UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TOM G. PALMER, *et al.*	)	
Plaintiffs,	)	
v.	)	Civil Action No. 09-01482 (FJS)
DISTRICT OF COLUMBIA, *et al.*,	)	
Defendants.	)	

DEFENDANTS' SUPPLEMENTAL MEMORANDUM

Pursuant to Fed. R. Civ. P. 56(b) and LCvR 7(a), defendants the District of Columbia and Chief Cathy Lanier (collectively "the District"), by and through undersigned counsel, respectfully submit this Supplemental Memorandum in support of their Motion.

I. Introduction

The parties completed dispositive briefing here over two-and-a-half years ago. And while no facts material to the instant matter have changed, nor have any of the District's arguments, the District files the instant memorandum to show that compelling, persuasive case law that has arisen in the intervening period supports the District's motion. Of those courts to have addressed the issue, a clear majority find that the Second Amendment does *not* encompass a general right to carry a firearm in public.

Moreover, the briefing from two pending Seventh Circuit appeals—and the extensive historical analysis conducted as part of that briefing—demonstrate that the right to carry an operable firearm in public is not within the scope of the Second Amendment.

II. Discussion

Illinois, like the District of Columbia, generally prohibits the carrying of operable firearms in public, as does the City of Chicago. Recent, unsuccessful challenges to Illinois law demonstrate that the Second Amendment does *not* encompass a right to carry an operable firearm in public, as this Court should find in the instant matter.

As the District has previously noted, *see* Doc. No. 27, the United States District Court for the Central District of Illinois, in *Moore v. Madigan*, ___ F.Supp.2d ___, 2012 WL 344760 (C.D. Ill. Feb. 3, 2012), upheld against Second Amendment challenge Illinois statutes which prohibit the carrying of loaded and operable firearms in public.[1] The United States District Court for the Southern District of Illinois did the same in *Shepard v. Madigan*, ___ F.Supp.2d ___, 2012 WL 1077146 (S.D. Ill. Mar. 30, 2012). *See* Doc. No. 32.

Moore and *Shepard* are currently on appeal to the Seventh Circuit. *See* No. 11-3134, No. 11-405 (7th Cir.).[2] Those district court decisions—and the briefs in support thereof—demonstrate that the District's similar restrictions survive Second Amendment challenge.

Illinois has generally prohibited the open carrying of operable firearms since 1961, some 18 years after the enactment of the District's prohibition. Illinois Br. at 3; *cf. Brown v. United States*, 66 A.2d 491, 493 (App. D.C. 1949) ("[T]he original statute as passed in 1932 forbade only the carrying of an unlicensed pistol when concealed on the person. It was eleven years

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[1] Counsel for the instant plaintiffs is also counsel for the plaintiffs in *Moore*.

[2] The appeals are not consolidated, but the Seventh Circuit "ordered that arguments in the two appeals be held before the same panel on the same day and . . . indicated that defendants were free to file a single, consolidated brief in the two appeals." Brief of Defendants-Appellees, *Moore v. Madigan*, Nos. 12-1269 and 12-1788 (7th Cir.) ("Illinois Brief"), at 2 (May 9, 2012) (copy attached as Ex. No. 1). Argument has been scheduled for June 8, 2012. *See* Order (Doc. No. 17), *Moore v. Madigan*, No. 12-1269 (7th Cir. May 9, 2012).

before Congress by amendment included the open carrying of an unlicensed pistol in the statute.") (citing 57 Stat. 586, ch. 296 (Nov. 4, 1943)).

In an extensive historical exegesis, Illinois and *amici* demonstrate that the Second Amendment's right to keep and bear arms, as understood at the time of ratification, did not include a right to carry firearms in public for self-defense. Illinois Br. at 8–14; Brief *Amici Curiae* of the City of Chicago, *et al.*, *Moore v. Madigan*, Nos. 12-1269 and 12-1788 (7th Cir.) ("Chicago Br."), at 7–14 (May 16, 2012) (copy attached as Ex. No. 2).[3]

As early as 1328, the Statute of Northampton stated that no man should "go nor ride armed by night or by day in fairs, markets, nor in the presence of justices or other ministers, nor in no part elsewhere . . . ." 2 Edw. III, ch. 3; Illinois Br. at 10; Chicago Br. at 9; Brady Center Br. at 16.[4] *See also* A Statute forbidding Bearing of Armour, 7 Edw. III, c. 2 (1313) ("The King forbids the coming armed to Parliament, &c.").[5] A subsequent statute prohibited the possession

[3] Joining Chicago on the brief were the Legal Community Against Violence, the Major Cities Chiefs Association, the Board of Education of the City of Chicago, and the Chicago Transportation Authority. *Id*. Also submitting a brief as *amici curiae* were Brady Center to Prevent Gun Violence, International Brotherhood of Police Officers, Major Cities Chiefs Association, National Association of Women Law Enforcement Executives, National Black Police Association, and Police Foundation ("Brady Center Br.") (copy attached as Ex. No. 3).

[4] Many of the historic sources cited are available online through Google Books at http://books.google.com. An extensive discussion of the understanding and interpretation of the Statute of Northampton, in the context of the Second Amendment, may also be found in Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. (forthcoming 2012), *available online at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1938950&download=yes (last visited May 22, 2012) and Patrick J. Charles, *Scribble Scrabble, the Second Amendment, and Historical Guideposts: A Short Reply to Lawrence Rosenthal and Joyce Lee Malcolm*, 105 NORTHWESTERN UNIV. L. REV. COLLOQUY 227 (2011), *available online at* http://www.law.northwestern.edu/lawreview/colloquy/2011/6/LRColl2011n6Charles.pdf (last visited May 22, 2012).

[5] *See* http://www.legislation.gov.uk/aep/Edw2/7/0/contents (last visited May 24, 2012). The District notes that the instant plaintiffs have previously argued that "[t]he ancient laws of England or of other States are irrelevant." Doc. No. 15 at 3.

of guns by anyone "not having lands and tenements or some other estate of inheritance in his own or his wife's right of the clear yearly value of one hundred pounds . . . other than the son and heir apparent of an esquire or other person of higher degree . . . ." An Act for the Better Preservation of the Game, 22 & 23, Charles II, c. 25, § 3 (1670), in Sir William David Evans, 7 *A Collection of Statutes* 224 (London, 3d ed. Thomas Blenkarn 1836).[6]

Centuries of British case law confirm that it was illegal to carry arms in public. *See* Illinois Br. at 10 (citing *Sir John Knight's Case* 87 Eng. Rep. 75, 76 (K.B. 1686), in which the Chief Justice noted that not only was the public carrying of weapons prohibited by the Statute of Northampton, it was "likewise a great offence at the common law."); *Id*. at 11 (citing *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1603) ("every one may assemble his friends and neighbors to

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[6] In 1603, the English and Scottish crowns were unified under James I (ruling as James VI in Scotland). *See, generally*, *The Court of King James the First, by Godfrey Goodman, Bishop of Gloucester* (John S. Brewer, ed., London, Richard Bentley, 1839) (*available online at* http://archive.org/details/courtkingjamesf00goodgoog). Prior to unification, King James signed a number of measures prohibiting the public carrying of firearms in Scotland without his express permission. *See* Concerning shooting and bearing of culverins and dags, Scot. Parl. Acts iii 29, c.23 (Dec. 1567) ("no manner of person or persons of whatsoever estate, condition or degree they be of bear, wear or use any culverins, dags, pistols or any other such firearm upon their persons or in their company with them, privately or openly, outwith houses . . . under the pain [of cutting off their right hand]"); The [penalty] of bearers, users or shooters [with pistols], culverins, handguns or engines of fire work, Scot. Parl. Acts iv 134, c.19 (Dec. 16, 1597) ("the contravenors thereof to be punished according to the [penalties] contained therein, and moreover by confiscation of all their goods moveable . . . the one half thereof to appertain to the apprehender for his travails and labours and the other half to be applied to our sovereign lord's use"); Regarding bearers and shooters with hackbuts and pistols, Scot. Parl. Acts iv 228, c.14 (Nov. 15, 1600) ("the bearers and wearers of hackbuts and pistols and other firearms who have neither committed slaughter nor mutilation or other odious violence therewith, but only borne and worn them upon their persons or in their companies contrary to his highness's laws and acts of parliament, may be [pursued criminally] providing always that such as shall be pursued . . . shall not incur the corporal punishment prescribed by the former acts by amputation of the right hand, but only to be punished by warding of their persons, escheat of their goods movable, or payment of such a pecuniary penalty and sum of money"). The statutes of James VI of Scotland may be found (and searched) online at *http://www.rps.ac.uk/static/statutes_jamesvi.html* (last visited May 23, 2012).

defend his house against violence: but he cannot assemble them to go with him to the market, or elsewhere for his safeguard against violence"). *See also* Lucilius A. Emery, "The Constitutional Right to Keep and Bear Arms," 28 HARVARD L. REV. 473 (Mar. 1915) ("The guaranty does not appear to have been of a common-law right, like that of trial by jury.").

Similarly, British law-enforcement officers have been authorized for hundreds of years to arrest anyone found carrying arms in public. *See* Illinois Br. at 12:

> [I]f any Person shall Ride or go Arm'd offensively, before Her Majesties Justices, or any other her Officers or Ministers, in the time of executing their Office, or in Fairs or Markets or elsewhere, by Day or by Night, in affray of Her Majesties Subjects, and Breach of the Peace; or wear or carry any Daggers, Guns or Pistols Charged; the Constable upon Sight thereof, may seize and take away their Armour and Weapons, and have them apprized as forfeited to Her Majesty; and may also carry the Persons wearing them before a Justice, to give Surety to keep the Peace.

Id. (quoting Robert Gardiner, *The Compleat Constable* 18 (London, Tho. Bever 3d ed. 1708) (citing, *inter alia*, 2 Edw. III, ch. 3)). *See also* Chicago Br. at 12.

This was the understanding that prevailed at the time of the founding of the American colonies, as evidenced by early statutes and the common law. *See* Illinois Br. at 13–14; Chicago Br. at 10–12.

