the supreme  
20 court has explained means both possessing them in your home and  
21 wearing them at -- to be ready -- armed and ready for  
22 confrontation. So if somebody uses their firearm within the  
23 contemplation of the text of the Second Amendment, anytime they  
24 keep it at home for the purpose of self-defense or carry it  
25 outside the home for purpose of self-defense.

1           And indeed, if you took the State's conception and  
2 asked how often is a particular arm actually fired for self-  
3 defense, I'm not sure we'd end up with any firearm protected by  
4 the Second Amendment, because fortunately, most people very  
5 rarely have to fire any type of firearm at would-be attackers;  
6 they instead keep them and hone their skills with them at  
7 places like shooting ranges and fortunately very rarely have to  
8 actually fire them. So I don't think that that's the right way  
9 to think about the analysis. If you look back at Heller,  
10 Heller found that handguns satisfy the common-use test because  
11 they are, "typically possessed for lawful purposes like self-  
12 defense".

13           So I do think the right inquiry is to ask about  
14 possession, about what people keep and carry for self-defense.  
15 And here, again, we don't believe it's our burden. We believe  
16 it's the State's burden to prove common use. But even thinking  
17 it was our burden, the district court concluded that we'd  
18 satisfied it as to all of the, so called, assault long guns  
19 that are prohibited by the statute.

20           JUDGE BIBAS: But you don't disagree that as to the  
21 injunctive factors, setting aside the possibility of the second  
22 half of merits, that you bear the burdens here?

23           MS. MURPHY: We certainly bear the burdens. But I --  
24 if you look at --

25           JUDGE BIBAS: How have you satisfied those burdens, as

1 I asked your friend on your side?

2 MS. MURPHY: Sure. I mean, we've satisfied them under  
3 this Court's precedent, K.A. v. Pocono Mountain School  
4 District, which says, "enforcement of an unconstitutional law  
5 vindicates no public interest", and that laws that deprive  
6 people of constitutional rights cause virtually per se  
7 irreparable harm. That is the law of this circuit as to  
8 individual rights under the First Amendment. And I can't  
9 really understand any reason why it would be different as to  
10 the Second Amendment. I mean, people aren't -- don't have to  
11 come in and show that they have zero First Amendments outlets  
12 left.

13 JUDGE BIBAS: But that approach basically collapses  
14 everything into likelihood of success on the merits.

15 MS. MURPHY: And I think when it comes to a law that  
16 violates constitutional rights, violates individual  
17 constitutional rights, that's basically correct. I mean, it's  
18 not that you don't have to satisfy the other two facts; it's  
19 just that, absent an extraordinarily rare set of circumstances,  
20 they're always going to be satisfied. Because the constitution  
21 has already done the public interest balancing and said, the  
22 public interest lies in favor of protecting individual  
23 constitutional rights. That is, after all, why they're in the  
24 constitution, to say, we're not going to allow for laws that  
25 infringe upon these rights, even when it seems like they're in



1 the public interest. And so I think it actually is just kind  
2 of at odds with the whole notion of a Bill of Rights to think  
3 that you could have --

4 JUDGE BIBAS: Except that equity is as old as that, and  
5 equity has that history. And while there's a Second Amendment  
6 interest here, but there's also a Seventh Amendment interest in  
7 having jury trials remain available, at least in cases with  
8 retrospective relief.

9 MS. MURPHY: Sure. And I mean, I suppose I would  
10 just -- I thought about this and tried to look in preparing for  
11 this argument. I just, I can't find any law where a court has  
12 ever said, yes, this law is unconstitutional, but we think it,  
13 nonetheless, under the balance of equities should stand. I  
14 mean, that just doesn't happen. Once a law is  
15 unconstitutional, that necessarily means that it is causing  
16 irreparable harm in preventing someone from exercising their  
17 constitutional rights. And it is not in the public interest to  
18 have laws that violate constitutional rights. And so --

19 JUDGE MONTGOMERY-REEVES: Does it matter that we're in  
20 a preliminary injunction context?

21 MS. MURPHY: No. I think what matters in a  
22 preliminary injunction context is simply that the first piece  
23 of the analysis is, of course, a likelihood of harm, so it's  
24 likelihood of success. So it's actually a little bit easier to  
25 me than it is in the ultimate injunctive context. But I do

1 think --

2 JUDGE MONTGOMERY-REEVES: Why would that weaken the  
3 need to show an irreparable harm?

4 MS. MURPHY: I don't think it does weaken. I think  
5 the three remaining factors apply the same way, whether you're  
6 in a preliminary or a permanent injunctive context. And the  
7 fact that you can really never say in the permanent injunctive  
8 context that you hadn't satisfied the three remaining factors,  
9 and that a court was going to leave an unconstitutional law on  
10 the books or apply an unconstitutional law to somebody because  
11 it had determined that it doesn't really harm them or doesn't  
12 really serve the public interest to vindicate their  
13 constitutional rights, I think that's pretty unthinkable in the  
14 context of a permanent injunction. And I don't know why the  
15 analysis would be radically different just because it's a  
16 preliminary injunction. So it's not that they don't apply. I  
17 mean, all factors apply. It's just --

18 JUDGE BIBAS: Let's say that there's a twenty percent  
19 chance that you're right on the merits. You're saying that no  
20 balancing needs to happen?

21 MS. MURPHY: No, no, no.

22 JUDGE BIBAS: That because there are harms on the  
23 other side if it turns out that it's -- you don't win on the  
24 merits.

