IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RHONDA EZELL, et al,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**No. 10-CV-5135**
	)	**Judge Virginia M. Kendall**
CITY OF CHICAGO,	)	
	)	
Defendant.	)	

MOTION OF THE NATIONAL RIFLE ASSOCIATION FOR LEAVE TO FILE *INSTANTER* A BRIEF AS AMICUS CURIAE

The National Rifle Association ("NRA"), a not-for-profit membership association representing members who seek to exercise and protect their Second Amendment rights, respectfully submits this Motion for Leave to File *Instanter* a Brief as Amicus Curiae in this matter. For the reasons set forth below, the NRA respectfully requests that this Court grant the motion and permit the filing of the amicus brief attached hereto as Exhibit A.

THE INTEREST OF AMICUS CURIAE

1. The NRA is America's foremost and oldest defender of Second Amendment rights. Founded in 1871, the NRA today has approximately four million members, including residents of Chicago, and its programs reach millions more. The NRA is America's leading provider of firearms marksmanship and safety training for both civilians and law enforcement. The NRA also collects and publishes real-life examples of citizens from all walks of life whose lawful possession of firearms enabled them to protect themselves from violent criminals.

2. The NRA and its members have numerous interests that will be substantially affected by the outcome of this litigation. First and foremost, the NRA's Chicago members'

Second Amendment rights are directly infringed by the City's ban on firearms ranges and training. Ensuring that this Court applies the appropriate standard of review to Plaintiffs' challenge is thus critically important to the NRA's Chicago members.

3. Second, the NRA and/or its members are often litigants in cases raising Second Amendment issues, and the appropriate post-*Heller* standard of review is a central feature of many, if not all, of these cases. *See, e.g.*, *Heller v. District of Columbia*, No. 10-7036 (D.C. Cir. appeal filed Apr. 1, 2010); *D'Cruz v. BATFE*, No. 5:10-cv-140-C (N.D. Tex. filed Sept. 8, 2010), *D'Cruz v. McCraw*, No. 5:10-cv-141-C, (N.D. Tex. filed Sept. 8, 2010); *Peruta v. County of San Diego*, No. 3:09-cv-02371 (S.D. Cal. filed Oct. 23, 2009).

THE NRA'S AMICUS BRIEF WILL AID THIS COURT'S CONSIDERATION OF A CRITICALLY IMPORTANT ISSUE

4. "A federal district court's decision to grant amicus status to an individual, or an organization, is purely discretionary. Relevant factors in determining whether to allow an entity the privilege of being heard as an amicus include whether the proffered information is timely, useful, or otherwise." *United States v. Board of Educ. of the City of Chicago*, No. 80-5124, 1993 U.S. Dist. LEXIS 14307, at *7-8 (N.D. Ill. Oct. 8, 1993) (citations and quotation marks omitted).[1]

[1] One judge of this Court has adopted Judge Posner's view that amicus curiae participation should be permitted only in "'a case in which a party is inadequately represented; or in which the would-be amicus has a direct interest in another case that may be materially affected by a decision in th[e] case [at issue]; or in which the amicus has a unique perspective or specific information that can assist the court beyond what the parties can provide.'" *Jones Day v. Blockshopper LLC*, No. 08-4572, 2008 U.S. Dist. LEXIS 94442, at *18 (N.D. Ill. Nov. 13, 2008) (quoting *Voices for Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (Posner, J., chambers opinion)). But the Seventh Circuit's standard for briefs submitted in that court are an interpretation of Fed. R. App. P. 29, which does not govern amicus briefs submitted in district courts, and Judge Posner's view of the utility of amicus participation has not been regularly followed by this Court and has found little support in other courts across the country. *See, e.g.*, *Neonatology Associates, P.A. v. Commissioner of Internal Revenue*, 293 F.3d 128, 130,

5. This Court has historically and repeatedly granted membership organizations similar to the NRA leave to file amicus briefs where the outcome of the litigation could have a substantial impact on the organization's members. *See, e.g., A.R.D.C. v. Harris*, 595 F. Supp. 107, 109 n.2 (N.D. Ill. 1984) (noting that Chicago Bar Association appeared as amicus curiae in case pertaining to Illinois Attorney Registration and Disciplinary Commission); *Board of Educ.*, 1993 U.S. Dist. LEXIS 14307 at *9-10 (granting two organizations leave to file because they "represent interests that will be significantly affected by the resolution of th[e] matter," granting another organization leave to file because its "interest in th[e] proceedings [wa]s substantial," and granting a fourth organization leave to file because its members' "information and concerns may be useful in the resolution of the matter"); *United States v. Board of Educ. of City of Chicago*, 663 F. Supp. 2d 649, 661 (N.D. Ill. 2009) (amici "participation was welcome and helpful and contributed to the clarity of the issues"); *Center for Individual Freedom v. Madigan*, minute order, No. 10-4383 (N.D. Ill., Aug. 20, 2010) (in case dealing with campaign-disclosure law, granting leave to public interest organization focused on public policy regarding elections) (attached as Ex. B).