As the above discussion makes clear, there was no common-law right to carry operable firearms in public. Hence, because constitutional rights "are enshrined with the scope they were understood to have when the people adopted them [,]" *Heller*, 554 U.S. at 634–35, the Second Amendment does not encompass the right to the public carrying of operable firearms.

In addition to *Moore* and *Shepard*, most courts to have faced the question have declined to find that the Second Amendment encompasses a right to carry an operable firearm in public. *See Moore*, 2012 WL 344760, at * 7 (collecting cases); *Piszczatoski v. Filko*, ___ F.Supp.2d ___, 2012 WL 104917, *1 (D.N.J. Jan. 12, 2012); *Jennings v. McCraw*, No. 5:10-cv-00141-C (N.D.

Tex. Jan. 19, 2012), *slip op.* at 12 ("the Second Amendment does not confer a right that extends beyond the home").[7] *See also Williams v. State*, 10 A.3d 1167, 1177 (Md. 2011) ("[I]t is clear that prohibition of firearms in the home was the gravamen of the certiorari questions in both *Heller* and [*McDonald v. Chicago*, ___ U.S. ____, 130 S. Ct. 3020 (June 28, 2010)] and their answers. If the Supreme Court, in this dicta, meant its holding to extend beyond home possession, it will need to say so more plainly."), *cert. denied*, ___ U.S. ___, 132 S. Ct. 93 (Oct. 3, 2011).

The District of Columbia Court of Appeals has similarly interpreted the Supreme Court's analysis, declining to extend the scope of the Second Amendment beyond the home. *Sims v. United States*, 963 A.2d 147, 150 (D.C. 2008); *Mack v. United States*, 6 A.3d 1224, 1236 (D.C. 2010); *Little v. United States*, 989 A.2d 1096, 1101 (D.C. 2010).

III. Conclusion

The right to carry an operable firearm in public is not within the scope of the Second Amendment. And even if it were, a right to carry an operable firearm in public is surely not within the 'core' of the right enunciated in *Heller*, 554 U.S. at 634–35. Thus, even if Second Amendment scrutiny were applied (and the District contends it need not be), the District's prohibition on public carrying survives such scrutiny.[8]

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[7] Decision available online at http://www.bradycenter.org/xshare/1.19.12_Order.pdf (last visited May 22, 2012).

[8] "At its core, the Second Amendment protects the right of law-abiding citizens to possess non-dangerous weapons for self-defense in the home." *United States v. Marzzarella*, 614 F.3d 85, 92 (3rd Cir. 2010) (footnote omitted); *accord United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) ("as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self defense."); *United States v. Reese*, 627 F.3d 792, 800 (10th Cir. 2010). *See also United States v. Booker*, 644

As the Fourth Circuit wisely noted, the danger of firearms "would rise exponentially as one moved the right from the home to the public square. If ever there was an occasion for restraint, this would seem to be it. There is much to be said for a course of simple caution." *Masciandaro*, 638 F.3d at 476. Since *McDonald*, the Supreme Court has repeatedly declined the opportunity to decide whether the scope of the Second Amendment extends beyond the home,[9] or provide any further clarification of the extent of the Second Amendment.[10]

Because the Second Amendment does not protect the right to carry operable firearms in public, this Court should reject the instant challenge.

DATE: May 24, 2012

Respectfully submitted,

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F.3d 12, 25 n.17 (1st Cir. 2011) ("While we do not attempt to discern the "core" Second Amendment right vindicated in *Heller*, we note that *Heller* stated that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.").

[9] *See Williams v. Maryland, cert. denied*, ___ U.S. ___, 132 S. Ct. 93 (Oct. 3, 2011); *Masciandaro v. United States, cert. denied*, 132 S. Ct. 756 (Nov. 28, 2011).

[10] *See Fincher v. United States, cert. denied*, 555 U.S. 1174 (Feb. 23, 2009); *Marzzarella v. United States, cert. denied*, 131 S.Ct. 958 (Jan 10, 2011); *Reese v. United States, cert. denied*, 131 S.Ct. 2476 (May 16, 2011); *Skoien v. United States, cert. denied*, 131 S.Ct. 1674 (Mar. 21, 2011); *Delacy v. California, cert. denied*, 132 S.Ct. 1092 (Jan. 17, 2012); *Chein v. California, cert. denied*, 132 S.Ct. 755 (Nov. 28, 2011).

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Defendants' Exhibit No. 1

Nos. 12-1269 and 12-1788

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MICHAEL MOORE, et al., Plaintiffs-Appellants, v. LISA MADIGAN and HIRAM GRAU, Defendants-Appellees.	)))))))))	Appeal from the United States District Court for the Central District of Illinois No. 11-3134 The Honorable Sue E. Myerscough, Judge Presiding.
MARY E. SHEPARD and ILLINOIS STATE RIFLE ASSOCIATION, Plaintiffs-Appellants, v. LISA MADIGAN, et al., Defendants-Appellees.	)))))))))	Appeal from the United States District Court for the Southern District of Illinois No. 11-405 The Honorable William D. Stiehl, Judge Presiding.

BRIEF OF DEFENDANTS-APPELLEES LISA MADIGAN, HIRAM GRAU, TYLER R. EDMONDS, AND PATRICK J. QUINN

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellants' jurisdictional statements are complete and correct.

ISSUES PRESENTED FOR REVIEW

1. Does the Second Amendment embody a right to carry ready-to-use firearms in public places for self-defense?

2. If so, do the challenged Illinois laws satisfy the appropriate means-ends test?

3. Is Governor Quinn a proper defendant?

STATEMENT OF THE CASE

1. *Moore v. Madigan*

On May 19, 2011, the *Moore* plaintiffs filed an amended complaint against Lisa Madigan, in her official capacity as Illinois Attorney General, and Hiram Grau, in his official capacity as Director of the Illinois State Police, seeking declaratory and injunctive relief under 42 U.S.C. § 1983 and alleging that Illinois statutes barring the carrying of ready-to-use firearms in public places for personal self-defense violated their Second Amendment rights. Moore Doc. 5; A1.[1] On February 3, 2012, the district court denied plaintiffs' motion for injunctive relief and dismissed plaintiffs' complaint for failure to state a claim. Moore Doc. 38; Moore SA1-48. Later that day, plaintiffs timely filed a notice of appeal. A37.

[1] In this brief, district court docket entries appear as "Moore Doc. __" and "Shepard Doc. __," respectively; plaintiffs' short appendices as "Moore SA __" and "Shepard SA __," respectively; the *Moore* plaintiffs' additional appendix as "A__"; and plaintiffs' briefs as "Moore Br. __" and "Shepard Br. __," respectively.

2. *Shepard v. Madigan*

On May 13, 2011, the *Shepard* plaintiffs filed an action against the Illinois Attorney General in her official capacity, Governor Pat Quinn, in his official capacity as Governor of Illinois, Tyler R. Edmonds, in his official capacity as State's Attorney of Union County, Illinois, and David Livesay, in his official capacity as Sheriff of Union County, Illinois, for declaratory and injunctive relief under 42 U.S.C. § 1983, alleging that Illinois statutes barring the carrying of ready-to-use firearms in public places for personal self-defense violated plaintiffs' Second Amendment rights. Shepard Doc. 2. On March 30, 2012, the district court denied plaintiffs' motion for injunctive relief and dismissed their complaint for failure to state a claim. Shepard Doc. 57; Shepard SA1-19. On April 3, 2012, plaintiffs timely filed a notice of appeal. Shepard Doc. 61.

* * *

On April 13, 2012, this Court ordered that arguments in the two appeals be held before the same panel on the same day and, on April 26, denied defendants' motion to consolidate but indicated that defendants were free to file a single, consolidated brief in the two appeals.

STATEMENT OF FACTS

In both cases, plaintiffs raise a facial challenge to Illinois' statutes barring the carrying of ready-to-use firearms in public places for personal self-defense. Moore is a jail superintendent and wishes to carry firearms to guard against attack by former inmates. A15-16. Fletcher seeks to protect herself on and around her

farm. A21-22. The remaining *Moore* plaintiffs are firearms owners who wish to carry their weapons in a ready-to-use condition, in public, for personal self-defense or are organizations dedicated to promoting Second Amendment rights. A18-20, A24-30. Shepard was attacked while working at a church in Anna, Illinois, and wishes to carry a ready-to-use firearm for self-defense. Shepard SA21, SA23. The Illinois State Rifle Association is an organization with members who wish to carry ready-to-use firearms, in public, for self-defense. Shepard SA40-41.

SUMMARY OF ARGUMENT

In Illinois, most adults may possess and carry firearms for self-defense in their home, at their fixed place of business, or on private property with permission of the property owner. The Illinois General Assembly long ago determined, however, that the presence of ready-to-use firearms in public places is a threat to the health and safety of Illinois residents. Accordingly, since 1961, Illinois has generally prohibited the carrying of firearms on public streets and on public lands within the limits of a city, village, or unincorporated town, unless the firearms are not immediately accessible, unloaded, or enclosed in a case. These statutes comply with the Second Amendment.

First, the historical record demonstrates that Illinois' laws regulate conduct outside the scope of the Second Amendment. An early English act, the Statute of Northampton, banned most people from carrying weapons in public; English courts recognized this prohibition hundreds of years later; and prominent common-law scholars including Blackstone and Coke confirmed that there was no right to carry

weapons in public for personal self-defense. Adopting this understanding, many colonies and early States prohibited carrying arms in public for self-defense, prohibitions that continued well after the Second Amendment's ratification.

Second, even if the challenged Illinois statutes implicate conduct within the Second Amendment's scope, this Court should uphold those laws under any form of heightened scrutiny. The statutes do not implicate activity within the Amendment's "core"—which history confirms is the right "to use arms in defense of hearth and home," *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)—and therefore are not subject to the "not quite 'strict scrutiny'" that *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011), reserves for laws implicating core rights. In any event, the statutes readily satisfy both intermediate scrutiny and the scrutiny *Ezell* applied, as well as the more deferential, reasonable regulation test that state courts have applied under their state constitutions. Illinois has a strong and compelling public-safety interest in preventing people from discharging firearms in public places, and both data and common sense demonstrate that the statutes advance this interest.