25 MS. MURPHY: If we're only twenty percent right on the

1 merits, you have a balance to draw between how strong our  
2 likelihood of success is --

3 JUDGE BIBAS: Right.

4 MS. MURPHY: -- and the remaining factors. But that's  
5 just a matter of -- and I think if you really look at the kind  
6 of rare First Amendment cases, where courts have said they're  
7 leaving some room for the possibility that it's not a per se  
8 satisfied, they're really cases where they're doubting whether  
9 you actually have a particularly strong likelihood of success  
10 on the merits. I mean, the one --

11 JUDGE BIBAS: When you read Winter v. NRDC --

12 MS. MURPHY: Yes.

13 JUDGE BIBAS: Granted, it's a statutory case, but the  
14 court doesn't say, oh, this is just because it's just a  
15 statutory right. It's like, well, factors two, three, and  
16 four, so we don't need to reach factor one.

17 MS. MURPHY: I think it makes all the difference in  
18 the world that Winter is a statutory case. And I really do  
19 think that if you look, you will have a very hard time finding  
20 any cases where the supreme court or this court has said, yes,  
21 we're pretty sure your constitutional rights, your individual  
22 fundamental rights are being violated. But too bad for you  
23 because it's in the public interest to violate them.

24 JUDGE BIBAS: We also have not established that  
25 outside the First Amendment context. And the question is what

1 to do with it, all First Amendment or some, but do we expand  
2 the treatment of First Amendment rights, which might be  
3 characterized as exceptional, to every other provision? And  
4 so many things can be recharacterized as due process  
5 issues under Section 1983. You're inviting us to basically  
6 allow all those 1983 claimants, if they raise a constitutional  
7 right, to get an injunction right away.

8 MS. MURPHY: I think that this would be the wrong  
9 context in which to stop. Because one thing we know is the  
10 supreme court has said quite emphatically that the Second  
11 Amendment is not a second-class right. It has said that --

12 JUDGE BIBAS: It's substantive protections, yes.

13 MS. MURPHY: And it said that, and it has specifically  
14 invoked First Amendment law in the context of explaining Second  
15 Amendment law. It talked about First Amendment law again in  
16 Bruen in terms of talking about the historical approach. It  
17 talked about it in McDonald in terms of implying this is a real  
18 meaningful fundamental right. So it seems to me it would be  
19 pretty problematic. You can worry about the other cases when  
20 they come. But boy, to start here as saying, yeah, we're going  
21 to treat this one differently seems pretty at odds with what  
22 the court has said.

23 JUDGE BIBAS: Okay. Well, in Bruen, it's gone back to  
24 history. And it's said we're not supposed to apply the tiers  
25 of scrutiny.

1 MS. MURPHY: That's right.

2 JUDGE BIBAS: Even though tiers of scrutiny persist in  
3 some areas of First Amendment law.

4 MS. MURPHY: They do.

5 JUDGE BIBAS: You're not asking us to go and borrow  
6 the First Amendment tiers of scrutiny and apply them.

7 MS. MURPHY: Absolutely not. But the Court  
8 specifically looked to First Amendment jurisprudence when  
9 explaining that it actually does do historical tradition in the  
10 First Amendment context as well. Particularly, in more recent  
11 cases, like there they were invoking United States v. Stevens.  
12 Which I think is actually instructive in that -- I mean, one of  
13 the differences -- one of the biggest differences between First  
14 Amendment and Second Amendment cases is, when it comes to First  
15 Amendment cases, we have a lot of issues that have already been  
16 resolved by the courts. But when the court confronted in  
17 Stevens an argument that a new category of speech was not  
18 protected by the Second -- the First Amendment, there the  
19 depictions of animal cruelty. Once the court decided that  
20 that, like, is at least a form of speech --

21 JUDGE BIBAS: Right.

22 MS. MURPHY: -- the burden shifted one hundred percent  
23 to the Government, and it had to justify it by looking at  
24 historical tradition. So the court drew from that and said,  
25 this really is the way we've done a lot of things in a lot of

1 other contexts and exactly how we should be doing it here in  
2 the Second Amendment context, too.

3 JUDGE BIBAS: Judge Roth, anything else?

4 JUDGE ROTH: Nothing further.

5 JUDGE BIBAS: All right. We'll get you back on  
6 rebuttal.

7 Mr. Ross, I guess, is going first.

8 MR. ROSS: Thank you, Your Honor. David Ross, Ross  
9 Aronstam & Moritz on behalf of Defendants Appellees.

10 The district court's exercise of its discretion not to  
11 preliminarily enjoin the statute banning guns whose only  
12 difference from machine guns, according to the undisputed  
13 record below, is the lack of fully automatic fire, can be  
14 affirmed for three independent reasons. First, the Court can  
15 affirm the district court's finding that the plaintiffs failed  
16 to establish the irreparable harm necessary to obtain a  
17 preliminary injunction. Second, the Court can reject the only  
18 argument the plaintiffs made below, which is that assault  
19 weapons and large capacity magazines are so common that  
20 historical regulations are "immaterial", as they argued at page  
21 11 of their reply brief below, and as they also argued to the  
22 district court in oral argument. And third, the Court can  
23 affirm under various aspects of the full Bruen analysis.

24 Today, I will focus on the irreparable harm factors,  
25 the sole argument that plaintiff presented below, and Bruen's

1 historical analysis. My friend from New Jersey will focus on  
2 the meaning of "in common use" and will explain why, as we  
3 argued below, that provides an additional basis on which to  
4 affirm the decision of the district court.

5 The undisputed record below is that the guns at issue  
6 here share core performance characteristics with machine guns.

7 JUDGE BIBAS: Let's talk about what your friend on the  
8 other side pressed with some force, the First Amendment analogy  
9 here. So is the fact that they -- they're alleging that they  
10 want to exercise Second Amendment rights mean that we shouldn't  
11 be doing an independent, irreparable harm analysis? That  
12 ultimately, we need to focus on the merits. And then if they  
13 win on the merits or have a likelihood of success on the  
14 merits, that's enough because in First Amendment contexts,  
15 we've allowed that.