6. For example, just a few months ago, Judge Dow granted four trade associations leave to file amicus briefs in a case raising constitutional challenges to Illinois's liquor regulations. Judge Dow credited the associations' contentions that their "members would be … affected" by the pending litigation and noted that the proffered briefs were helpful to the court (i)

131-33 (3d Cir. 2002) (Alito, J., chambers opinion) (recognizing the "small body of judicial opinions that look with disfavor on motions for leave to file amicus briefs," but concluding that Rule 29 does not contain the limitations suggested in those opinions and explaining that a much more permissive standard is "the predominant practice"). Indeed, in its recent Second Amendment cases, the Supreme Court itself has welcomed dozens of amicus briefs. In any event, the NRA and its members easily satisfy the second of Judge Posner's standards: as noted above, the NRA and its members are currently litigating several Second Amendment cases in which their interests may be materially affected by the standard of review adopted.

because they "assert[ed] legal arguments, some of which are new and others of which add[ed] new twists on arguments that the parties ha[d] already raised," (ii) because the issues raised in the litigation were important, and (iii) because the case was proceeding on an expedited track. *Anheuser-Busch, Inc. v. Schnorf*, docket order, No. 10-cv-1601, at 2, 3-4 (N.D. Ill. June 1, 2010) (attached as Ex. C).

7. In an earlier TRO hearing, this Court stated that "the most important thing … is to determine what standard we are going to use here." Tr. of Hr'g of Aug. 24, 2010 at 73:16-19. The Court reiterated the importance of this issue at the hearing of September 28, 2010. The NRA's amicus brief focuses on this issue—namely, the appropriate framework for reviewing Second Amendment challenges in the wake of the Supreme Court's decisions in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), and *McDonald v. Chicago*, 130 S. Ct. 3020 (2010). As in *Anheuser-Busch*, the NRA's proffered brief offers arguments, perspectives, and elaborations on this issue that are simply not be found in any of the briefs submitted by the parties to date. The NRA respectfully submits, therefore, that as in *Anheuser-Busch*, the brief offered here be helpful to the Court as it seeks to resolve a critically important constitutional issue on an expedited basis.

CONCLUSION

For the foregoing reasons, the NRA respectfully requests that the Court grant this motion for leave to file a brief as amicus curiae.

Dated: October 1, 2010

Respectfully submitted,

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EXHIBIT A

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BRIEF OF THE NATIONAL RIFLE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS

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INTEREST OF AMICUS CURIAE

The NRA is America's foremost and oldest defender of Second Amendment rights. Founded in 1871, the NRA today has approximately four million members and its programs reach millions more. The NRA is America's leading provider of firearms marksmanship and safety training for both civilians and law enforcement. The NRA also collects and publishes real-life examples of citizens from all walks of life whose lawful possession of firearms enabled them to protect themselves from violent criminals. The NRA's membership includes Chicago residents.

The NRA and its members have numerous interests that will be substantially affected by the outcome of this litigation. First and foremost, the NRA's Chicago members' Second Amendment rights are directly infringed by the City's ban on firearms ranges and training. Range training allows NRA members to become proficient at the safe and effective handling of firearms. Ensuring that this Court applies the appropriate standard of review to Plaintiffs' challenge is thus critically important to the NRA and its Chicago members.

Second, the NRA and/or its members are often litigants in cases raising Second Amendment issues, and the appropriate post-*Heller* standard of review is a central feature of many, if not all, of these cases. *See, e.g.*, *Heller v. District of Columbia*, No. 10-7036 (D.C. Cir. appeal filed Apr. 1, 2010); *D'Cruz v. BATFE*, No. 5:10-cv-140-C (N.D. Tex. filed Sept. 8, 2010), *D'Cruz v. McCraw*, No. 5:10-cv-141-C, (N.D. Tex. filed Sept. 8, 2010); *Peruta v. County of San Diego*, No. 3:09-cv-02371 (S.D. Cal. filed Oct. 23, 2009); *Owner-Operator Independent Drivers, et al. v. Lindley*, No. 2:10-cv-2010 (E.D. Cal. filed July 28, 2010).

BACKGROUND AND SUMMARY OF ARGUMENT

The Supreme Court has declared that the Second Amendment preserves the fundamental right to keep and bear arms. *See District of Columbia v. Heller*, 128 S. Ct. 2783 (2008); *McDonald v. Chicago*, 130 S. Ct. 3020 (2010). The City of Chicago has long objected to, and banned, its residents' exercise of their Second Amendment rights. In grudging acknowledgement that *Heller* and *McDonald* would require the City to do *something* about its patently unconstitutional total handgun ban, the Mayor and City Council hastily amended the City's firearms ordinances to ban *most* but not all exercise of Second Amendment rights. At issue in this case is the City's complete ban on training with a firearm. *See* Municipal Code of Chicago § 8-20-280 ("Shooting galleries, firearm ranges, or any other place where firearms are discharged are prohibited…."); *id.* § 8-24-010 ("No person shall fire or discharge any firearm within the city, except in the [sic] lawful self-defense or defense of another…."). Enactment of the law was akin to recognizing that the First Amendment prohibits a ban on books but then banning literacy. And this ban is particularly pernicious and perverse because the City *requires* a resident to obtain range training before he or she may possess, keep, or carry a firearm in the City. *Id.* §§ 8-20-110, -120. In other words, the City now conditions the right to keep and bear arms on obtaining range training but simultaneously bans range training.