ARGUMENT

I. Standard Of Review

"To win a preliminary injunction, a party must show that it has (1) no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied and (2) some likelihood of success on the merits." *Ezell*, 651 F.3d at 694. The courts below did not rely on factual findings, and the judgments of the district

courts granting defendants' motions to dismiss, and denying their motions for preliminary injunction, therefore are reviewed *de novo*. *See id.*

II. The Second Amendment Does Not Confer A Right To Carry Operable Firearms In Public Places.

The Second Amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." By these words, the Amendment did not create a new right, "but rather codified a right inherited from our English ancestors." *Heller*, 554 U.S. at 599 (internal markings omitted). Thus, judicial review under the Second Amendment proceeds in two steps. The Court must answer a "threshold" question: whether "the restricted activity [is] protected by the Second Amendment in the first place." *Ezell*, 651 F.3d at 701. "[I]f the government can establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment . . . then the analysis can stop there; the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review." *Id.* at 702-03.

If the historical evidence suggests that the regulated activity falls within the Amendment's scope, then the Court proceeds to the second step: means-ends scrutiny.[2] *Id.* at 703. But there is no need to do so here. The Second Amendment

[2] Public policy is presumptively left to elected legislatures; the Supreme Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems," and courts "should not diminish that role absent impelling reason to do so." *Oregon v. Ice*, 555 U.S. 160, 171 (2009). Although *Ezell* suggests that some democratically enacted laws are subject to

was not originally understood to include a right to carry guns in public places for personal self-defense. Accordingly, the challenged statutes fall outside the Amendment's scope.

A. The Relevant Historical Moment For Determining The Scope Of The Second Amendment Is The Period Beginning With The Creation Of The English Right To Bear Arms And Ending With The Second Amendment's Ratification.

Determining the scope of the Second Amendment "requires a textual and historical inquiry into original meaning" to determine whether the activity at issue fell "outside the scope of the Second Amendment right as it was understood at the relevant historical moment." *Ezell*, 651 F.3d at 701-03. Because the Second Amendment "codified a right inherited from our English ancestors," *Heller*, 554 U.S. at 599 (internal markings omitted), the "relevant historical moment" begins with an understanding of the English right to bear arms and ends with its ratification, *United States v. Williams*, 616 F.3d 685, 691 (7th Cir. 2010) (Second Amendment does not apply to conduct "outside the scope of the Second Amendment's protection at the founding"); *see United States v. Moore*, 666 F.3d 313, 318 (4th Cir. 2012) ("If such restrictions were outside the scope of Second Amendment coverage at ratification, then obviously it is not within Second Amendment protection now.").

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means-ends scrutiny under the Second Amendment even where "the historical evidence is inconclusive" as to whether the Amendment was ever intended to apply to such laws, 651 F.3d at 703, this suggestion turns that presumption on its head. The better approach would be to leave the question to the democratic process where the evidence is "inconclusive." But the Court need not address this question here, for, as explained, the challenged statutes fall conclusively outside the Amendment's scope.

Constitutional rights are "enshrined with the scope they were understood to have when the people adopted them." *Heller*, 554 U.S. at 634-35. Thus, historical sources from *after* the Second Amendment's ratification are useful only to the extent that they inform our understanding of the *original* meaning of the Second Amendment, and their usefulness for that purpose diminishes with time. *See id.* at 584 ("most relevant" state constitutional sources are those "written in the 18th century or the first two decades of the 19th"); *id.* at 614 ("Since those discussions took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources."); *id.* at 605 (post-ratification sources may illuminate original public meaning of Second Amendment but should not be used as "postenactment legislative history").

To be sure, this Court stated in *Ezell* that "when state- or local-government action is challenged, the focus of the original-meaning inquiry is carried forward in time; the Second Amendment's scope as a limitation on the States depends on how the right was understood when the Fourteenth Amendment was ratified." 651 F.3d at 702. But any holding that the Second Amendment has two different "scopes"—one for federal laws, determined by Eighteenth Century history, and another for state laws, determined by Nineteenth Century history—would conflict with Supreme Court precedent, as the *Shepard* plaintiffs appear to recognize. *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 n.14 (2010) (plurality op.) (describing "well-established rule that incorporated Bill of Rights protections

[including Second Amendment protections] apply identically to the States and the Federal Government"); *id.* at 3035 (citing other Supreme Court decisions for same proposition); Shepard Br. 15 n.5.

B. The Second Amendment's Right To Bear Arms, As Originally Understood, Did Not Include A Right To Carry Firearms In Public Places For Personal Self-Defense.

Here, the relevant history demonstrates that Illinois' firearms laws are outside the scope of the Second Amendment. Neither English nor Founding-era American law interpreted the right to bear arms to include a right to carry operable firearms in public places for personal self-defense. Because Illinois' firearms laws are nothing more than a continuation of these long-permissible practices, they are outside the scope of the Second Amendment.

English common law drew a sharp distinction between self-defense in the home and self-defense in public. Because a man's home was his castle, he had broad powers to defend himself there. *See* 4 William Blackstone, *Commentaries* *223. But this principle did not extend to self-defense in public. *See id.* at *181-82. Rather, English law actively *discouraged* violent self-defense in public places, imposing a duty on individuals to retreat from an attack "as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant." *Id.* at *184-85; *see also* 3 Edward Coke, *Institutes of the Laws of England* 55 (London, E. & R. Brooke 1797) (person assaulted in public must retreat "untill he commeth unto a hedge, wall, or other strait, beyond which he cannot passe" before

using deadly force in self-defense).[3] Using deadly force in public without "retreat[ing] to the wall" was not merely frowned upon at common law, it was prosecutable as homicide. *See, e.g.*, *United States v. Peterson*, 483 F.2d 1222, 1234-38 (D.C. Cir. 1973) (surveying history of common-law duty to retreat and upholding manslaughter conviction of defendant who failed to retreat before using deadly force). This duty to retreat from attacks in public places was universally understood at the time of the Second Amendment's ratification, and it remained the majority rule in both the United States and England well into the late Nineteenth Century.[4]

This pronounced distinction between self-defense in public places and self-defense in the home carried over into weapons regulations. As *Heller* recognized, the English right to bear arms allowed individuals to keep arms for self-defense on their own property. *See* 554 U.S. at 592-95. But a different rule prevailed in public places, where arms-carrying could be completely restricted. The

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[3] Unless otherwise noted, the historical sources cited in this brief are available online through Google Books at http://books.google.com/. Additional citation information is provided where the sources are difficult to locate using the Google Books search engine.

[4] Starting in the late Nineteenth Century, some States began to allow violent self-defense in public places without a duty to retreat. *See* Garret Epps, *Any Which Way But Loose: Interpretive Strategies & Attitudes Toward Violence in the Evolution of the Anglo-American "Retreat Rule"*, 55 Law & Contemp. Probs. 303, 311-14 (Winter 1992). This approach later became the majority one, although a "strong minority" of States still retain the common law duty to retreat. 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.4 (2d ed. 2011); *Peterson*, 483 F.2d at 1235. But this change in the law began decades after the Second Amendment was ratified.

Statute of Northampton, an early law regulating weapons possession, provided that, unless he was on the King's business, no man was permitted to "go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere, upon pain to forfeit their Armour to the King, and their Bodies to Prison at the King's pleasure." Statute of Northampton, 2 Edw. 3, c. 3 (1328). English courts continued to recognize the vitality of this prohibition hundreds of years later. In *Sir John Knight's Case*, (1686) 87 Eng. Rep. 75 (K.B.), for example, the Chief Justice noted that carrying arms in public was not merely banned by the Statute of Northampton, but was "likewise a great offence at the *common law*." *Id.* at 76. The reason was not merely that carrying arms in public was dangerous, but also that it was an insult to the sovereign and the social compact. *See id.* In this way, the Statue of Northampton was "but an affirmance" of the longstanding common-law rule that there is no right to carry weapons in public. *Id.*; *see also* Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standard of Review*, 60 Clev. St. L. Rev. (forthcoming 2012) (manuscript at 27-31), available at http://ssrn.com/abstract=1938950 (last visited May 3, 2012) (discussing *Sir John Knight's Case* and dispelling common misconceptions about its holding).

The most prominent common-law scholars agreed that there was no right to carry arms outside the home. Lord Coke, for instance, was "widely recognized by the American colonists as the greatest authority of his time on the laws of

England," *Payton v. New York*, 445 U.S. 573, 593-94 (1980) (internal markings omitted), and his works were "'[f]oremost among the titles to be found in private libraries of the time,'" *id.* at 594 n.36 (quoting A. Howard, *The Road From Runnymede* 118-19 (1968)). And Coke confirmed—in a chapter entitled "Against going or riding armed," *see* 3 Coke, *Institutes* at 160—that English law forbade carrying weapons in public. Under the Statute of Northampton, Coke explained, one could possess weapons in the home "to keep his house against those that come to rob, or kill him, or to offer him violence in it." *Id.* at 162. "But he cannot assemble force, though he be extreamly threatned, to goe with him to church, or market, or any other place." *Id.*; *see also Semayne's Case*, (1603) 77 Eng. Rep. 194, 195 (K.B.) ("every one may assemble his friends and neighbors to defend his house against violence: but he cannot assemble them to go with him to the market, or elsewhere for his safeguard against violence"). That the weapons were carried for self-defense was no excuse under the Statute. *See* 3 Coke, *Institutes* at 162. Indeed, even an immediate threat of harm did not permit one to go armed in public spaces. *See id.*

William Blackstone, whose works "constituted the preeminent authority on English law for the founding generation," *Heller*, 554 U.S. at 593-94 (internal quotations omitted), confirmed that there was no right to carry weapons in public for personal self-defense. "The offence of *riding* or *going armed* with dangerous or unusual weapons," he wrote,

> is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by the [Statute of Northampton], upon pain of forfeiture of the arms, and imprisonment during the king's pleasure: in like manner as, by the laws of Solon, every Athenian was finable who walked about the city in armour.

