

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

CALEB BARNETT, et al.,

Plaintiffs-Appellees,

V.

KWAME RAOUL, Attorney General
of Illinois, and BRENDAN F. KELLY,
Director of the Illinois State Police,

Defendants-Appellants.

Nos. 23-1825; 23-1826; 23-1827; &
23-1828

**PLAINTIFFS-APPELLEES' STATEMENT REGARDING
CONSOLIDATION**

In response to this Court’s Order of May 3, Plaintiffs-Appellees Caleb Barnett, Brian Norman, Hood’s Guns & More, Pro Gun and Indoor Range, and National Shooting Sports Foundation, Inc. (collectively, “Plaintiffs”), respectfully submit that these appeals should be aligned for briefing and oral argument with the appeal in *Herrera v. Raoul*, No. 23-1793, and further request that all of these appeals be aligned with *Bevis v. Naperville*, No. 23-1353, for oral argument. All of these appeals challenge the constitutionality of the same Illinois law, as well as similar local laws that raise the same Second Amendment issues. The cases will entail the same constitutional analysis, and there is substantial overlap among the defendants. Accordingly, while the different alignment of the parties on account of the different results reached by the district courts counsels against complete consolidation, in the sense of requiring all plaintiffs and defendants to file consolidated briefs, aligning the cases on a schedule that will enable the Court to consider all of these appeals together would best ensure that the Court has the full benefit of the district courts’ differing views and records when it considers the constitutionality of HB 5471.

Consistent with that position, Plaintiffs proposed exactly that shortly after the state noticed this appeal. Plaintiffs further offered to brief this appeal on an expedited basis and endeavored to negotiate a schedule among all parties across all three appeals that would facilitate alignment for argument. But while all plaintiffs were amenable to that proposal, the state ultimately declined to agree to anything.

And since then, the state has taken the position that briefing should not be expedited at all, and that the Court should proceed to promptly schedule argument in *Bevis* alone. Given that the state has already filed a full brief defending the constitutionality of HB 5471 in the *Bevis* case, it is hard to see what that would accomplish other than to deprive Plaintiffs of a full and fair opportunity to defend the preliminary injunction that they secured before this Court—even as the state is actively urging this Court to immediately undo that relief pending resolution of an appeal that it has so far evinced no desire to expedite. And it makes particularly little sense to consider *Bevis* without *Herrera* and *Barnett* alongside it when *Bevis* is the lone case in which the state did not even participate below.

The far better course is to consider all of these cases *together*, and to align and expedite the remaining briefing to whatever extent necessary to facilitate that outcome. That will ensure that the Court has before it the view of *all* district courts that have addressed this issue, as well as the findings of the *Barnett* court in the only case that actually considered the critical question of whether the arms Illinois has banned are “in common use today.” *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S.Ct. 2111, 2143 (2022). And it will ensure that no plaintiffs are effectively sidelined in the fight to restore their constitutional rights.

BACKGROUND

1. On January 10, 2023, Illinois enacted HB 5471, the “Protect Illinois Communities Act,” Ill. Pub. Act. 102-1116 §1, which takes the radical step of banning nearly every modern semiautomatic rifle—the single most popular type of rifle in the country, possessed by Americans in the tens of millions. HB 5471 also bans many semiautomatic shotguns and pistols, even though “semiautomatic pistols” are “the weapons most commonly used today for self-defense.” *Caetano v. Massachusetts*, 577 U.S. 411, 417-18 (2016) (Alito, J., concurring in the judgment). HB 5471 goes even further and bans all ammunition feeding devices (without which semiautomatic firearms cannot fire as designed) that are capable of holding “more than 10 rounds of ammunition for long guns and more than 15 rounds of ammunition for handguns,” 720 ILCS 5/24-1.10(a)(1), even though tens of millions of Americans own hundreds of millions of such arms, which account for half of all magazines in circulation today.

2. Four sets of plaintiffs promptly filed suit in the U.S. District Court for the Southern District of Illinois, arguing that HB 5471 violates the Second Amendment, and all plaintiffs moved for preliminary injunctive relief. All four cases were consolidated before the Honorable Stephen McGlynn, who proceeded to consider extensive briefing, evidence, and oral argument on the motions.