16 MR. ROSS: We do not believe that even if they were  
17 likely to prevail on the merits, which the district court did  
18 not find, that that would be enough to establish preliminary  
19 harm. We don't believe that it all collapses. Even in the  
20 First Amendment context, a violation is not, per se, remedied  
21 by a preliminary injunction. It's true in other contexts as  
22 well, including, for example, the equal protection context,  
23 Construction (sic) Association of Western Pennsylvania v.  
24 Kreps. And if you look at the cases that they cite in the  
25 First Amendment context, what you see is that there were

1 different interests that could not be remedied absent a  
2 preliminary injunction. So for example, in Ayers, what you had  
3 was someone who wanted to send invitations to a Christmas  
4 party. And obviously, if that was delayed, there would be no  
5 ability to remedy that. In Lewis, the court noted that it was  
6 focused on a potential remedy if the plaintiff prevailed, and  
7 there, there would be no way for an individual to express  
8 themselves -- their wearing long hair -- without a risk of  
9 their constitutional rights being deprived. Here, we have  
10 specific factual findings by the district court. As Your Honor  
11 noted, several of these plaintiffs already own assault weapons.  
12 They all own guns. And critically, the district court found  
13 with respect to the irreparable harm factor, with respect to  
14 the core purpose of the Second Amendment, one's right to armed  
15 self-defense. There are numerous other avenues available for a  
16 plaintiff to exercise that right.

17 JUDGE BIBAS: But that doesn't mean that their Second  
18 Amendment rights couldn't be being infringed, right? Just  
19 because they have some guns doesn't mean that they don't have a  
20 right to have other guns.

21 MR. ROSS: No, it doesn't mean that there couldn't be  
22 some infringement. The court found it to be a very limited  
23 infringement, at best. And when one is weighing the factors  
24 for purposes of a preliminary injunction, the degree of  
25 infringement is a relevant consideration.



1 JUDGE BIBAS: But how do we weigh the balance of  
2 equities here? And is it, does the public interest collapse  
3 into it? Because there's -- you argued below and you argue  
4 that there's a public safety interest here. But these  
5 defendants -- these plaintiffs here, they want to have the  
6 firearms for lawful purposes, including self-defense. So how  
7 do we weigh those? The district court -- what does our  
8 deference to the district court's weighing look like,  
9 especially since the district court didn't really express it in  
10 those terms?

11 MR. ROSS: Well, I think how one -- the Court would  
12 undertake that analysis is to actually look at the factual  
13 record that was presented. And in this case, you have a  
14 factual record where the sole extent of the evidence that was  
15 presented by the plaintiffs is four declarations, which  
16 established that some of them already own assault weapons; they  
17 all own guns. And as the district court specifically found,  
18 the types of weapons that they would like to purchase are  
19 neither useful for, nor in fact, based upon the undisputed  
20 record evidence before it, actually utilized in self-defense  
21 situations. It was on the basis of those -- and of course  
22 there are numerous alternatives available. So it was on the  
23 basis of all of that that the court was able to balance -- I  
24 should add one more thing. I apologize. The Court also had  
25 below it and considered the devastating potential effects of

1 having these weapons out there. It had the declaration of Lucy  
2 Allen with respect to the use of these weapons in mass  
3 shootings. It --

4 JUDGE BIBAS: Okay. But in Bruen, the Court did say,  
5 look, once the Second Amendment has struck a balance, it's not  
6 for courts to balance again. Is that different because we're  
7 in the preliminary injunctive context? Because when it comes  
8 to the scope of the right, we're not supposed to be balancing.

9 MR. ROSS: No. Bruen has struck a balance with  
10 respect to the nature of the underlying inquiry. We don't read  
11 Bruen as suggesting that all -- the remainder of the  
12 preliminary injunction inquiry collapses, and it simply becomes  
13 a question of likelihood of success on the merits.  
14 Particularly, as we noted, we're at the preliminary injunction  
15 stage, not at the permanent injunction stage.

16 JUDGE MONTGOMERY-REEVES: Your friends on the other  
17 side said, well, that shouldn't make a difference. The  
18 irreparable harm analysis is the same in the preliminary  
19 injunction and the permanent injunction stage. What's your  
20 response to that?

21 MR. ROSS: Well, the -- once a plaintiff has  
22 established that there is in fact a constitutional violation,  
23 then, obviously, I think how the Court thinks about it has to  
24 account for that. But what we are talking about here is a  
25 preliminary finding on a limited record. And therefore, I

1 think the analysis is different at the preliminary injunction  
2 stage than it would be at the final injunction stage.

3 JUDGE MONTGOMERY-REEVES: And then just thinking a  
4 little bit more about irreparable harm and what that looks like  
5 in a case like this. If your friends on the other side had put  
6 evidence in of that, like, what additional facts would we need  
7 to see? What additional facts would have needed to be offered  
8 below to establish irreparable harm in a case like this?

9 MR. ROSS: Sure. So the plaintiffs could have  
10 attempted -- they did not, but they could have attempted to  
11 rebut the evidence that we presented with respect to both the  
12 suitability of the weapons at issue for self-defense and their  
13 actual use. The Court had undisputed evidence in the  
14 Yurgealitis Declaration that these weapons are not well suited  
15 for self-defense. It had undisputed record evidence from Lucy  
16 Allen that these weapons are not in fact used for self-defense.  
17 They could have attempted -- we wanted an evidentiary hearing.  
18 The plaintiffs did not want that. They could have attempted to  
19 cross-examine them, to take issue with it, or to put in their  
20 own experts on these points. They chose to do none of that.