4 Blackstone, *Commentaries* *148-49.

In light of this long legal tradition, British constables, magistrates, and justices of the peace were to arrest anyone found carrying arms in public. *See* Robert Gardiner, *The Compleat Constable* 18 (London, Tho. Bever 3d ed. 1708) ("if any Person shall Ride or go Arm'd offensively . . . in Fairs or Markets or elsewhere, by Day or by Night, in affray of her Majesties Subjects, and Breach of the Peace; or wear or carry any Daggers, Guns or Pistols Charged; the Constable upon Sight thereof, may [seize the weapons, arrest the person, and bring him before a justice of the peace]"); 1 Gilbert Hutcheson, *Treatise on the Offices of Justice of Peace; Constable; Commissioner of Supply; & Commissioner Under Comprehending Acts, in Scotland* app. I at xlviii (Edinburgh, Mundell & Son 1806) (citing Oliver Cromwell's *Instructions Concerning Constables* (1665)) ("A constable shall arrest any person, not being in his Highness service, who shall be found wearing naugbuts, or guns, or pistols, of any sort."); *id.* at app. I at lxv-lxvi (citing Commission and Instructions to the Justices of Peace & Constables, 1661 (R.P.S. 1661/1/423) (Scot.)) ("All Constables shall arrest any persons not being in his Majesties service, who shall be found wearing of Hagbuts, Guns or Pistols of any sort.").

The American colonists adopted this centuries-old understanding. In 1686, for instance, New Jersey passed a law providing that "no person . . . shall presume privately to wear any pocket pistol, skeines, stilladers, daggers or dirks, or other unusual or unlawful weapons within this Province," and that "no planter shall ride or go armed with sword, pistol, or dagger" unless he was a government officer or a foreign traveler passing peacefully through. An Act against wearing Swords, &c., *reprinted in The Grants, Concessions & Original Constitutions of the Province of New Jersey* 289-90 (Aaron Leaming & Jacob Spicer eds., Lawbook Exch. 2002). Similarly, the States of Massachusetts, North Carolina, and Virginia all had versions of the English Statute of Northampton on the books well after the Second Amendment's ratification. *See* Charles, *Faces of the Second Amendment* at 32 n.167.

Even in States and colonies with no specific statutory provisions, carrying arms in public remained a common-law offense. American constables, magistrates, and justices of the peace were expected to arrest persons carrying arms in public, just like their British counterparts. *See, e.g.*, A Bill for the Office of Coroner and Constable (Mar. 1, 1682), *reprinted in Grants, Concessions & Original Constitutions* at 251 (constable oath) ("I will endeavour to arrest all such persons, as in my presence, shall ride or go arm'd offensively."); John Haywood, *A Manual of the Laws of North-Carolina* pt. 2 at 40 (Raleigh, J. Gales 3d ed. 1814) (1777 constable oath) ("you shall arrest all such persons as in your sight shall ride or go armed

offensively"); 1 John Haywood & Robert L. Cobbs, *The Statute Laws of the State of Tennessee of a Public & General Nature* 10 (Knoxville, F.S. Heiskell 1831) (1801 statute) ("If any person or persons shall publicly ride, or go armed to the terror of the people or privately carry any dirk, large knife, pistol or any other dangerous weapon, to the fear or terror of any person, it shall be the duty of any judge or justice on his own view [to bind the person to good behavior or commit him to jail].").

In short, English and early-American law both understood that the right to bear arms did not include a right to carry weapons in public places for personal self-defense, and the Second Amendment incorporated this understanding when it "codified" the "right inherited from our English ancestors." *Heller*, 554 U.S. at 599 (internal markings omitted). Accordingly, Illinois' firearms laws are outside the scope of the Second Amendment and do not violate the Constitution.

C. Other Courts Agree That Second Amendment Rights Do Not Extend To Public Places.

Courts around the country agree that there is no Second Amendment right to carry firearms for personal self-defense in public places. To the degree that courts push the Second Amendment beyond its core in the home, they "circumscribe the scope of popular governance, move the action into court, and encourage litigation in contexts [they] cannot foresee." *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011). "We do not wish," the Fourth Circuit has observed, "to be even minutely responsible for some unspeakably tragic act of mayhem because in the

peace of our judicial chambers we miscalculated as to Second Amendment rights. It is not far-fetched to think the *Heller* Court wished to leave open the possibility that such a danger would rise exponentially as one moved the right from the home to the public square." *Id.* As a result, many courts have declined to extend the Second Amendment to carrying guns in public places. *See id.* at 475; *Williams v. State*, 10 A.3d 1167, 1177 (Md. 2011); *see also* Moore SA19-22, SA7-28, SA31-33 (collecting cases).

D. Plaintiffs' Arguments To The Contrary Are Meritless.

1. Plaintiffs Misread The Governing History.

At the threshold, plaintiffs misread Blackstone, arguing that he saw the right to bear arms as "a public allowance . . . of the natural right of resistance and self-preservation." Shepard Br. 29 (quoting 1 Blackstone, *Commentaries* *139). This quotation is incomplete: Blackstone actually described the right to bear arms as "a public allowance, *under due restrictions*, of the natural right of resistance and self-preservation." 1 Blackstone, *Commentaries* *139 (emphasis added). And these "due restrictions" included a prohibition on "*riding* or *going armed*, with dangerous or unusual weapons," for this was "a crime against the public peace, by terrifying the good people of the land; and [was] particularly prohibited by the Statute of Northampton." 4 Blackstone, *Commentaries* *148-49.

Plaintiffs also misunderstand what Blackstone meant when he described the right to bear arms as a "public allowance." Blackstone conceived of two classes of

rights. First, there were "absolute rights" "as would belong to their persons merely in a state of nature" (including the rights of personal security, personal liberty, and property) and, second, there were "auxiliary subordinate rights of the subject." 1 Blackstone, *Commentaries* *119, 125-36. Rights in the latter class were political rather than personal, intended to serve as "barriers to protect and maintain inviolate the three great and primary rights." *Id.* at 136.

The auxiliary rights included (1) the "constitution, powers, and privileges" of Parliament; (2) the traditional restrictions on the king's royal power; and (3) the right "of applying to the courts of justice for redress of injuries." *Id.* at 136-38. "If there should happen any uncommon injury, or infringement of the rights beforementioned, which the ordinary course of law is too defective to reach," Blackstone continued, there remained "a fourth subordinate right appertaining to every individual, namely, the right of petitioning the king, or either house of parliament, for the redress of grievances." *Id.* at 138-39. Finally, if the foregoing rights all failed, the people could resort to the right of "having arms for their defence, suitable to their condition and degree, and such as are allowed by law," which was "a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." *Id.* at 139.

In other words, the right to bear arms was not "public" because it allowed people to carry arms in public spaces. It was "public" because it was *political*—the

right arose only if the constitutional order collapsed, and neither Parliament, nor the crown, nor the courts, would protect individual rights. *See Heller*, 554 U.S. at 599 (right to bear arms "helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down"); *see also Nat'l Rifle Ass'n of Am., Inc. v. City of Chicago*, 567 F.3d 856, 859 (7th Cir. 2009) ("Blackstone discussed arms-bearing as a *political* rather than a *constitutional* right."), *rev'd on other grounds sub nom. McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010); Charles, *Faces of the Second Amendment* at 48-49. In short, Blackstone did not believe that there was a general, everyday right to carry arms in public places. On the contrary, he specifically rejected that notion. *See* 4 Blackstone, Commentaries *148-49.

Next, plaintiffs cite various English treatises for the proposition that "Gentlemen" and "Persons of Quality" were generally permitted to carry arms in public. *See* Moore Br. 37-38; Shepard Br. 30. From this, plaintiffs infer that all "responsible law abiding individuals" could carry arms in public. Moore Br. 40.

But this is mistaken. "Gentlemen" and "Persons of Quality" meant only high-ranking nobles. *See Black's Law Dictionary* 755 (9th ed. 2009) (historical definition of "gentleman" is a "man of noble or gentle birth or rank; a man above the rank of yeoman," or a "man belonging to the landed gentry"). Such nobles played special practical and ceremonial roles in keeping the peace in English society. As a result, they were permitted to wear swords fashionable at the time and to go in

public with armed servants. Thus, "no one, of whatever condition he be" could "carry arms, by day or by night,"

> *except the vadlets of the great lords of the land, carrying the swords of their masters in their presence, and the serjeants-at-arms of* [the royal family], and the officers of the City, and such persons as shall come in their company in aid of them, at their command, for saving and maintaining the said peace[.]

John Carpenter & Richard Whitington, *Liber Albus: The White Book of the City of London* 335 (Henry Thomas Riley trans., London, Griffin & Co. 1861) (1419) (emphasis added).

William Hawkins, another prominent treatise writer (whom plaintiffs cite, *see* Moore Br. 37; Shepard Br. 29),[5] similarly wrote that English law enforcement overlooked the wearing of "weapons of fashion as swords, &c. or privy coats of mail" by nobles with "their usual number of attendants with them, for their ornament and defence, in such places, and upon such occasions, in which it is the common fashion to make use of them, without causing the least suspicion of an intention to commit any act of violence or disturbance of the peace." 1 William Hawkins, *Treatise on the Pleas of the Crown* 267, 735 (Thomas Leach ed., London, His Majesty's Law Printers 6th ed. 1787), *available at* http://books.google.com/books?id=lqYDAAAAQAAJ&pg=PP5 (last visited May 3, 2012); *see also* Charles,

[5] Plaintiffs cite three other writers—Wilson, Dunlap, and Russell, *see* Moore Br. 37-38; Shepard Br. 31 n.11—all of whom relied on Hawkins' treatise for the same point. *See* 3 James Wilson, *The Works of the Honourable James Wilson* 79 n.i (Philadelphia, Lorenzo Press 1804); John A. Dunlap, *The New-York Justice* 8 (New York, Isaac Riley 1815); 1 William Oldnall Russell, *A Treatise on Crimes & Indictable Misdemeanors* 271 n.h. (London, Butterworth & Son 2d ed. 1826).