The Plaintiffs—law-abiding residents of Chicago—challenge this ban as an infringement of their rights under the Second and Fourteenth Amendments. The case thus presents the question of what analytical framework lower courts should utilize in adjudicating Second Amendment challenges after *Heller* and *McDonald*. In *McDonald*, the Supreme Court specifically rebuffed Chicago's contention that Second Amendment rights are subject to "interest balancing," 130 S. Ct. at 3047 (plurality) (citing *Heller*, 128 S. Ct. at 2820-21), and informed the

City that it could no longer view the right to keep and bear arms "as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees," *id.* at 3044. Ignoring these holdings, the City still maintains that Second Amendment rights are not to be protected by the courts with the same vigilance as other rights. Instead, the City amazingly suggests that rational basis scrutiny or interest-balancing—both of which the Supreme Court has now *twice* rejected— are the appropriate analytical frameworks in Second Amendment cases.

As demonstrated below, the question after *Heller* and *McDonald* is not whether strict scrutiny or lesser scrutiny applies to Second Amendment challenges, but whether tiers-of-scrutiny analysis should be applied instead of, or in addition to, the historically sensitive analysis employed in *Heller*. If a tiers-of-scrutiny framework is to be adopted, however, *Heller* and *McDonald* allow only for strict scrutiny.

ARGUMENT

Generally, the Supreme Court reviews constitutional challenges within the familiar tiers-of-scrutiny framework, wherein laws that infringe on constitutional rights are subject to heightened scrutiny and those that do not are subject to deferential rational-basis review. In *District of Columbia v. Heller*, however, the Court eschewed levels of scrutiny in favor of a more historically sensitive analysis. *See* 128 S. Ct. 2783, 2817-18 (2008). Subsequent to *Heller* some lower courts have nonetheless proceeded to analyze Second Amendment claims under the tiers-of-scrutiny framework, and there has been some debate as to whether intermediate or strict scrutiny applies. *Compare United States v. Engstrum*, 609 F. Supp. 2d 1227, 1231-32 (D. Utah 2009) (applying strict scrutiny), *with United States v. Miller*, 604 F. Supp. 2d 1162, 1171 (W.D. Tenn. 2009) (applying intermediate scrutiny on theory that Second Amendment rights are not fundamental). The Seventh Circuit has reserved the question, at least with respect to all cases

not concerning disarmament of criminals. *See United States v. Skoien*, __ F.3d __, No. 08-3770, 2010 U.S. App. LEXIS 14262, at *11 (7th Cir. July 13, 2010) (en banc) (assuming without deciding that intermediate scrutiny applied to law banning possession by those convicted of misdemeanor crimes of domestic violence and refusing to "get more deeply into the 'levels of scrutiny' quagmire"); *United States v. Williams*, __ F.3d __, No. 09-3174, 2010 U.S. App. LEXIS 16194, at *16 (7th Cir. Aug. 5, 2010) (applying intermediate scrutiny to felon-in-possession statute "without determining that it would be the precise test applicable to all challenges to gun restrictions"); *United States v. Yancey*, __ F.3d __, No. 09-1138, 2010 U.S. App. LEXIS 18442, at *5-6 (7th Cir. Sept. 3, 2010) (applying *Skoien* "framework" to challenge to ban on firearms possession by unlawful drug user but "again reserve[ing] the question whether a different kind of firearm regulation might require a different approach").[1]

[1] Remarkably, it is the City's position that the Seventh Circuit's reservation implies that bans on the exercise of Second Amendment rights of law-abiding citizens should be subject to *lesser* scrutiny than bans relating to criminals. This contention turns *Heller* on its head. The Supreme Court recognized that exercise of the right to keep and bear arms by law-abiding citizens is at the very core of the Second Amendment, 128 S. Ct. at 2821, whereas bans pertaining to convicted criminals and other dangerous persons may be outside the scope of the right as a historical matter, *id.* at 2816-17.

At bottom, the City is really arguing that the right to train with a firearm—to become proficient in the "use [of] arms in defense of hearth and home," *id.* at 2821—is outside the scope of the Second Amendment. There is little to this argument. As the Supreme Court explained in *Heller*, the Second Amendment's prefatory clause, while not "suggest[ing] that preserving the militia was the only reason Americans valued the ancient right," does show that the founding generation believed that codification of the right would "prevent elimination of the militia," 128 S. Ct. at 2801, which consisted of "all males physically capable of acting in concert for the common defense," *id.* at 2799. The prefatory clause's reference to a "well-regulated militia" was thus a reference to "'the body of the people, *trained* to arms.'" *Id.* at 2800 (citing Va. Declaration of Rights § 13 (1776), in 7 Thorpe 3812, 3814) (emphasis added). *See also id.* ("the adjective 'well-regulated' implies nothing more than the imposition of proper discipline and *training*") (emphasis added). *See also* FEDERALIST NO. 29 (the federal army cannot be a threat to the people "while there is a large body of citizens, little, if at all, inferior to them in discipline and the use of arms"); Letter XVIII, *Letters from the Federal Farmer to the Republic* 124 (W. Bennett ed. 1978) ("[T]o preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them."). The founding