21 As I indicated, the weapons that are issue at (sic)  
22 here share core performance features with machine guns. They  
23 have, as Yurgealitis said in his declaration, identical  
24 performance capabilities and characteristics. The only  
25 difference between these weapons and machine guns is the lack

1 of fully automatic fire. As the Seventh Circuit said in the  
2 Bevis opinion, the AR-15 is "almost the same gun as the M-16  
3 machine gun." Because they share common performance  
4 capabilities and characteristics like machine guns, they are  
5 designed to maximize lethality. They can shoot through the  
6 vests of law enforcement officers. They can penetrate three-  
7 eights-inch hardened steel, and when they are used, they cause  
8 gruesome injuries. It is therefore not surprising, as Lucy  
9 Allen said in her declaration, that when these are used in mass  
10 shootings, the number of fatalities and injuries increase  
11 significantly.

12 Now, the supreme court has said in Heller that you can  
13 ban machine guns. And it talked about them as M-16s and the  
14 like. Justice Scalia said it would be startling to suggest  
15 otherwise, and he went on to explain why it would be startling.  
16 He did not talk about the number of machine guns. In the very  
17 same sentence, he said the reason that that would be startling  
18 is because machine guns are useful in warfare. And I would  
19 note that with respect to the sole performance difference, the  
20 lack of fully automatic fire, the undisputed record evidence  
21 below from the Yurgealitis Declaration is that semi-automatic  
22 fire is in fact the preferred method of fire for the Army in  
23 combat situations. And so these weapons, given that limited  
24 difference, fall clearly within the "and the like" that the  
25 supreme court was referring to when it said "M-16s and the

1 like" in Heller.

2 Now, with respect to the sole argument that the  
3 plaintiffs presented below, they initially acknowledged in  
4 their opening papers that Bruen required a historical inquiry.  
5 In response to what the district called the defendant's robust  
6 historical record, including affidavits from five experts,  
7 including -- sorry, a declaration from five experts, including  
8 Professor Spitzer, who talked about the historical tradition of  
9 regulation. The plaintiffs elected not to present any  
10 evidence. They pivoted on reply, abandoned that, and said that  
11 because these guns are common, the historical tradition becomes  
12 immaterial. Plaintiffs had it right in their opening brief and  
13 wrong in their reply. Bruen teaches that the Second Amendment  
14 protects only the carrying of weapons that are those --

15 JUDGE ROTH: Let me get back to that point. If this  
16 case should proceed beyond the argument today, are the  
17 plaintiffs still precluded from introducing any additional  
18 evidence?

19 MR. ROSS: They're not, Judge Roth. This was solely  
20 for purposes of the preliminary injunction. Judge Andrews  
21 specifically found that the findings that he was making were  
22 applicable only with respect to the preliminary injunction.

23 So with respect to Bruen, we see in the structure that  
24 Bruen contemplates that the in common-use analysis is part of  
25 the textual inquiry. It notes in Section 3-A of the opinion

1 that it was undisputed that the guns were in common use. It  
2 then went in Section 3-B to undertake the historical analysis.  
3 Now, consistent with the plain language of the supreme court,  
4 when it said that the Second Amendment protected the weapons  
5 that are in common use, that only gets you to the, then -- the  
6 constitutional inquiry. So for example, in *Heffner v. Murphy*,  
7 this court said -- a commercial speech case -- "the First  
8 Amendment protects commercial speech". It then went on to  
9 consider the restrictions with respect to commercial speech and  
10 found that some of those were valid, even though it was  
11 protected speech. And I would note critically, with respect to  
12 the only argument that the plaintiffs presented below, that  
13 even Judge Brennan, in his dissent in the *Bevis* case in the  
14 Seventh Circuit at page 1211, rejected the idea that  
15 commonality alone would foreclose the historical inquiry. He  
16 said it is not an on-off switch; that it does not bar the  
17 government from regulating; and that even with respect to  
18 popular weapons, the --

19 JUDGE ROTH: Does "common use" include the additional  
20 language for common use for self-defense? In other words, in  
21 considering common use, are we thinking about common use for  
22 any legal purpose, or are we thinking -- are we required to  
23 think about common use for self-defense?

24 MR. ROSS: As we argued below to Judge Andrews, we  
25 believe that in common use requires that the weapons be

1 actually used for self-defense. And I understand that my  
2 friend from New Jersey is going to have that as the focus of  
3 his argument. We have focused in our appeal on why even taking  
4 Judge Andrews' -- he disagreed with that. But why even taking  
5 that construct, we would still prevail.

6 I would like to take a moment to discuss briefly two  
7 critical factual findings with respect to the Second Amendment  
8 inquiry, which is the finding that there is both unprecedented  
9 societal concerns and dramatic technological changes. Those  
10 are factual findings subject to clear mistake, having presented  
11 no evidence on them below. The plaintiffs --

12 JUDGE BIBAS: This is a very odd area, where there are  
13 trial-type procedures and things, but at the same time, should  
14 we be treating these, as your friends on the other side  
15 suggest, as legislative facts? Things where they ask us to  
16 look at the records of other cases and declarations in other  
17 cases?

18 MR. ROSS: No, Your Honor. We do not believe these  
19 are legislative facts. In fact, the very fact that they are  
20 citing expert declarations that the plaintiffs in other cases  
21 chose to submit to those courts, but that for whatever reason,  
22 these plaintiffs chose not to submit here, is precisely  
23 evidence that these are adjudicative facts. It's exactly what  
24 Bruen teaches in footnote 6, that this is for trial courts to  
25 deal with on the record that is presented before them. And the

1 factual findings with respect to unprecedented societal concern  
2 and dramatic technical change are critical because it goes to  
3 how the Court undertakes its analogical reasoning.