Faces of the Second Amendment at 26 n.124 (collecting citations from legal dictionaries providing that "it is an Offence for Persons to go or ride *armed* with dangerous and unusual Weapons; But Gentlemen may wear common *Armour* according to their Quality").

In other words, "[g]oing armed in public was not a right, but an exception that most generally applied to men of nobility and their attendants." Charles, *Faces of the Second Amendment* at 21. Indeed, authorities in England and America uniformly held that there was no general right to carry weapons in public for personal self-defense; while a man could use arms to defend his house, "a man cannot excuse the wearing of such armour in publick, by alledging that such a one threatened him, and that he wears it for the safety of his person from his assault." 1 Hawkins, *Pleas of the Crown* at 267; *see also* 3 Coke, *Institutes* at 161-62; James Parker, *Conductor Generalis: Or, The Office, Duty & Authority of Justices of the Peace, High-Sheriffs, Under-Sheriffs, Coroners, Constables, Gaolers, Jury-Men, & Overseers of the Poor* 12 (Woodbridge N.J., Parker 1764) (citing Hawkins); 1 Russell, *Treatise on Crimes* at 272 (citing Hawkins).

History likewise refutes plaintiffs' next argument. Plaintiffs observe that the Statute of Northampton and the common law banned "dangerous" or "unusual" weapons that were apt to "terrify" the people. Moore Br. 36-39. Plaintiffs' ensuing presumption that carrying guns in public was neither dangerous nor unusual and therefore would not have terrified people, *see id.*, is incorrect historically. Carrying

firearms in public was rare in most parts of England and early America. As a result, *all* firearms were considered dangerous or unusual weapons. *See, e.g.*, *King v. Hutchinson*, (1784) 168 Eng. Rep. 273, 274 n.a (C.C.R.) ("guns, pistols, daggers, and instruments of war" are "dangerous" and "offensive" weapons); An Act to prevent the practice of Dueling ¶1 (May 1779), *reprinted in Acts & Laws of the State of Connecticut, in America* 148 (Hartford, Hudson & Goodwin 1796) ("Pistol . . . or other dangerous Weapon"); An Act for the punishment of crimes, § 56 (Mar. 18, 1796), *reprinted in Laws of the State of New Jersey* 259 (Trenton 1821) ("pistol, or other dangerous weapon"); John B. Colvin, *The Magistrate's Guide, & Citizen's Counsellor; Adapted to the State of Maryland & Washington County, in the District of Columbia* 281 (Washington, D.C., Weens 1819) ("guns, pistols, swords, clubs and other offensive weapons"); 2 David Bailie Warden, *A Statistical, Political, & Historical Account of the United States of North America* 40 n.* (Edingburgh, Ramsay & Co. 1819) ("wearing a short pistol, dagger, or other unusual weapon"); *State v. Huntly*, 25 N.C. (3 Ired.) 418, 422 (1843) ("No man amongst us carries [a gun] about with him, as one of his every day accouterments—as part of his dress—and never we trust will the day come when any deadly weapon will be worn or wielded in our peace loving and law-abiding State, as an appendage of manly equipment.").[6]

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[6] The *Huntly* court continued:

> But although a gun is an "unusual weapon," it is to be remembered that the carrying of a gun *per se* constitutes no offence. For any lawful

Because *all* firearms were considered dangerous and unusual, carrying one in a public place was considered *inherently* terrifying and was *by itself* a criminal breach of the peace—no further threats, danger, or "terrifying" conduct was required. *See, e.g.*, *Chune v. Piott*, (1614) 80 Eng. Rep. 1161 (K.B.) (Croke, J.) ("Without all question, the sheriffe hath power to commit . . . if contrary to the Statute of Northampton, he sees any one to carry weapons in the high-way, in terrorem populi Regis; he ought to take him, and arrest him, notwithstanding he doth not break the peace in his presence."); A Gentleman of the Law, *A New Conductor Generalis: Being a Summary of the Law Relative to the Duty & Office of Justices of the Peace, Sheriffs, Coroners, Constables, Jurymen, Overseers of the Poor* 27 (Albany, D. & S. Whiting 1803) ("it seems certain, that in some cases there may be an affray, where there is no actual violence: as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror

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> purpose—either of business or amusement—the citizen is at perfect liberty to carry his gun. It is the wicked purpose—and the mischievous result—which essentially constitute the crime. He shall not carry about this or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people.

25 N.C. at 422-23. This admonition is consistent with the historical understanding of common-law arms regulations. The common law allowed (and Illinois law allows, *see* 720 ILCS 5/24-1 *et seq*. (West 2012); 520 ILCS 5/1.1 *et seq*. (West 2012); 17 Ill. Admin. Code § 510.10 *et seq*.) people to transport firearms in public for lawful purposes, including hunting, militia service, using shooting ranges, moving to a new residence, and to facilitate lawful commerce in firearms. *See* Charles, *Faces of the Second Amendment* at 35-36. Given this understanding, *Huntly* recognized that guns could be carried in public for "business" and "amusement." Significantly, however, *Huntly* did not include "self-defense" on this list, for, as discussed *supra* pp. 11, 19, personal self-defense was not a justification for carrying arms in public.

to the people; which is said to have been always an offence at the common law"); 1 Russell, *Treatise on Crimes* at 271 (same); *see also* 7 *Laws of the Commonwealth of Pennsylvania, from the Fourteenth Day of October, One Thousand Seven Hundred* 722 (John Bioren, ed. Philadelphia 1822) ("the show of armour" by people in a group is "naturally apt to strike a terror into the people" and will support a conviction for rioting); 3 Thomas Edlyne Tomlins & Thomas Colpitts Granger, *The Law-Dictionary, Explaining the Rise, Progress, & Present State of the British Law* 397 (Philadelphia, R. H. Small 1st American ed. 1836) (same).

Plaintiffs also misdescribe several other historical sources by taking statements out of context. They cite Edward Christian's commentaries on Blackstone, for instance, for the proposition that "every one is at liberty to keep or carry a gun, if he does not use it for the destruction of game." Shepard Br. 30-31 (citing 2 Blackstone, *Commentaries* *411-12 n.2 (Christian 12th ed. 1794)). But Christian was not addressing the Statute of Northampton—a provision on which Christian had no comment. *See* 4 Blackstone, *Commentaries* *149 (Christian 12th ed. 1795). Rather, Christian was discussing the purposes behind England's *game laws*. In his original *Commentaries*, Blackstone had speculated that England's game laws were a secret attempt to disarm the people; Christian disagreed, arguing that the game laws did not forbid all possession of guns, for this was not the game laws' purpose. 2 Blackstone, *Commentaries* *411-12 & n.2 (Christian 12th ed. 1794).

In other words, Christian's comment was a response to a specific scholarly debate about the purposes of English game laws, not a statement about the scope of the right to bear arms in general, including where or under what circumstances they could be "carr[ied]." Indeed, without this scholarly context, Christian's observation would be absurd. "Every one" is not at liberty to carry a gun—felons and those with sufficient mental impairments may not be permitted to possess arms. *See Heller*, 554 U.S. at 626. Nor is a person free to carry a gun anywhere, and for any purpose, so long as he does not use it for "the destruction of game." *See id.* (guns may be excluded from "sensitive places such as schools and government buildings"). When viewed in its proper context, therefore, Christian's comment does not support plaintiffs' assertions.

Plaintiffs similarly cite the Recorder of London's legal opinion regarding the legality of the London Military Foot-Association, which stated that arms could be used for "immediate self-defence, . . . suppression of violent and *felonious* breaches of the peace, the assistance of the civil magistrate in the execution of the laws, and the defence of the kingdom against foreign invaders." Shepard Br. 30 (citing Opinion on the Legality of the London Military Foot-Association (1780), *reprinted in* William Blizard, *Desultory Reflections on Police* 63 (London, Bauer & Galabin 1785)). But once again, plaintiffs take this statement out of context. The London Military Foot-Association was not a group of people seeking to carry weapons in public for personal self-defense—it was a private militia formed by gentlemen to

support the government in suppressing riots. *See* Sylvanus Urban, *Obituary of Sir William Blizard, F.R.S.*, 5 The Gentleman's Magazine (New Series) 318-19 (1836) ("the London Military Foot Association" was "formed for the purpose of supporting the civil power in the maintenance of peace and order, and . . . rendered important service during the riots of 1780"). Bearing arms in response to a "hue and cry"—an official call for immediate support in keeping the peace—was a recognized exception to the common-law ban on carrying arms in public. *See* 1 Hawkins, *Pleas of the Crown* at 267-68; Parker, *Conductor Generalis* at 11; *see also id.* at 219-24 (describing law of hue and cry). Thus, Hawkins wrote that "private persons may arm themselves in order to suppress a riot" and "may also make use of arms in the suppressing of it, if there be a necessity for their so doing." 1 Hawkins, *Pleas of the Crown* at 298. It is to this narrow exception that the Recorder of London was referring, not a broader right to carry arms in public for personal self-defense. *See Parker v. District of Columbia*, 478 F.3d 370, 382 n.8 (D.C. Cir. 2007) (Recorder's opinion regarded "the legality of private organizations armed for defense against rioters"), *aff'd sub nom. District of Columbia v. Heller*, 554 U.S. 570 (2008).