While *Heller* did not definitively fix the methodology for reviewing Second Amendment challenges, the debate that remains open is not between strict and intermediate scrutiny, but between strict scrutiny and the framework applied in *Heller*. In this regard, it is noteworthy that the Chief Justice, a member of the *Heller* majority, expressly suggested at oral argument in *Heller* that the inquiry into levels of scrutiny was atextual and unhelpful. *See* Tr. of Oral Argument at 44, *Heller*, 128 S. Ct. 2783. If a level-of-scrutiny analysis is to be employed in Second Amendment cases going forward, however, *Heller* and *McDonald* create no great mystery on what type of scrutiny applies.

When a law interferes with "fundamental constitutional rights," it is subject to "strict judicial scrutiny." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973). *See also id.* at 17 (if a law "impinges upon a fundamental right explicitly or implicitly protected by the Constitution, [it] thereby requir[es] strict judicial scrutiny"); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("classifications affecting fundamental rights … are given the most exacting scrutiny"); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983) ("strict scrutiny [is] applied when government action impinges upon a fundamental right protected by the Constitution"); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) ("There

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generation thus clearly understood that for the right to keep and bear arms to mean anything at all, the people had to become proficient with those arms.

The same goes for the generation that incorporated the Second Amendment against the states. For example, *Heller* credited two significant constitutional treatises penned by Thomas Cooley as representative of the Reconstruction-era understanding of the right to keep and bear arms. In "his 1880 work, General Principles of Constitutional Law," Cooley explained: "'to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms.'" *Heller*, 128 S. Ct. at 2811-12 (quoting page 271). And in his "massively popular 1868 Treatise on Constitutional Limitations, Cooley explained that "'[t]he alternative to a standing army is 'a well-regulated militia,' but this cannot exist unless the people are trained to bearing arms.'" 128 S. Ct. at 2811 (quoting page 350).

may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments ….").[2]

Heller explained that Blackstone "cited the arms provision of the [English] Bill of Rights as one of the fundamental rights of Englishmen," and that "[b]y the time of the founding, the right to have arms had become fundamental for English subjects." 128 S. Ct. at 2798. And it was this fundamental "pre-existing right" that the Second Amendment "codified." *Id.* at 2797 (emphasis omitted). Thus, it is unsurprising that the Court, in *McDonald*, explained that the "decision in *Heller* points unmistakably to [an affirmative] answer" to the question of "whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty." *McDonald*, 130 S. Ct. at 3036. Indeed, *McDonald* laid to rest any doubt on this question, declaring that "the right to bear arms was fundamental to the newly formed system of government." *Id.* at 3037. *See also id.* ("This is surely powerful evidence that the right was regarded as fundamental in the sense relevant here."); *id.* at 3041 ("Evidence from the period immediately following the ratification of the Fourteenth Amendment only confirms that the right to keep and bear arms was considered fundamental."); *id.* at 3042 ("In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights

[2] *See also Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 n.14 (1985) ("governments are entitled to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied"); *Hutchins v. District of Columbia*, 188 F.3d 531, 536 (D.C. Cir. 1999) ("any government impingement on a *substantive* fundamental right to free movement would be measured under a strict scrutiny standard"); *Narragansett Indian Tribe v. National Indian Gaming Comm'n*, 158 F.3d 1335, 1340 (D.C. Cir. 1998) (citing *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966), for "holding that strict scrutiny applies to classifications that burden fundamental rights").

necessary to our system of ordered liberty.").[3] Accordingly, regulatory burdens on the fundamental rights secured by the Second Amendment are subject to strict scrutiny. *See Engstrum*, 609 F. Supp. 2d at 1231-32.

This conclusion is buttressed by the fact that while the *Heller* Court did not engage in a traditional strict-scrutiny analysis, it did explicitly and definitively reject application of rational basis review[4] and also Justice Breyer's proposed "interest-balancing" approach, which was, at least implicitly, a form of intermediate scrutiny. *See Heller*, 128 S. Ct. at 2821; *McDonald*, 130 S. Ct. at 3050 (plurality) ("[W]hile [Justice Breyer's] opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion."). Justice Breyer denominated his test "interest-balancing," rather than intermediate scrutiny, not because he was adopting a less demanding test, but because of his view that the government's interest in regulating firearms—some version of protecting the safety and lives of the public—would always be important or compelling. Thus, in Justice Breyer's view, whether the standard of review were strict (compelling) or intermediate (important), the government interest would always be sufficient and application of the test would involve a search for the appropriate degree

[3] *See also id.* at 3037 ("The right to keep and bear arms was considered no less fundamental by those who drafted and ratified the Bill of Rights."); *id.* at 3038 n.17 ("Abolitionists and Republicans were not alone in believing that the right to keep and bear arms was a fundamental right"); *id.* at 3040 (holding that the 39th Congress's "efforts to safeguard the right to keep and bear arms demonstrate that the right was still recognized to be fundamental"); *id.* at 3041 ("In debating the Fourteenth Amendment, the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection."); *id.* at 3059 (Thomas, J., concurring in part and in judgment) (agreeing that "the right to keep and bear arms … is 'fundamental' to the American 'scheme of ordered liberty.'").