4 We know from Bruen that in no circumstances does the  
5 Government need to find either a dead ringer or a historical  
6 twin. And we also know that in light of those factual  
7 findings, you need to take an even more nuanced approach to  
8 your examination of analogs and find something that is only  
9 relevantly similar. And the declaration of Professor  
10 Spitzer -- which talks about the long historical tradition that  
11 starts even before the founding of the nation, comes throughout  
12 time into the 20th century -- it includes the 1934 Act, fits  
13 well within that. And we see this pattern of regulation  
14 throughout history, as Professor Spitzer noted. I mean, even  
15 if we were to look, for example, in the founding era, we see  
16 that Tennessee, Alabama, and Georgia in 1837 all passed laws  
17 which made it either illegal to sell or imposed massive taxes,  
18 the equivalent of thousands of dollars of taxes today, on Bowie  
19 knives. The Tennessee statute was entitled, an act to suppress  
20 the sale and use of Bowie knives. Alabama passed an act to  
21 suppress the use of Bowie knives; Georgia did the same thing.

22 So we see numerous tradition -- numerous analogues  
23 throughout history, instances in which, in response to the  
24 concerns of violence, the threat to public safety, the risk of  
25 disparate use and criminality -- we see numerous instances in



1 which governments reacted in a variety of ways. The statutes  
2 that were passed here are entirely consistent with that.  
3 They're consistent with the founding era of statute, they're  
4 consistent with the 1934 act, and they should be affirmed on  
5 that basis.

6 JUDGE BIBAS: Thank you.

7 MR. ROSS: Thank you, Your Honor.

8 Mr. Feigenbaum, take your time. Whenever you're  
9 ready.

10 MR. FEIGENBAUM: May it please the Court. Fifteen  
11 states, representing almost forty percent of the U.S.  
12 population, restrict assault weapons or LCMs, just as the  
13 federal government did for ten years. As Delaware has  
14 explained this afternoon, there are at least three different  
15 ways to affirm, and I will address each in turn, starting with  
16 Judge Roth's questions about common use, turning to Judge  
17 Montgomery-Reeves' questions about the history, and closing on  
18 Judge Bibas' questions about irreparable harm.

19 Judge Roth, to your questions on common use, we have  
20 two primary observations to make. The first is that common use  
21 is not and cannot be the exclusive criterion for Second  
22 Amendment analysis. And second is that appellants' circulation  
23 test is the wrong way to think about common use. On the  
24 former, we believe that common use is part of the step one of  
25 the Bruen analysis, where plaintiffs bear the burden. And the

1 reason is twofold, both from the precedent and from the  
2 evidence of original public meaning.

3           On the precedent, Bruen itself uses step-one language  
4 to talk about the common use inquiry. So at pages 2143 and  
5 2144 of Bruen, it talks about arms in common use for self-  
6 defense being the ones that are protected -- the ones that get  
7 Second Amendment protection. But whether something gets the  
8 constitutional protection is the language of the original scope  
9 of the right. The text as originally understood. You then  
10 engage in an analogical inquiry based on the statutory history  
11 to determine whether the particular restriction on that arm  
12 falls inside or outside the historical tradition. And so when  
13 you're talking about the step-one analysis, what gets  
14 protection, you're using exactly the kind of language like  
15 "arms in common use". And we know that it can't be step two  
16 because neither Heller nor Bruen actually analyzed any state  
17 statutes in engaging in the inquiry to decide whether a  
18 particular arm is in common use or not as the appropriate test.  
19 Instead, what they did is look at the usual sources of original  
20 public meaning to understand the words that appear in the text,  
21 and then they proceeded to actually engage with the analysis in  
22 Bruen, dealing with the public carry right; in Heller, dealing  
23 with the restriction on handguns, something that we don't see  
24 going on in the way that plaintiffs would have this Court do  
25 the analysis.

1           And I think the Seventh Circuit's decision in *Bevis* is  
2 particularly helpful on this score. The Seventh Circuit's  
3 decision specifically walks through the relevant original  
4 public-meaning evidence. So the 1689 English Bill of Rights,  
5 the state constitutions at the time, Blackstone, all of which  
6 show that the specific Second Amendment right to bear arms was  
7 about arms that facilitate armed self-defense. And as we have  
8 undisputed record evidence here, that doesn't include assault  
9 weapons; that doesn't include large capacity magazines.

10           Judge Roth, to your other questions on common use, I  
11 have two points. What is the right test, and what is the right  
12 denominator? Meaning, are you looking at all lawful possible  
13 purposes or are you looking at self-defense, specifically? In  
14 terms of what the proper test is, we don't understand how a  
15 circulation or a tallying up of the number of arms in the  
16 market could possibly be the appropriate test for four reasons.

17           First, I'm not aware of any constitutional right that  
18 turns on looking at how many items exist in the marketplace and  
19 give it constitutional protection based on a question like  
20 that. Second, a circulation test, as both *Bevis* and *Ocean*  
21 *State Tactical* most recently made clear, is inherently  
22 circular. We know the test is circular because whether or not  
23 something gets constitutional protection would turn on how many  
24 exist in the market; and how many exist in the market would  
25 turn on whether and when it was regulated. So the reason

1 machine guns are not as widespread in the market today -- Bevis  
2 footnote 7 makes this clear -- is because they got restricted  
3 first with registration requirements in 1934, and then with a  
4 prohibition in 1986. And so we know the reason we don't even  
5 see more machine guns in circulation today is because they were  
6 restricted. But a law, as Judge Easterbrook put most  
7 memorably, I would say, in Friedman -- a law can't be the  
8 source of its own constitutional validity. But that's the way  
9 that their arrangement would ultimately work. Third, the  
10 approach that they take is incompatible with the agreement  
11 everyone has that you can restrict machine guns. Heller says  
12 it would be startling that machine guns would get  
13 constitutional protection. This court in Palmetto said that  
14 machine guns do not get constitutional protection. And as a  
15 result, we know that it can't just be a circulation test,  
16 because we have 176,000 machine guns in civilian circulation  
17 right now, an undisputed record finding the district court  
18 made. And again, there's no record evidence in this case at  
19 the PI stage that would undermine that. And then finally, we  
20 also think a circulation test is inconsistent with Heller and  
21 Bruen themselves. Heller does not count how many handguns are  
22 in circulation. It talks about the features of a handgun that  
23 make it useful for self-defense. Palmetto, the Third Circuit's  
24 decision, does not count the number of machine guns in  
25 circulation. It talks about the features that are useful in

1 warfare that aren't useful for self-defense. Bruen does not  
2 ever count up the number of weapons in public carry in deciding  
3 the scope of the public carry right. And Miller itself doesn't  
4 count the number of short-barrel shotguns in circulation. So  
5 we think the test doesn't work.