Indeed, the fact that commentators felt the need to clarify that arms *could* be carried in public to suppress immediate riots, *see* 1 Hawkins, *Pleas of the Crown* at 298, demonstrates that arms *could not* be so carried otherwise. And even the right to carry arms to suppress riots was limited. It was "extremely hazardous for private persons to proceed to those extremities; and it seems no way safe for them to

go so far in common cases, lest under the pretence of keeping the peace, they cause a more enormous breach of it." *Id.* "[T]herefore, such violent methods seem only proper against such riots as favour of rebellion, for the suppressing whereof no remedies can be too sharp or severe." *Id.*

Next, plaintiffs observe that over the course of American history, some jurisdictions have tolerated greater public carriage of arms, and that some people have thought that gun ownership was a good idea. We are told, for instance, that carrying guns was common in some areas, that some frontier colonies required arms-bearing by statute for public safety reasons, and that Thomas Jefferson told his nephew to let a gun "be the constant companion of your walks." Shepard Br. 32-34. These arguments mistake policy analysis for constitutional analysis. Reasonable people differ on how guns should be regulated, and democratically elected legislatures have always had the power to expand gun rights beyond the constitutional minimum. But the fact that some people held a particular policy view does not mean they thought the contrary view was *unconstitutional*. Thomas Jefferson may have thought it was a good idea to carry a gun at times, just as he thought it was a good idea to avoid "[g]ames played with the ball," which are "too violent for the body, and stamp no character on the mind." Letter to Peter Carr (Aug. 19, 1785), *reprinted in* 1 *The Writings of Thomas Jefferson* 397-98 (H.A. Washington ed., Washington, D.C., Taylor & Maury 1853). But this tells us nothing about whether States lack the constitutional power to regulate guns in public. Similarly, the colony of Georgia may have thought it was a good idea to require its

citizens to carry guns to church to defend against "internal dangers and insurrections." *See* An act for the better security of the inhabitants by obliging the white male persons to carry fire arms to places of public worship (Feb. 27, 1770), *reprinted in* 19 *The Colonial Records of the State of Georgia* pt. 1 at 137-40 (Allen Daniel Candler ed., 1911). But that does not mean that different policy choices were unconstitutional.

Finally, plaintiffs mistakenly rely on sources from decades—or centuries—after the relevant time period. *See, e.g.*, Moore Br. 29 (citing 1980 Oregon Supreme Court case interpreting Oregon Constitution, as "[p]articularly instructive"); Shepard Br. 34-35. But attitudes about arms and self-defense began to change to some degree in the mid-Nineteenth Century, and some state courts and legislatures became more willing to tolerate self-defense in public. *See, e.g.*, *supra* at 9 n.4 (describing shift away from common-law duty to retreat). As part of this trend, a few state courts concluded, with no historical analysis, that the Second Amendment protects a right to carry weapons in public, so long as they are in plain view. *See, e.g.*, *State v. Chandler*, 5 La. Ann. 489, 490 (1850) (dicta); *Nunn v. State*, 1 Ga. (1 Kelly) 243, 251 (1846).

Other courts harshly criticized this new approach, however. West Virginia's high court, for instance, said of it:

> It would thus seem that the state cannot constitutionally prohibit the carrying of deadly weapons; and, secondly, that upon a mere threat to kill, made by your enemy, you may hunt him down, and, without waiting for any hostile demonstration on his part, may take his life. We have but to put these two alleged principles of law together, in order to destroy

> that security of life and that social order which are absolutely essential to civilization. In the state where they have been announced, a prolific harvest of murders, street fights, and family feuds has been their natural fruition, to the degradation and terror of society, and the abasement of justice and civil order. In this state, just the reverse has been held as to both the principles alluded to.

State v. Workman, 14 S.E. 9, 11 (W. Va. 1891). Many other state courts and legislatures were in accord. *See, e.g.*, *Aymette v. State*, 21 Tenn. (Hum.) 154, 159 (1840) ("The Legislature, therefore, have a right to prohibit the wearing or keeping weapons dangerous to the peace and safety of the citizens, and which are not usual in civilized warfare, or would not contribute to the common defence."); *English v. State*, 35 Tex. 473, 475-80 (1871) (upholding ban on carrying non-military weapons and citing Statute of Northampton); An act to prevent the carrying of dangerous weapons in the City of Washington (Nov. 4, 1857), *reprinted in Corporation Laws of the City of Washington* app. at 75 (James W. Sheahan ed., Washington, D.C., Robert A. Waters 1860) ("it shall not hereafter be lawful for any person or persons to carry or have about their persons any deadly or dangerous weapons, such as [a] dagger, pistol, bowie knife, dirk knife, or dirk, colt, slung shot, or brass or metal knuckles, within the city of Washington"); An Act to Prevent the Carrying of Fire Arms and Other Deadly Weapons (Dec. 2, 1875), *reprinted in The Compiled Laws of Wyoming* 352 (J.R. Whitehead ed., Cheyenne, H. Glafcke 1876) (it shall be unlawful "to bear upon his person, concealed or openly, any fire arm or other deadly weapon, within the limits of any city, town or village"); *cf. State v. Buzzard*, 4 Ark. (4 Pike) 18, 27 (1842) (opinion of Ringo, C.J.) (upholding concealed weapons ban because "the

Legislature possesses competent powers to prescribe, by law, that any and all arms, kept or borne by individuals, shall be so kept and borne as not to injure or endanger the private rights of others, [or] distur[b] the peace or domestic tranquility").

But even if there had been a Nineteenth Century judicial trend universally in their favor, it would not affect the outcome here. "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future . . . judges think that scope too broad." *Heller*, 554 U.S. at 634-35. As a result, these mistaken understandings, reached decades after the relevant time period, "cannot nullify the reliance of millions of Americans . . . upon the true meaning of the right to keep and bear arms." *Id.* at 624 n.24. Because the Framers did not understand the English right to bear arms, codified in the Second Amendment, to include a right to carry firearms in public for personal self-defense, Illinois' firearms laws are constitutional.

2. Neither The Second Amendment's Text Nor Supreme Court Precedent Establishes A Right To Carry Arms In Public For Personal Self-Defense.

None of plaintiffs' legal or textual arguments overcomes this original, historical understanding of the Second Amendment. Plaintiffs argue that the Second Amendment protects a right to "bear" arms, and that to "bear" means to "carry." *See, e.g.*, Moore Br. 24-27; Shepard Br. 23-24. Moreover, plaintiffs note, several Founding-era state constitutions guaranteed citizens the right to "'bear arms in defense of themselves and the state'" or "'bear arms in defense of himself and the state.'" Shepard Br. 31-32; *see also* Moore Br. 27-28.

But plaintiffs' reliance on the word "bear" is misplaced. To be sure, the right to "bear" arms includes a right to "carry" them "in case of confrontation." *Heller*, 554 U.S. at 584, 592. It is equally indisputable, however, that this right is limited; *Heller* cautioned that the Second Amendment does not "protect the right of citizens to carry arms for *any sort* of confrontation," *id.* at 595, and that the right to carry arms is subject to exceptions that will be determined—not by the Amendment's text—but by its history, *id.* at 635. Thus, while true, plaintiffs' observation that there is a right to "carry" arms in self-defense is unhelpful; it begs the question whether the particular "carrying" in question is within the Second Amendment's scope.

Plaintiffs also argue that limiting the Second Amendment to the "home" would "effectively read the term 'bear' out of the Constitution," Shepard Br. 23, 26, and would prevent people from engaging in hunting, firearms training, and military service, *see id.* at 25-27, 36-37; Moore Br. 23-24. But Illinois law does not confine the right to bear arms to "toting a weapon from room to room in one's house," as plaintiffs suggest. Shepard Br. 32. Nor does it prevent Illinois citizens from hunting, target shooting, or serving in the military. Illinois citizens may carry arms on their own land; in their fixed place of business; in someone else's home or on their land (with their permission); in designated hunting areas; and during militia service. *See* 720 ILCS 5/24-1 *et seq.* (West 2012); 520 ILCS 5/1.1 *et seq.* (West 2012); 17 Ill. Admin. Code § 510.10 *et seq*. Conversely, Illinois law generally

restricts the "carrying" of arms on: (1) private property, if the owner has not given permission; and (2) public property. As discussed, restrictions on carrying weapons in these areas were permissible when the Second Amendment was adopted, and they therefore remain permissible now.

Next, plaintiffs rely on *Heller*'s statement that the English right to bear arms was "'an individual right protecting against both public and private violence.'" Shepard Br. 28 (quoting *Heller*, 554 U.S. at 594). But *Heller* used these terms in its discussion of Blackstone's right to bear arms. His description, *Heller* held,

> cannot possibly be thought to tie it to militia or military service. It was, he said, "the natural right of resistance and self-preservation," and "the right of having and using arms for self-preservation and defence." Thus, the right secured in 1689 as a result of the Stuarts' abuses was by the time of the founding understood to be an individual right protecting against both public and private violence.

554 U.S. at 594 (internal citations omitted). As *Heller*'s context makes clear, the Court did not mean "public" and "private" in the sense of "public spaces" and "private spaces." Rather, it meant that the right to bear arms applies both to "public" militias and "private" individuals.

Plaintiffs further rely on *Heller*'s list of presumptively lawful restrictions on gun use. *See* Moore Br. 30-31; Shepard Br. 38. *Heller* cautioned that it did not "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment." 554 U.S. at 626. Thus, the Court wrote, "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms

in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27.

Plaintiffs argue that this explicit limitation was, in fact, an implicit *expansion* of the Court's holding. Plaintiffs reason that the "obvious implication" of *Heller*'s list of presumptively lawful restrictions is that "the Second Amendment forbids Illinois from *totally banning* the carrying of firearms in *all* public spaces, but not in particularly sensitive places." Shepard Br. 38; *see also* Moore Br. 30-31. This argument reduces to an application of the "*expressio unius est exclusio alterius*" canon of construction: Because the Supreme Court's list of "presumptively lawful" restrictions did not include limits on carrying arms in public, such restrictions must not be "presumptively lawful." But "[t]he maxim Expressio unius est exclusio alterius is premised on the assumption that the [decision-maker] considered and rejected all factors not listed." *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 756 n.2 (7th Cir. 1979). And that assumption fails here. "[S]ince this case represents this Court's first in-depth examination of the Second Amendment," the *Heller* Court wrote, "one should not expect it to clarify the entire field." 554 U.S. at 635. Thus, while *Heller* provided a list of "presumptively lawful" regulations, it cautioned that these were only "examples" and that "our list does not purport to be exhaustive." *Id.* at 627 n.26. In so doing, the Court "warn[ed] readers not to treat *Heller* as containing broader holdings than the Court set out to establish: that the Second Amendment creates individual rights, one of which is keeping operable handguns at

home for self-defense." *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (*en banc*). "What other entitlements the Second Amendment creates, and what regulations legislatures may establish, were left open." *Id.*; *see also Gonzalez v. Vill. of West Milwaukee*, 671 F.3d 649, 659 (7th Cir. 2012) ("Whatever the Supreme Court's decisions in *Heller* and *McDonald* might mean for future questions about open-carry rights, for now this is unsettled territory.").