[4] 128 S. Ct. at 2818 n.27 ("Obviously, the [rational basis] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms…. If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.").

of fit, i.e., interest-balancing. *See Heller*, 128 S. Ct. at 2851-52 ("I would simply adopt such an interest-balancing inquiry explicitly."). There is, however, no doubt that in defending his approach, Justice Breyer relied on cases such as *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), and *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), which are undeniably intermediate scrutiny cases. *See Heller*, 128 S. Ct. at 2852 (Breyer, J., dissenting). Even more revealingly, Justice Breyer invoked *Burdick v. Takushi*, 504 U.S. 428 (1992). *See Heller*, 128 S. Ct. at 2852 (Breyer, J., dissenting). That is the case on which the United States principally relied in advocating that the Court adopt intermediate scrutiny. *See* Brief of United States at 8, 24, 28, *Heller*, 128 S. Ct. 2783. Thus, Justice Breyer's interest-balancing test is nothing other than intermediate scrutiny, and the Court's rejection of that approach in *Heller* and *McDonald* forecloses this Court from adopting intermediate scrutiny in Second Amendment cases.[5]

Contrary to Justice Breyer's rejected *dissenting* suggestion, *Heller*, 128 S. Ct. at 2851 (Breyer, J., dissenting), *Heller*'s underlying logic—that the right is subject to strict scrutiny—is entirely consistent with its dictum stating that certain types of restrictions, such as possession by

[5] Ignoring this repeated holding, the City would have this Court adopt the interest-balancing inherent in the Supreme Court's abortion cases—the "undue burden" framework. But the Court adopted the undue-burden test in the abortion context because there are two rights at stake in such cases, not one, and thus interest-balancing is inherent in the nature of "the central holding of *Roe*" itself. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871-72 (1992) (plurality) ("[I]t must be remembered that *Roe v. Wade* speaks with clarity in establishing not only the woman's liberty but also the State's important and legitimate interest in potential life.") (quotation marks omitted). This is why, "subsequent to viability, the State … may … regulate, and even proscribe, abortion." *Id.* at 879 (quotation marks omitted). In the Second Amendment context, however, the Supreme Court has now twice made clear that such balancing is not inherent in the nature of the right. *Heller*, 128 S. Ct. at 2821 ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach…. The Second Amendment … is the very *product* of an interest-balancing by the people…."); *id.* at 2822 ("[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table."); *McDonald*, 130 S. Ct. at 3045, 3047 (plurality).

felons and the mentally ill, are "presumptively lawful," *Heller*, 128 S. Ct. at 2817 & n.26. First, a state's interest in prohibiting firearm possession by violent felons and the insane is self-evidently compelling. Thus, it was of no great moment that the *Heller* Court, in dicta, suggested that in future cases the government might easily prove that it considered and acted upon a compelling interest justifying these laws. This Court need not over-read "presumptively lawful" to mean more than that.

Second, the *Heller* Court may simply have been stating that based on its preliminary historical research, these laws appear to fall outside the bounds of the right as understood at the time of the Founding, with future cases and briefing available to test that proposition and refine and sharpen the precise contours of the right as understood at the Founding. *See id.* at 2821 ("The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. … [T]here will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us."); *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010) ("[W]e think the better reading, based on the text and structure of *Heller*, is … that these longstanding limitations are exceptions to the right to bear arms."); *Skoien*, __ F.3d at __, 2010 U.S. App. LEXIS 14262, at *6 ("That *some* categorical limits are proper is part of the original meaning …."); *United States v. Stevens*, 130 S. Ct. 1577, 1584-86 (2010) (categories of speech not protected by First Amendment are based on historical exemptions at time of the Framing and not judicial interest balancing); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1449 (2009) ("Sometimes, a constitutional right

isn't violated by a restriction because the restriction is outside the terms of the right as set forth by the constitution."). Indeed, in his concurring opinion in *McDonald*, Justice Scalia specifically explained that "[t]he traditional restrictions [on the right to keep and bear arms] go to show the scope of the right, not its lack of fundamental character." *McDonald*, 130 S. Ct. at 3056 (Scalia, J., concurring). Strict scrutiny in the First Amendment context, after all, is not foreclosed by the recognition that there are reasonable limits on the scope of the right. *See United States v. Stevens*, 130 S. Ct. 1577, 1584-86 (2010).