6 One final point on common use to Judge Roth's question  
7 about what the denominator is: So the question about whether  
8 it can include other lawful purposes, like collecting, or  
9 target shooting, or hunting, or what have you, I'm not sure is  
10 squarely presented in this case for two reasons. First,  
11 plaintiffs have not built a record at the preliminary  
12 injunction stage that they actually want to use any of these  
13 arms for purposes other than self-defense. They haven't shown  
14 a record of why they would want to use them for hunting.  
15 Instead, the undisputed record evidence in this case from the  
16 Yurgealitis Declaration shows that assault weapons and large  
17 capacity magazines are not, in fact, useful for hunting. So  
18 whatever the denominator is, I'm not sure it really matters  
19 under a proper analysis in this case. And I'm not sure it's  
20 going to matter in the paradigmatic case either, because your  
21 prototypical hunting rifle is going to be useful in self-  
22 defense, in sharp contrast to the large capacity magazine or  
23 the assault weapon.

24 But if this Court does reach that Second Amendment  
25 question, we do think that the denominator is the self-defense

1 right. Bruen says that, in engaging with historical  
2 evidence -- to Judge Montgomery-Reeves' question -- you look at  
3 the comparability of the burden on self-defense. And so it  
4 doesn't really make sense that common use would turn on  
5 something like hunting or collecting, but the historical  
6 inquiry would turn on something like self-defense. And the  
7 Bevis decision from the Seventh Circuit does a particularly  
8 good job of situating the right in its original public meaning  
9 and showing the original public meaning specifically yoked the  
10 right to the self-defense right. So that's everything I wanted  
11 to say on the common use point.

12 Turning quickly to Judge Montgomery-Reeves' question  
13 about the history, making sure I leave a minute or two for  
14 irreparable harm at the end. Two points to make here, building  
15 on, I think, really helpful opinions, both from the Seventh  
16 Circuit and the First Circuit; again the Bevis case and the  
17 Ocean State Tactical case. We have a historical tradition in  
18 this country of regulating arms once they enter the civilian  
19 market and once they become widespread enough that they need to  
20 get restricted. So the undisputed record evidence that we have  
21 in this case dealing with the Bowie knives specifically  
22 addresses to your question, Judge Montgomery-Reeves, exactly  
23 how our historical tradition works. It's not a circulation  
24 test. It's not the idea that once something enters the market,  
25 you lose the ability to restrict it. Instead, it's that once

1 something enters the market, you have reason to want to  
2 restrict it, and legislatures do restrict it. So forty-two  
3 states had various restrictions on Bowie knives, including  
4 multiple restrictions that outright prohibited both manufacture  
5 and sale. Forty-three states restricted slung shots, again,  
6 including a number of them that restricted manufacture or sale.  
7 So whether it's carry or manufacture or sale or even possession  
8 outright, they all reflect a national and long-standing  
9 historical tradition of flexibility, of different states having  
10 different responses to shared public safety problems, because  
11 that is a part of the historical tradition we've always seen.  
12 Not every state regulates in the same way. Alaska, New Jersey,  
13 and Delaware, and other states may have very different  
14 approaches to some of these public safety questions, but our  
15 historical tradition has always embraced that, going back to  
16 the 19th century, the 18th century, and before.

17 Now, Judge Bibas, with the two minutes remaining, I do  
18 want to talk about the irreparable harm questions that you  
19 asked today and make two points. First, what we heard today at  
20 the podium is that plaintiffs have embraced fully the idea that  
21 constitutional harm must always be per se irreparable harm  
22 because they've built no record that they're suffering any  
23 irreparable harm that goes beyond that. This isn't a surprise.  
24 In the appellants' opening briefs, they also stake their case  
25 entirely on the idea constitutional harm is per se irreparable

1 harm. I don't think that can be quite right, partially because  
2 this court has said that's not quite right in cases like Hohe  
3 v. Casey and Anderson v. Davila. I think it also can't be  
4 right in large part because of Winter.

5 I understand that my friends on the other side are  
6 trying to draw a distinction between statutory and  
7 constitutional. I'm not quite sure I understood the way they  
8 were doing it. The whole reason that agencies can't act beyond  
9 the authority granted to them by statutes is our constitutional  
10 understanding that the executive has to stay in the lanes the  
11 legislature has provided. So if the Army, in the case of  
12 Winter, is violating NEPA, is going beyond what environmental  
13 requirements would have them do, they are violating the  
14 separation of powers, as I think my friends on the other side  
15 would agree, because executive agents can't flout congressional  
16 statutes. And when you have that situation, you have Winter.  
17 But Winter was very clear that the military exercises were  
18 allowed to proceed without simply saying, merely because you  
19 have a likelihood of success on the merits, we'll draw a line  
20 then and collapse the entire inquiry.

21 I think it's especially important when we're thinking  
22 about disrupting the status quo. Both this court and the  
23 Supreme Court have long made clear that disruptions on the  
24 status quo require a little more attention, a little more  
25 support at the preliminary injunction stage, especially when



1 you have, say, delays from the other party. Which I'm not  
2 saying about this case specifically, but it's something we see  
3 all the time in constitutional litigation. And I do think a  
4 contrary rule would have significant problems, not just for the  
5 parties, but for judicial economy, because it's going to  
6 require courts to collapse PI inquiries into a single  
7 likelihood of success factor every time. And when it does the  
8 likelihood of success on a limited record, this case is a  
9 perfect example. There is no record from the plaintiffs  
10 dealing with some of these historical questions, these  
11 technical questions, et cetera. I do think that's a real risk  
12 for courts, not just for parties.