3. Meanwhile, two lawsuits in the Northern District of Illinois brought similar challenges. The plaintiff in *Hererra* challenged HB 5471 in addition to local laws imposing similar restrictions, and the plaintiffs in *Bevis* challenged local laws and then later added challenges to the constitutionality of HB 5471 to their pending case. While the *Bevis* plaintiffs notified the state that they amended their complaint to add that challenge, they did not add any state defendants, and the state declined to intervene or otherwise participate. The district court proceeded to deny the *Bevis* plaintiffs' motion for a preliminary injunction. The court did so without making any findings about whether the arms Illinois has banned are commonly possessed by law-abiding individuals for lawful purposes, as it concluded that they could be banned regardless of their commonality because they are purportedly "particularly 'dangerous.'" Op.18, *Bevis v. Naperville*, No. 22-cv-4775 (N.D. Ill. Feb. 17, 2023), Dkt.63.

4. The *Bevis* plaintiffs appealed, and at that point the state moved to intervene as of right, which this Court granted. *See* No. 23-1353. The *Bevis* appellants moved for an injunction pending appeal, which this Court denied. They then petitioned the Supreme Court for the same relief. *See* Application for Injunction Pending Appeal, No. 22A948 (U.S. Apr. 26, 2023). Justice Barrett ordered the defendants to respond to their petition, which they have since done, and the petition remains pending. The *Bevis* appellants filed their opening brief in this Court on April

4, 2023, and the state and the City of Naperville filed their response briefs on May 3, 2023. The *Bevis* reply brief is currently due on May 24, 2023. Oral argument has not yet been scheduled.

5. The district court in *Herrera* denied plaintiff's motion for a preliminary injunction a few weeks ago, expressly adopting the analysis of the *Bevis* opinion. Herrera appealed on April 26, 2023, and moved on the same day to consolidate *Herrera* with *Bevis* and expedite briefing in *Herrera* so that the Court could hear oral argument in both cases at the same time. No. 23-1793, ECF.5. That motion remains pending.

6. On April 28, 2023, the district court in this case granted Plaintiffs' motion for a preliminary injunction. As the court explained, the Supreme Court just held in *Bruen* that law-abiding citizens have a constitutional right to possess firearms that are "in common use today." *Bruen*, 142 S.Ct. at 2143. Considering all the evidence before it, the court concluded that the state had not met, and likely could not meet, its burden of proving that the arms it has banned are not in common use, as unrefuted record evidence demonstrated that they are possessed by millions of law-abiding Americans for lawful purposes like self-defense. Op.22-24, D.Ct.Dkt.101. While the court found that "dispositive" under *Bruen*, it went on to explain why the state's historical analogs were not really analogous at all. Op.23-

25. And the court found that all the remaining factors favored injunctive relief as well. Op.26-29.

7. The state lost no time trying to undo that relief. It filed a motion to stay the preliminary injunction in the district court mere hours after it issued, and it filed an emergency stay motion in this Court two business days later, before Plaintiffs could even respond to the (non-emergency) motion it filed in the district court. This Court granted a stay pending further order of the Court on May 4, 2023.

8. Given the alacrity with which the state moved to undo the relief Plaintiffs secured, Plaintiffs promptly inquired whether the state intended to move to expedite its appeal, and informed the state that Plaintiffs are willing to brief the case on an expedited basis. The state demurred, but said it would consider a briefing schedule if Plaintiffs proposed one. Plaintiffs proceeded to do so, but the state then took the position that it could not agree to any proposal unless all parties across *Bevis*, *Herrera*, and these appeals would agree to it as well. It then informed Plaintiffs that the other defendants in the *Herrera* case would not agree to expedite their brief, and that the defendants in the *Bevis* case would not agree to anything that might slow down resolution of their case while the application for an injunction remains pending before the Supreme Court.

9. On May 5, 2023, this Court ordered the parties in *Herrera* and in this case to file statements advising whether the appeals should be consolidated. Shortly

thereafter, the state filed an opposition to the pending consolidation motion in *Herrera* in which it argued that briefing in *Herrera* should not be expedited at all, and that this Court should not wait until *Herrera* is briefed to schedule and hear argument in *Bevis*. No. 23-1793 ECF.16 at 3-5.

10. On May 8, 2023, the state defendants filed their statement on consolidation. The defendants did not oppose consolidating the *Barnett* and *Hererra* appeals. ECF.28 at 9. But the state objected to expediting and aligning with the *Bevis* appeal out of professed concern that doing so would “delay[] scheduling oral argument in *Bevis*.” *Id.* at 8.

ARGUMENT

This Court now has pending before it three sets of appeals presenting the same constitutional challenge to the same state law, arising out of district court decisions that reached diametrically opposite results. While the district courts in *Bevis* and *Herrera* concluded that HB 5471 does not violate the Second Amendment, the district court in this case concluded that HB 5471 is exceedingly unlikely to survive under the test laid out in the Supreme Court’s recent decision in *Bruen*, and hence preliminarily enjoined the state from enforcing it. In the course of doing so, the court made findings about the commonality of the arms that Illinois has banned—a question that neither of the other districts courts addressed, even though *Bruen* deemed it central to the constitutionality of efforts to ban arms.