Third, the logic behind the suggestion—that *Heller*'s recognition of "presumptively lawful" regulations precludes application of strict scrutiny—would also preclude application of intermediate scrutiny. It is rational-basis review that affords a presumption of legality to challenged regulations, putting the burden of proof on the party challenging the regulation. But intermediate scrutiny, like strict scrutiny, puts the burden on the government to justify the challenged regulation. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 519 (1996). This reality only further suggests that this dicta in *Heller* was not a coded instruction to lower courts to apply intermediate scrutiny, but rather was simply a preliminary statement of what logic and historical research might bear out in future cases. *Skoien*, __ F.3d at __, 2010 U.S. App. LEXIS 14262, at *5 ("We do not think it profitable to parse these passages of *Heller* as if they contained an answer …. They are precautionary language …. [T]he Justices have told us that the matters have been left open.");

To conclude, as some courts have in the wake of *Heller*, that Second Amendment rights deserve some lesser protection than other fundamental constitutional rights is to conclude, contrary to what *is* explicit in *Heller* and *McDonald*, that Second Amendment rights are not fundamental and exist on a lower plateau than other constitutional rights. But no enumerated

constitutional right is "less 'fundamental' than" others, and there is "no principled basis on which to create a hierarchy of constitutional values …." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982). "To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution." *Ullmann v. United States*, 350 U.S. 422, 428-29 (1956). Accordingly, the Court in *Heller* repeatedly treated the Second Amendment right with equal dignity to that afforded other fundamental rights. *See* 128 S. Ct. at 2791-92 (Second Amendment, like First Amendment, extends protections to instruments that were not in existence at Founding); *id.* at 2797 ("Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right"); *id.* at 2799, 2816 (Second Amendment, like other constitutional rights, has historical boundaries); *id.* at 2821 (holding that the "Second Amendment is no different" from the First Amendment, in that it was the product of interest-balancing by the People). And in *McDonald*, the Court flatly "reject[ed]" the argument "that the Second Amendment should be singled out for special—and specially unfavorable—treatment." *Id.* at 3043.. *See also id.* at 3044 (plurality) (rejecting argument that the Second Amendment right should be "treat[ed] … as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees").

Thus, if a level-of-scrutiny analysis is to apply, it is strict scrutiny that governs judicial review of government burdens on Second Amendment rights, as with other fundamental constitutional rights. In such cases, a reviewing court must first ask whether the challenged law burdens a right within the scope of the Second Amendment as originally understood and, if so, then whether the law serves a compelling state interest through narrowly tailored means. In any

event, whether this Court applies strict scrutiny or an approach more akin to *Heller* itself, there is no doubt that the flat bans at issue in this case are unconstitutional.

CONCLUSION

For the foregoing reasons, Amicus respectfully submits that the Second Amendment challenge in this case should, can only, be reviewed pursuant to the framework followed in *Heller*, 128 S. Ct. 2783, or strict scrutiny.

Dated: October 1, 2010

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*Motion for admission *pro hac vice* forthcoming

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CERTIFICATE OF SERVICE

I, Charles J. Cooper, hereby certify that on this 1st day of October, 2010, I caused a copy of the foregoing to be served by electronic filing on:

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EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 4.0.3
Eastern Division

Center for Individual Freedom

Plaintiff,

v.

Case No.: 1:10−cv−04383
Honorable William T. Hart

Lisa M. Madigan, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Friday, August 20, 2010:

MINUTE entry before Honorable William T. Hart: Illinois Campaign for Political Reform motion for leave to file a brief amicus curiae in support of the challenged disclosure provisions of the Illinois Election Code and the defendants charged with enforcing them is granted.No court appearance required on 8/26/2010.Mailed notice(slb,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov***.

EXHIBIT C

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Robert M. Dow, Jr.	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	10 C 1601	**DATE**	6/1/2010
CASE TITLE	Anheuser-Busch, Inc., et al. vs. Schnorf, et al.		

DOCKET ENTRY TEXT

Before the Court are (1) Proposed Intervenor-Defendant the Wine & Spirits Distributors Association's ("WSDI") motion to intervene [39], (2) Proposed Intervenor-Defendant WSDI's motion for leave to file instanter its opposition to Plaintiffs' motion for summary judgment [76], and (3) the motion of the Associated Beer Distributors of Illinois ("ABDI") for leave to file instanter its *amicus curiae* brief [81]. For the reasons stated below, the WSDI's motion to intervene [39] is respectfully denied without prejudice; however, the WSDI's motion for leave to file instanter its opposition to Plaintiffs' motion for summary judgment [76] is granted in part and the WSDI is given leave to file its opposition brief [76, Ex. 1] as an *amicus* brief. The ABDI's motion [81] is granted. Plaintiff is given until 6/8/10 to file responses to the *amicus* briefs, and this case remains set for oral argument on 6/16/10 at 10:00 a.m.

■[For further details see text below.] Docketing to mail notices.

STATEMENT

I. Background

Plaintiffs filed a lawsuit on March 10, 2010 challenging the Illinois Liquor Control Commission's construction of the Illinois Liquor Control Act of 1934 on several federal constitutional grounds. The lawsuit was spurred by Plaintiffs' contention that the Commission's action unlawfully blocked a "significant and important business transaction" – namely, the acquisition by Anheuser Busch, Inc. (an out-of-state brewer of beer) of City Beverages (an in-state distributor of beer). Most immediately, Plaintiffs seek a declaration that the Commission's construction violates the Commerce Clause. The Court has granted Plaintiffs' request for expedited briefing on that claim – a request that the State Defendants, represented by the Illinois Attorney General, did not oppose – and has set the matter for oral argument on June 16.