13 And if I might go about twenty seconds over to answer  
14 your question about Lewis, Judge Bibas.

15 JUDGE BIBAS: Yes.

16 MR. FEIGENBAUM: So I think you're asking about Lewis  
17 v. Kugler. And I just want to note in footnote 12 in that  
18 opinion, the court was specifically talking as well about how  
19 where as in this case it is alleged that First Amendment rights  
20 have been chilled as a result of government action, a  
21 presumption of irreparable harm is manifest. So it's not even  
22 clear that Lewis was fully disaggregating Fourth Amendment from  
23 First Amendment, as opposed to perceiving some risk of chill in  
24 that case from the behavior of the police that was being  
25 challenged. So it's not even obvious that Lewis alone -- and I

1 spot you that it's also fifty years ago in a one-off case --  
2 stands for the proposition that all constitutional cases are  
3 going to collapse into a single likelihood of success analysis.

4 So given Winter; given what we see in elections cases  
5 like Purcell, which are also often constitutional, but  
6 nevertheless, do not collapse into a likelihood of success; and  
7 given that Lewis I don't think stands for that proposition, if  
8 all plaintiffs are resting on is the idea that constitutional  
9 harm is always irreparable harm per se, I just don't think  
10 they've made their case.

11 JUDGE BIBAS: Thank you.

12 MR. FEIGENBAUM: Thank you.

13 JUDGE BIBAS: Mr. Ohlendorf, rebuttal?

14 MR. OHLENDORF: Thank you, Your Honor. It's just a  
15 few quick points. First, on the irreparable harm and the  
16 injunction factors. I think even my friend on the other side  
17 couldn't swallow the pill that a permanent injunction upon  
18 finding an actual constitutional violation, a court could  
19 decline to enter a permanent injunction of the violation  
20 because it concluded that the other equitable factors didn't  
21 favor that type of relief.

22 JUDGE BIBAS: Sometimes a declaratory judgment  
23 suffices and courts don't grant an injunction in that  
24 situation.

25 MR. OHLENDORF: Judge Bibas, I just can't conceive of

1 a rule that a First Amendment or Second Amendment violation --  
2 a court would not enjoin an actual violation of one of those  
3 constitutional rights because it concluded, it's just not  
4 important enough; there's not enough tangible -- there's not  
5 enough tangible harm here.

6 JUDGE BIBAS: All right. Well, what about your  
7 friends skillfully alluding to your four-month delay in seeking  
8 this relief?

9 MR. OHLENDORF: Judge Bibas, I mean, number one, all  
10 of the delay cases they cited did not involve constitutional  
11 rights. They involved patent disputes or monetary disputes of  
12 that kind. And they also involved much, much longer delays. I  
13 mean, in one of the cases was a three-year delay; and another  
14 one, I think, was thirteen months. So I think that just  
15 doesn't factor into the analysis at all.

16 On common use, Your Honor, if I may, plainly, that is  
17 part of the tradition prong under Bruen, not the text prong. I  
18 mean, I would love to hear -- I have yet to hear and I didn't  
19 hear from my friends on the other side this morning what word  
20 in the Second Amendment common use comes from as a matter of the  
21 plain text or what Bruen called an analysis of the bare  
22 text. I mean, I have yet to heard an answer to that. But we  
23 do know from Heller where it does come from; it comes from two  
24 historical traditions. The tradition that the militia would  
25 come into militia service bearing the arms typically in common

1 use, and the tradition that, conversely, governments could ban  
2 the carrying of dangerous and unusual arms. Those clearly are  
3 historical analyses under Bruen's second test, not under its  
4 textual test. And Bruen itself says this. It says, we drew  
5 the common use standard from the historical tradition.

6 Finally, on history and tradition, if I may, Judge  
7 Bibas, very quickly, just two points. First, if this Court  
8 does decide to look beyond common use, the historical analysis  
9 has to be limited to the founding era. That's what a panel of  
10 this court held in the Lara case. That's binding here, unless  
11 the Court decides to take it en banc. I haven't heard -- the  
12 great bulk of the founding era laws they've cited below are  
13 laws that apply to slaves, specifically. I don't think those  
14 can conceivably carry its burden. This morning, my friend  
15 mentioned three laws from the 1830s. I think 1837 is too late.  
16 I also would note, one of those was struck down by the Georgia  
17 Supreme Court in Nunn as contrary to the Second Amendment. So  
18 I think plainly that does not suffice to bear the State's  
19 burden either.

20 JUDGE BIBAS: Okay. I thank you, and you're entitled  
21 to some rest, because we're no longer in the morning; we're in  
22 the afternoon now.

23 Ms. Murphy?

24 MS. MURPHY: Thank you. If I can just supplement a  
25 couple of points Mr. Ohlendorf made and then add a couple more.

1 Just the one other thing I would add on the injunctive relief  
2 factors is, it's not just that I think it's right as a matter  
3 of comparison to other constitutional rights. And what you  
4 heard basically this morning is, this isn't causing any harm.  
5 It's not a big deal, because we're pretty confident you can  
6 defend yourself with something else. And if there's one thing  
7 that Heller already addressed squarely, it was that question.  
8 Heller said, and I quote, it is no answer to say that it's  
9 permissible to ban the possession of handguns so long as the  
10 possession of other firearms, like long guns, is allowed. And  
11 then it went on to say, it doesn't matter. We hypothesize some  
12 reasons why people might prefer something -- one type of  
13 firearm to another. But at the end of that paragraph, the  
14 court says, whatever the reason, handguns are the most popular  
15 weapon chosen for self-defense in the home, so a complete  
16 prohibition is invalid. So I don't think it's open to the  
17 State to come in now and say, you know, it's all well and good  
18 that you would like to have a semi-automatic rifle, but we  
19 think you can do well enough with a revolver or whatever it is  
20 that they think is permissible.