Plaintiffs extend this same faulty logic to other Supreme Court decisions, citing five cases for the proposition that the Court "has always accepted that the right to guard against confrontation extends beyond the threshold of one's home." Moore Br. 21-22. But four of these cases are silent about whether the Second Amendment confers a right to carry arms for personal self-defense in public. *See Heller*, 554 U.S. at 620; *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950); *United States v. Miller*, 307 U.S. 174, 175 (1939); *United States v. Cruikshank*, 92 U.S. 542, 553 (1876). Plaintiffs infer from this silence that such a right must exist; they reason that if it did not, the Court would have said so. *See* Moore Br. 21-22. But a judicial opinion "is not a comprehensive code; it is just an explanation for the Court's disposition" and "must be read in light of the subject under consideration." *Skoien*, 614 F.3d at 640. As discussed, the fact that a question has not been resolved does not mean that it has been settled; it means that the Court has not had reason to answer it.

As for the fifth case, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), cited by plaintiffs for its suggestion that recognizing the full privileges of citizenship for African-Americans would allow them to "'keep and carry arms wherever they went,'" Moore Br. 21-22; Shepard Br. 35, that discredited case was decided nearly seven decades after the Second Amendment was ratified and provided no support—historical or otherwise—for this dicta.

In sum, then, the Second Amendment's history and text, and its construction by the Supreme Court, establish that it does not embody a right to carry ready-to-use arms in public spaces.

III. In The Alternative, Illinois Law Satisfies Means-Ends Scrutiny.

If, however, this Court concludes that the challenged statutes implicate activity within the scope of the Second Amendment, this activity is so far removed from the core Second Amendment purpose of permitting self-defense in the home that the relatively deferential, "reasonable regulation" level of means-ends scrutiny applies, scrutiny that Illinois law easily survives. Indeed, the challenged statutes are constitutional even if the Court applies intermediate scrutiny, which other circuits have used when faced with similar Second Amendment challenges, or the "not quite 'strict scrutiny'" that *Ezell* reserves for violations of core Second Amendment rights, 651 F.3d at 708.

A. Even If Within The Scope Of The Second Amendment, The Challenged Regulations Are Not Within The Amendment's "Core."

The Supreme Court has yet to decide what degree of heightened scrutiny applies to firearms regulations that implicate Second Amendment rights. *See Ezell*, 651 F.3d at 703 (citing *Heller*, 554 U.S. at 628-29). *Ezell* imported a sliding-scale analysis from First Amendment doctrine, under which "the rigor of . . . judicial review will depend on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right." 651 F.3d at 703. Laws that severely burden core Second Amendment rights are subject to "not quite 'strict scrutiny.'" *Id.* at 708. By contrast, "laws restricting activity lying closer to the margins of the Second Amendment right, laws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified." *Id.* Critically, *Ezell* did not apply strict scrutiny (nor deem categorically unlawful) even the gun range ban that was an "important corollary" to the exercise of the core, home-defense right recognized in *Heller*. *Id.* Thus, *Ezell* forecloses plaintiffs' arguments that the Illinois laws should be invalidated without applying any scrutiny at all because they are "complete ban[s]." Moore Br. 40-41; *see also* Shepard Br. 46-47.

Indeed, even if Illinois passed a law implicating the core right, voiding the challenged law without first undertaking means-ends scrutiny would run afoul of the First Amendment jurisprudence on which *Ezell* relied for its sliding scale. For

even "'presumptively invalid,'" content-based speech restrictions and laws prohibiting speech in public forums are subject to strict scrutiny. *Ezell*, 651 F.3d at 707 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)). Nor did *Heller* suggest a different approach for the Second Amendment, as plaintiffs contend. *See* Moore Br. 40-41; Shepard Br. 46. Rather, the Court held that the handgun ban there failed constitutional muster "[u]nder any of the [available] standards of scrutiny"—not that courts should forego scrutiny entirely. 554 U.S. at 628.

The Court's reasoning in *Heller* also is inconsistent with applying strict scrutiny to firearms regulations, as plaintiffs request. *See* Moore Br. 41; Shepard Br. 48-50. *Heller* held that certain firearms regulations are "presumptively lawful" under the Second Amendment, an approach that defers to the legislature in a manner irreconcilable with strict scrutiny. *See* 554 U.S. at 688 (Breyer, J., dissenting) ("the majority implicitly . . . rejects [a 'strict scrutiny' test] by broadly approving a set of laws . . . whose constitutionality under a strict scrutiny standard would be far from clear").

Nor should this Court accept plaintiffs' invitation to apply "not quite 'strict scrutiny'" to Illinois' laws. *See* Moore Br. 41; Shepard Br. 52. The challenged laws do not implicate core Second Amendment rights and thus do not call for this form of heightened scrutiny. In *Heller*, the Supreme Court identified the core purpose of the right conferred by the Second Amendment as permitting "law-abiding,

responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635.[7] The Court held that the Second Amendment right was not an "unlimited" right to carry arms "for *any sort* of confrontation," *id.* at 595, but included a right to carry a handgun "for self-defense in the home," *id.* at 629. Likewise, much of the Court's reasoning arose from the need for home defense. *See id.* at 628 (challenged statute "extends, moreover, to the home, where the need for defense of self, family, and property is most acute"); *id.* at 629 (listing potential reasons that "a citizen may prefer a handgun for home defense" and concluding that "handguns are the most popular weapon chosen by Americans for self-defense in the home").

The historical meaning of the Second Amendment confirms that the right to carry firearms in public spaces for personal self-defense is not at the Amendment's core. Neither English statutory nor common law provided any right to carry weapons in public, and state and local governments frequently restricted citizens from carrying firearms in public at the time the Second and Fourteenth Amendments were ratified. *See supra* Part II. In short, "as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self defense." *Masciandaro*, 638 F.3d at 470. And "[s]ince historical meaning enjoys a privileged interpretative role in the Second Amendment context, *see Heller*, 554 U.S. at [625-26]; *Skoien*, 587 F.3d at 809, this

[7] Because plaintiffs are "law-abiding, responsible citizens," Shepard Br. 51, their Second Amendment rights "are entitled to full solicitude," *Ezell*, 651 F.3d at 708. This Court must still find, however, that their conduct—carrying firearms in public for self-defense—implicates the core of those rights. *See id.*

longstanding out-of-the-home/ in-the-home distinction bears directly on the level of scrutiny applicable." *Masciandaro*, 638 F.3d at 470.

The courts of appeals likewise agree that "[a]t its core, the Second Amendment protects the right of law-abiding citizens to possess non-dangerous weapons for self-defense *in the home*." *United States v. Marzzarella*, 614 F.3d 85, 92 (3d Cir. 2010) (emphasis added); *accord Masciandaro*, 638 F.3d at 470; *United States v. Reese*, 627 F.3d 792, 800 (10th Cir. 2010); *see also United States v. Booker*, 644 F.3d 12, 25 n.17 (1st Cir. 2011) ("While we do not attempt to discern the 'core' Second Amendment right vindicated in *Heller*, we note that *Heller* stated that the Second Amendment 'elevates above all other interests the right of law-abiding responsible citizens to use arms in defense of hearth and home.'"). These courts thus applied intermediate scrutiny to various firearms regulations that did not implicate this core right. *See Masciandaro*, 638 F.3d at 471; *Reese*, 627 F.3d at 801-02; *Marzzarella*, 614 F.3d at 97.

A holding that carrying firearms in public implicates core Second Amendment rights (triggering almost-strict scrutiny) would conflict with these decisions. Nor does *Ezell* require it. *Ezell* referred to "the core right to possess firearms for self-defense." 651 F.3d at 708. But in context this was an apparent reference to the right to possess firearms for self-defense *in the home*—the right at issue in that case and the one discussed throughout the remainder of the opinion. *See id.* at 698 (describing plaintiffs' assertion "that the range ban impermissibly

burdens the core Second Amendment right to possess firearms at home for protection"); *id.* at 703, 708; *see also id.* at 712 (Rovner, J., concurring in the judgment) (describing "'core' Second Amendment . . . right to use a firearm in the home for self-defense"). Because the laws at issue here do not infringe on the core values identified in *Heller* in the way that the gun range ban did in *Ezell*, a more lenient standard of scrutiny applies.

B. The State Has A Compelling Interest In Preventing The Unwanted Discharge Of Firearms In Public.

Under any level of scrutiny, the State has a compelling interest in preventing the discharge of firearms in public. Such discharge, whether intentional or accidental, presents a genuine and serious risk to public safety, *see Skoien*, 614 F.3d at 642, and there can be no dispute that protecting the safety and lives of citizens is a compelling government interest for purposes of constitutional scrutiny, *see United States v. Salerno*, 481 U.S. 739, 750, 754-55 (1978). Statistically, "guns are about five times more deadly than knives," *Skoien*, 614 F.3d at 642 (citing data), and regulations that reduce the likelihood of "stray bullets" therefore serve a vitally important government interest, *Ezell*, 651 F.3d at 709.

For example, in 2007 alone, there were 1,032 gun-related deaths (including 150 children) in Illinois. *See* Ill. Council Against Handgun Violence ("ICHV"), http://www.ichv.org/facts-about-gun-violence/general-facts-about-gun-violence (last visited May 3, 2012) (citing Centers for Disease Control National Center for Health Statistics mortality report online 2010). On average 31,593 people die from gun

violence each year in the United States. *See* Brady Center to Prevent Gun Violence ("Brady Center"), *Facts/Gun Violence Overview*, http://www.bradycampaign.org/facts/gunviolence?s=1 (last visited May 3, 2012) (citing National Center for Injury Prevention and Control, Web-based Injury Statistics Query and Reporting System). Firearms-related homicides in the United States are 19.5 times higher than in other populous, high-income countries. *See* Erin G. Richardson & David Hemenway, *Homicide, Suicide, & Unintentional Firearm Fatality: Comparing the United States With Other High-Income Countries, 2003*, 70 J. of Trauma, Injury, Infection, & Critical Care 238-43 (Jan. 2011). Nor are these the only costs firearms impose. "Medical costs, costs of the criminal justice system, security precautions such as metal detectors, and reductions in quality of life because of fear of gun violence" together total approximately $100 billion each year. Brady Center, *Facts/Gun Violence Overview*, http://www.bradycampaign.org/facts/gunviolence?s=1 (last visited May 3, 2012) (citing Philip J. Cook & Jens Ludwig, *Gun Violence: The Real Costs* (Oxford Univ. Press 2000)).