In addition to the original parties, two additional parties have filed motions seeking to participate in the lawsuit. The Wine & Spirits Distributors Association ("WSDI") contends that it should be given leave to intervene, both as of right and permissively in the exercise of the Court's discretion. The Associated Beer Distributors of Illinois ("ABDI"), which like the WSDI is a trade association, requests that it be given leave to file an *amicus curiae* brief. The Attorney General does not oppose either motion; Plaintiffs oppose both. The Court took full briefing on the motion to intervene and heard oral argument from all interested parties on the motion for leave to file the *amicus* brief.

The WSDI is comprised of family-owned licensed distributors of alcoholic beverages, which handle the majority of all wine and spirits distributed in Illinois. It asserts an interest in this litigation on the basis of its

contentions that (i) Plaintiffs' lawsuit challenges the three-tier distribution system of beer, wine, and spirits in Illinois and (ii) success in the lawsuit may have very serious negative consequences for the WSDI's members. In support of its motion, the WSDI contends that it would present arguments beyond those raised by the party Defendants and in fact already has set forth those arguments in writing, both in its intervention papers and in its proposed response to Plaintiffs' motion for summary judgment on their Commerce Clause claim.

The ABDI represents more than sixty licensed Illinois beer distributors. Like the WSDI, the ABDI contends that the interests of its members would be adversely affected by a successful challenge to Illinois' current three-tier regulatory system. The ABDI contends that its proposed *amicus* brief will assist the Court by providing a unique historical and policy perspective and by presenting alternative views on the merits and potential remedies in this case.

II. Analysis

A. Intervention as of Right

Federal Rule of Civil Procedure 24(a)(2) establishes four requirements for intervention as of right: (1) the applicant must seek to intervene in a timely manner; (2) the applicant must claim an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; (4) existing parties must not be adequate representatives of the applicant's interest. *Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941, 945-46 (7th Cir. 2000); *Wade v. Goldschmidt*, 673 F.2d 182, 185 (7th Cir. 1982). The Seventh Circuit has stressed that "[i]ntervention as of right will not be allowed unless all requirements of the Rule are met." *Sokaogon Chippewa Community*, 214 F.3d at 946. In addition, before intervention of right will be granted, the applicant "must have a stake in the litigation," which some courts have equated to standing in the Article III sense. *Id*. However, where it is clear that the application to intervene as of right founders on one or more of the Rule 24 requirements, the Seventh Circuit has indicated that there is no need to explore "what the outer boundaries of standing to intervene might be." *Id*.

In this instance, the Court need not resolve either the standing issue or whether the WSDI can satisfy all of the Rule 24 requirements, because "the requirement of proving inadequacy of representation by the existing parties" presents an insurmountable "stumbling block," at least at this stage of the litigation. *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 101 F.3d 503, 508 (7th Cir. 1996). As Judge Posner has written, that requirement "is taken seriously" because "[i]ncreasing the number of parties to a suit can make the suit unwieldy." *Id*. And here there are two presumptions in play concerning the adequacy of the current Defendants that undermine the case for allowing intervention. First, where the would-be intervenor and an existing party have the same ultimate objective, a presumption of adequacy of representation arises. See, *e.g.*, *American Nat'l Bank & Trust Co. v. City of Chicago*, 865 F.2d 144, 148 n.3 (7th Cir. 1989). In this case, at a minimum, the existing party Defendants and the proposed intervenor have the same ultimate objective of defeating Plaintiffs' challenge to the existing three-tier system of regulation. In addition, and perhaps even more significantly, there is a presumption of adequate representation where, as here, the party representative is a governmental body or officer charged by law with representing the interests of the proposed intervenor. See *id*. at 147-48; see also *Menominee Indian Tribe of Wisc. v. Thompson*, 164 F.R.D. 672, 676 (W.D. Wis. 1996). There is no suggestion that the State Defendants are not adequately defending this lawsuit, and it is well established that disagreements on tactics, including whether and in what manner to make certain legal arguments, is not a compelling justification for allowing intervention as of right. See *United States v. City of Los Angeles*, 288 F.3d 391, 402-03 (9th Cir. 2002) (denying intervention as of right where the differences

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between the proposed intervenors and the party were "merely differences in strategy, which are not enough to justify intervention as a matter of right"); 7C Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 1909 (3d ed. 2007) ("A mere difference of opinion concerning the tactics with which the litigation should be handled does not make inadequate the representation of those whose interests are identical with that of an existing party or who are formally represented in the lawsuit").

In view of the foregoing discussion, at this stage of the case the Court can do no better than to quote language from a recent Seventh Circuit decision addressing a hypothetical scenario that fits our circumstances to a T: "[h]ad the association sought to intervene earlier, its motion would doubtless (and properly) have been denied on the ground that the state's attorney general was defending the statute and that adding another defendant would simply complicate the litigation." *Flying J, Inc. v. J.B. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009) (holding that trade association was entitled to intervene as of right on appeal where state attorney general declined to appeal adverse district court judgment). The WSDI's motion to intervene as of right therefore is respectfully denied at this time without prejudice.