Given those dynamics, both thorough constitutional analysis and judicial economy would be served by ensuring that all of these appeals can be argued and decided together, as the Second Circuit recently did when facing a similar dynamic, *see Order, Spencer v. Nigrelli*, No. 22-3237 (2d Cir. Jan. 23, 2023), ECF.47 (expediting briefing and aligning argument schedule for five appeals challenging the same law), and aligning and expediting the remaining briefing to whatever extent necessary to facilitate that outcome. That is the best way to ensure that the Court has before it both the different reasoning that the lower courts employed and the findings that the *Barnett* court made on the substantial record that it considered.

To that end, Plaintiffs stand ready and willing to brief this case on whatever schedule this Court deems necessary to ensure that all appeals can be argued together. And it is hard to see how the state could have any legitimate basis to resist that course of action when it not only filed an emergency motion seeking to undo the relief Plaintiffs secured mere days after the district court granted it, but has already filed a response brief defending the constitutionality of HB 5471 in the *Bevis* case. To be sure, the plaintiffs and defendants are on different sides of the v. in this case, and the *Herrera* and *Bevis* cases present some issues that this case does not. But the Court can address that dynamic by aligning the briefing schedules and arguments, without consolidating to the point of ordering the *Herrera* and *Barnett* parties to file joint consolidated briefs.

Thus, the only evident reason to resist expedition and alignment for argument at this point would seem to be to try to keep the *Bevis* case ahead of *Barnett*, and hence deprive Plaintiffs of a full and fair opportunity to defend the relief that the state has urged this Court to immediately undo. Indeed, the state's seeming desire to keep *Bevis* in the lead is particularly odd given that *Bevis* is the lone case in which the state was not even a party or participant in the district court, and hence played no role in crafting the arguments or record that the district court considered. To state what should be obvious, a desire to sideline the plaintiffs who actually prevailed in the district court is hardly a compelling justification for standing in the way of the most orderly resolution of three very similar appeals, especially when oral argument in the *Bevis* case has not even been scheduled. Accordingly, Plaintiffs respectfully submit that this Court should align all three cases for oral argument and order the *Herrera* and *Barnett* appeals to be briefed on whatever schedule best facilitates its ability to jointly consider and resolve all three of these appeals at once.

DAVID H. THOMPSON
PETER A. PATTERSON
WILLIAM V. BERGSTROM
COOPER & KIRK, PLLC
1523 New Hampshire Ave., N.W.
Washington, DC 20036

DAVID G. SIGALE
LAW FIRM OF DAVID G. SIGALE, P.C.
430 W. Roosevelt Road
Wheaton, IL 60187

*Counsel for Plaintiffs-Appellees
Dane Harrell, et al.*

C.D. MICHEL
ANNA M. BARVIR*
KONSTADINOS T. MOROS*
MICHEL & ASSOCIATES, P.C.
180 E. Ocean Blvd., Suite 200
Long Beach, CA 90802

*Application for admission pending

MARK L. SHAW
SHAW LAW LTD.
33 North County St., Ste. 300
Waukegan, IL 60085

*Counsel for Plaintiffs-Appellees Federal
Firearms Licensees of Illinois, et al.*

Respectfully submitted,

S/Erin E. Murphy
PAUL D. CLEMENT
ERIN E. MURPHY
Counsel of Record
MATTHEW D. ROWEN*
MARIEL A. BROOKINS*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900

*Supervised by principals of the firm who
are members of the Virginia bar

GARY C. PINTER
SWANSON, MARTIN & BELL, LLP
103 W. Vandalia Street
Suite 215
Edwardsville, IL 62025
(618) 655-3131
gpinter@smbtrials.com

ANDREW A. LOTHSON*
SWANSON, MARTIN & BELL, LLP
330 N. Wabash
Suite 3300
Chicago, IL 60611

*Counsel for Plaintiffs-Appellees
Caleb Barnett, et al.*

THOMAS G. MAAG
PETER J. MAAG
MAAG LAW FIRM, LLC
22 W. Lorena Avenue
Wood River, IL 62095

*Counsel for Plaintiffs-Appellees
Jeremy W. Langley, et al.*

May 11, 2023

**CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION**

I hereby certify that:

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 2,162 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

May 11, 2023

s/Erin E. Murphy
Erin E. Murphy

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Erin E. Murphy
Erin E. Murphy