21 On the common use test, I would just point you -- Mr.  
22 Feigenbaum pointed specifically to page 2143 of Bruen. I'd  
23 invite you to go read that paragraph, because before the  
24 court uses the words "in common use", it specifically says,  
25 drawing from this historical tradition, we explained in Heller

1 that the Second Amendment protects the carrying of weapons that  
2 are in common use. And if you look earlier at page 2128 of  
3 Bruen, the Court again says, we found it fairly supported by  
4 the historical tradition of prohibiting the carrying of  
5 dangerous and unusual weapons; that the Second Amendment  
6 protects the possession of weapons that are in common use at  
7 the time. So it's quite clear that the Court is drawing us to  
8 the common use test, not from the word "arms", which of course  
9 says nothing about common use, but from the historical  
10 tradition of prohibiting dangerous and unusual weapons.

11 Now, that gets to the argument you heard about how,  
12 well, yeah, the court may have said that lots of times, but  
13 they couldn't possibly have meant it because it's a bad test  
14 and it's circular and it doesn't work. That just rests on a  
15 misunderstanding of the test. Because what the State continues  
16 to overlook is, it has to be dangerous and unusual in order for  
17 an arm to be banned. Which means if a state comes in and just  
18 bans something because it's new on the market, but what it's  
19 banning is not materially different at all from things that are  
20 already on the market, it's not abnormally dangerous in some  
21 way that differentiates from other arms, then it's satisfied  
22 the abnormally, unusually dangerous component.

23 So this whole idea of circularity is just built on a  
24 false premise. And I think you see that if you look back to  
25 machine guns. Everybody always wants to say, oh, machine guns

1 were -- that just proves that this is all circular because the  
2 only reason they're not common is because they were banned. In  
3 fact, they were banned because they weren't common. They came  
4 onto the market around 1921. And there were thousands of  
5 them available -- tens of thousands of them available. If you  
6 look to the declaration of the State's own expert, Professor  
7 Spitzer explains nobody really wanted them. There wasn't a big  
8 rush to go buy these. Instead, there was a big rush to ban  
9 them. By 1925, states started banning them. Thirty-two states  
10 had banned them by 1934, when the federal legislation came  
11 along. So what we saw is the reaction of Americans all across  
12 the country was, we actually do think this is something new and  
13 different that requires different treatment. And that's  
14 particularly notable given that by the time these submachine  
15 guns, bearable automatic firearms, come onto the market in the  
16 1920s, semi-automatic rifles like the ones we're talking about  
17 here today had been on the market for more than thirty years,  
18 and nobody was prohibiting them. And even in the 1920s, when  
19 the states -- a vast majority of the states started banning  
20 these automatic weapons, they recognized the difference between  
21 the two. And only a handful of states impose any restrictions  
22 on semi-automatics. And if you study those restrictions and  
23 what even Professor Spitzer had to say about them, you will  
24 find that no more than at absolute most five had any kind of  
25 ban on semi-automatic technology, and all but the District of

1 Columbia's was repealed or amended within a few decades.

2 JUDGE ROTH: But if it's only recently in the last  
3 twenty years that semi-automatic weapons have been used by  
4 people in mass shootings who want to inflict as much damage and  
5 death as possible very quickly so that the use that has upset  
6 people today was not a use that was recognized or was not a use  
7 that was in actual use fifty years ago. So don't we have to  
8 consider -- don't we have to consider the present use or the  
9 change of use of these weapons, not just the fact that they  
10 originally appeared on the market shortly after World War I?

11 MS. MURPHY: If that were the typical means for which  
12 they were being used, I'd be with you. But when less than one-  
13 tenth of one percent, and probably even less than that, of  
14 these firearms are being used by somebody for that purpose, and  
15 the vast, vast, vast majority of people in this country of  
16 people who own those weapons own them for lawful purposes like  
17 self-defense, then Heller and Bruen teach that you cannot ban  
18 them from the possession of law-abiding citizens because the  
19 Second Amendment --

20 JUDGE ROTH: You are saying, forget the fact that it's  
21 only very few cases where they're used for these terrible  
22 purposes; move onto something else. There are people who are  
23 concerned that they are used for these terrible purposes,  
24 miniscule as it may be, is something that is needed to protect  
25 all of us from those circumstances arising in our own life?



1 MS. MURPHY: I very, very much appreciate the concern,  
2 which is a concern that all of us share, Judge Roth. But the  
3 problem is that Heller considered very similar, indeed, some of  
4 the same concerns. There were amici there who made the same  
5 arguments, that handguns should be prohibited because handguns  
6 are the overwhelmingly common use of firearms in mass  
7 shootings. And what the Supreme Court said is, we will take  
8 all of that as a given. We are not going to dispute that the  
9 problems you're talking about are real, but the Second  
10 Amendment already struck the balance in favor of protecting the  
11 rights of the law-abiding citizens to protect themselves  
12 against the people who would use arms to cause them and their  
13 loved ones harm.

14 JUDGE BIBAS: Thank you, Counsel.

15 MS. MURPHY: Thank you, Your Honor.

16 JUDGE BIBAS: The case is submitted. We'd like to ask  
17 both sides to work together to produce a transcript and split  
18 the cost. And let's go off the record for a moment so we can  
19 greet counsel at sidebar before our next case.

20 (Whereupon these proceedings were concluded at 2:42 PM)

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C E R T I F I C A T I O N

I, Bridget Hearne, certify that the foregoing transcript is a true and accurate record of the proceedings.

*Bridget Hearne*

Bridget Hearne

eScribers

7227 North 16th Street, Suite #207

Phoenix, AZ 85020

Date: March 19, 2024

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**[factors - georgia]**

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[give - honor]

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