B. Permissive Intervention

In the alternative, the WSDI asks the Court to grant permissive intervention pursuant to Federal Rule of Civil Procedure 24(b). "The grant or denial of permissive intervention lies within the discretion of the district court (*Sokaogon Chippewa Community*, 214 F.3d at 949), which is to "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b). The Court is persuaded that the rationale for denying intervention as of right set forth above – namely, that "the state's attorney general [is] defending the statute and that adding another defendant would simply complicate the litigation" (*Flying J,* 578 F.3d at 572) – applies equally to permissive intervention. See *Menominee Indian Tribe*, 164 F.R.D. at 678 ("When intervention of right is denied for the proposed intervenor's failure to overcome the presumption of adequate representation by the government, the case for permissive intervention disappears"). That conclusion is reinforced by the approach suggested in several previous cases (and adopted here, see below) that the Court allow the would-be intervenor who cannot make the cut under Rule 24 nevertheless to participate in the litigation as *amicus curiae*.

C. Amicus Status

As the Court stated at the hearing on the ABDI's motion for leave to file an *amicus* brief, the critical question in considering such a motion is whether the moving party is a friend of the Court or simply a friend of a party. Here, the Court is satisfied that both the WSDI and the ABDI fall sufficiently into the former category to allow both to participate in this litigation as *amicus curiae*. In regard to the WSDI specifically, the Court's research has revealed several cases in which proposed intervenors who cannot satisfy all of the Rule 24(a) factors and likewise fall short on permissive intervention under Rule 24(b) have been given the opportunity to make their views known to the Court (and to other parties) through the vehicle of an *amicus* brief. See, *e.g.*, *Maine v. Director, United States Fish & Wildlife Serv.*, 262 F.3d 13, 19 (1st Cir. 2001) (noting that "amicus-plus status" enabled proposed intervenor to present its legal arguments on the merits); *Menominee Indian Tribe*, 164 F.R.D. at 678 (allowing proposed intervenor to participate as amicus curiae); *United States v. Brooks*, 164 F.R.D. 501, 507 (D. Or. 1995) (same). And in regard to both trade associations, based on its review of the briefs in question – the WSDI's brief in opposition to summary judgment and the ABDI's *amicus* filing – the Court concludes that the *amici* raise issues worthy of the Court's attention as to which Plaintiffs should be given an opportunity to respond. Both association assert legal arguments, some of which are new and others of which add new twists on arguments that the parties already have raised. While the

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Court is sensitive to Plaintiffs' concerns about the additional burden of responding to the arguments of the *amici*, a number of the arguments (*e.g.*, jurisdiction, constitutional avoidance) raise points that the Court would be obliged at least to consider on its own, with or without the assistance of the parties' written and oral submissions. Given the importance of the issues raised in this litigation and the expedited track on which the first specific issue – the Commerce Clause challenge – is proceeding to decision, the Court finds on balance that participation by the *amici* and additional briefing by Plaintiffs will be helpful to the Court. Accordingly, the WSDI's motion for leave to file a brief in opposition to Plaintiffs' motion for summary judgment [76] will be granted in part, and the WSDI's opposition brief [76, Ex. A] will be accepted as an *amicus* brief. In addition, the ABDI's motion for leave to file its *amicus* brief instanter [81] is granted. Plaintiff is given until 6/8/10 to file responses to both *amicus* briefs, and this case remains set for oral argument on 6/16/10 at 10:00 a.m.

Finally, the Court adds a caveat: if at a later stage of the litigation – indeed, even after a decision is rendered (see *Flying J*, 578 F.3d at 572-73) – it becomes evident that the Attorney General is not adequately representing the interests of the parties who seek to uphold the existing scheme against Plaintiffs' challenges to it, then this Court may revisit the matter of intervention. See, *e.g.*, *Maine*, 262 F.3d at 21. But for now, there will be no additional parties and two new *amici*.

III. Conclusion

For the reasons stated above, the WSDI's motion to intervene [39] is respectfully denied without prejudice; however, the WSDI's motion for leave to file instanter its opposition to Plaintiffs' motion for summary judgment [76] is granted in part and the WSDI is given leave to file its opposition brief [76, Ex. 1] as an *amicus* brief. The ABDI's motion for leave to file an *amicus* brief instanter [81] is granted. Plaintiff is given until 6/8/10 to file responses to the *amicus* briefs, and this case remains set for oral argument on 6/16/10 at 10:00 a.m.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RHONDA EZELL, et al,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**No. 10-CV-5135**
	)	**Judge Virginia M. Kendall**
CITY OF CHICAGO,	)	
	)	
Defendant.	)	

L.R. 3.2 Notification of Affiliates

Pursuant to Local Rule 3.2 of the United States District Court for the Northern District of Illinois, Amicus Curiae National Rifle Association, a nonprofit corporation, hereby states that it has no publicly held affiliates.

Dated: October 1, 2010

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