Given the serious risk that gun violence poses, the State does not complete its obligations to protect the health, safety, and welfare of its citizens merely by averting the "armed mayhem" that could occur if felons widely possessed weapons. *Skoien*, 614 F.3d at 642. The State also can act to advance its broader interest in limiting injury and death arising from the discharge of weapons in public spaces. Plaintiffs offer no persuasive argument why limitations on where handguns may be

carried promote a less vital government interest than restrictions on who may carry them. Illinois not only has an important state interest, but also a compelling one, and both data and common sense establish the fit between that interest and the challenged laws.

C. Most States Apply A "Reasonable Regulation" Standard Where Such Regulations Lie Far From The State Constitutional Core.

As a matter of first impression, this Court should follow most state courts and apply a reasonable regulation test to firearms laws that implicate constitutional protections but lie far from the constitutional core. Although defendants did not raise the reasonable regulation test below, it was advanced by *amicus curiae* the Brady Center, *see* Moore Doc. 28, and, in any event, this Court may affirm dismissal of the complaints "on any ground supported by the record," *Jones v. Hulick*, 449 F.3d 784, 787 (7th Cir. 2006).

Over forty States have established a constitutional right to bear arms, *see State v. Hamdan*, 665 N.W.2d 785, 801 n.21 (Wis. 2003), and nearly every one to address the question has held that the right is subject to reasonable regulation, *see State v. Cole*, 665 N.W.2d 328, 337 (Wis. 2003); *see also* Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 686-87 (2007). By "reasonable regulation," the States do not mean that laws restricting arms need only satisfy rational basis scrutiny; "[t]he explicit grant of a fundamental right to bear arms clearly requires something more, because the right must not be allowed to become illusory." *Cole*, 665 N.W.2d at 338. The reasonable regulation test therefore

"focuses on the balance of the interests at stake, rather than merely on whether any conceivable rationale exists under which the legislature may have concluded the law could promote the public welfare." *Id.* And—unlike the interest-balancing test proposed in Justice Breyer's dissent in *Heller*—it leaves a core of protected conduct inviolate, striking down provisions that effectively destroy the right. *See Hamdan*, 665 N.W.2d at 798.

Defendants acknowledge that no court has applied the reasonable regulation test to laws challenged under the Second Amendment, as opposed to its state constitutional counterparts. *But see Nordyke v. King*, 644 F.3d 776, 795 (9th Cir. 2011) (Gould, J., concurring) ("I would subject incidental burdens on the Second Amendment right . . . to reasonableness review."). Yet there is good reason to do so. The States "have far more experience than the federal government when it comes to charting the lines between gun rights and safety regulation, and the 'reasonableness' standard they have unanimously endorsed both reflects their collective wisdom on the subject and permits individual states to tailor gun regulations to their own circumstances." *Id.* at 798 (Gould, J., concurring) (internal quotations omitted). The text and history of the Second Amendment also support a reasonableness test: The text recognizes that the "militia" must be "well regulated," U.S. Const. amend. II, thereby calling for reasonable regulation of firearm use. And it is beyond dispute that firearms have been subject to reasonable restrictions throughout the history of Anglo-American law. *Heller*, 554 U.S. at 626.

Furthermore, application of the reasonable regulation test is consistent with Supreme Court and Seventh Circuit jurisprudence. As explained, the Supreme Court has left open the appropriate level of scrutiny, stating only that Second Amendment rights should be accorded the same treatment as other enumerated constitutional rights. *See id.* at 628-29 & n.27. Nor has this Court foreclosed application of a standard stricter than rational basis yet more deferential than intermediate scrutiny to laws, like those here, that do not implicate the core Second Amendment right of self-defense in the home. *See Ezell*, 651 F.3d at 703.

Here, given the State's significant interest in preventing the discharge of firearms in public, *see Skoien*, 614 F.3d at 642, the statutes are reasonable regulations on the right to bear arms, for they restrict only the public carrying of operable firearms, while safeguarding the core right to bear arms for self-defense on private property and the corollary right to transport weapons from place to place. *See Cole*, 665 N.W.2d at 344 (given "the danger of wide-spread presence of weapons in public places and police protection against attack in these places," regulation that did "not restrict possession in homes or businesses" was reasonable).

D. The State's Regulation Of Ready-To-Use Weapons In Public Is Closely Related To Its Interest In Barring The Firing Of Those Weapons In Public.

In any event, the challenged Illinois laws satisfy intermediate scrutiny, the means-ends scrutiny that most federal courts have applied in analogous cases. Under that test, the precise fit of a firearm regulation need not be "established by admissible evidence," for a court may look to "logic" in deciding whether a

"substantial relation" exists between the regulation and its objective. *Skoien*, 614 F.3d at 641-42; *see also Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 628 (1995) (speech regulations may survive First Amendment challenge "based solely on history, consensus, and 'simple common sense'"). A court also may consider "data," including scholarly journals and studies. *Skoien*, 614 F.3d at 642, 643-44.

Nor does reasonable, empirical disagreement over a law's fit mean that the law fails intermediate scrutiny. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 437 (2002) (plurality op.) (under intermediate scrutiny, government "does not bear the burden of providing evidence that rules out every theory . . . inconsistent with its own"); *G.M. Enters., Inc. v. Town of St. Joseph*, 350 F.3d 631, 639 (7th Cir. 2003) ("[a]lthough this evidence shows that the Board might have reached a different and equally reasonable conclusion . . . , it is not sufficient to vitiate the result reached in the Board's legislative process" under intermediate scrutiny). And courts should not "substitute [their] judgment in regards to whether a regulation will best serve a community, so long as the regulatory body" has met its responsibility to consider "evidence that it reasonably believed to be relevant to the problem addressed." *G.M. Enters.,* 350 F.3d at 639-40 (internal quotations and citation omitted).

When enacting the challenged statutes, the Illinois General Assembly determined that "permit[ting] citizens to carry loaded, immediately accessible guns in holsters on the public streets of Illinois" presents "inherent dangers to police

officers and the general public." *People v. Smythe*, 817 N.E.2d 1100, 1103-04 (Ill. App. Ct. 2004) (internal quotations omitted); *see also People v. Marin*, 795 N.E.2d 953, 958-59 (Ill. App. Ct. 2003) (legislative purpose was "to protect the public from gun violence"); *People v. Williams*, 305 N.E.2d 186, 188 (Ill. App. Ct. 1973) (explaining that predecessor to challenged laws was "designed to protect innocent persons from being victimized by those who carry hidden weapons, as the potential for injury is very grave"). Logic supports the legislature's conclusion that the more guns there are in public, the greater the likelihood that one will be discharged, and the more victims of gun violence there will be.

Data likewise support the Illinois General Assembly's exercise of its police power in passing the challenged laws. Evidence suggests that "criminal gun use is far more common than self-defense gun use," and that guns are used "far more often to intimidate and threaten than . . . to thwart crimes." David Hemenway & Deborah Azrael, *The Relative Frequency of Offensive & Defensive Gun Uses: Results from a National Survey*, 15 Violence & Victims 257, 257, 271 (2000); *see also* John J. Donohue, *The Impact of Concealed-Carry Laws*, in *Evaluating Gun Policy Effects On Crime & Violence* 289, 320-25 (2003) (finding statistical correlation between less restrictive gun laws and increases in crime, recognizing that existing data make it difficult to isolate the causal effect of such laws). Such evidence is not limited to urban areas, for guns and highway confrontation are a particularly deadly

combination. *See* David Hemenway, *Road Rage in Arizona*: *Armed & Dangerous*, 34 Accident Analysis & Prevention 807-14 (2002).

Plaintiffs' view that "firearms are frequently used to deter and defend against criminal violence," Shepard Br. 57, thus is inconsistent with the available evidence. Indeed, of the approximately 30,000 gun deaths in the United States each year, only a small percentage are "justifiable homicides" (defined by the FBI as "[t]he killing of a felon, during the commission of a felony, by a private citizen)," FBI, *Uniform Crime Reports, Expanded Homicide Data Table 15/Justifiable Homicide*, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10shrtb l15.xls (last visited May 3, 2012). Between 2006 and 2010, there were on average only 212 justifiable homicides. *See id*. In other words, justifiable homicides account for less than 1% of all gun deaths.

Studies also show that laws restricting people from carrying firearms in public actually reduce gun violence, by discouraging people from carrying guns and enabling police officers to take *illegal* guns off of the streets. In jurisdictions where public carry is restricted, if a police officer encounters a person reasonably suspected of carrying a gun, that officer may stop and frisk, and, upon finding a firearm, make an arrest and confiscate it. *See, e.g.*, *United States v. Black*, 525 F.3d 359, 364-65 (4th Cir. 2008); *Commonwealth v. Robinson*, 600 A.2d 957, 959-60 (Pa. Super. Ct. 1991). These policing strategies increase the likelihood that either gang members and others likely to misuse guns will refrain from carrying them in public,

or the police will take the guns before they are used in crimes. *See* Lawrence Rosenthal, *Second Amendment Plumbing After* Heller*: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, & Criminal Street Gangs*, 41 Urb. Law. 1, 30-48 (2009). Thus, contrary to plaintiffs' suggestion, *see* Shepard Br. 57, it is neither "naïve" nor "nonsensical" to conclude that laws restricting public carry deter criminals from carrying (and using) guns. But these strategies are less likely to be effective in places where carrying a gun with a license is allowed, because courts may well conclude that an officer's reasonable suspicion that a person is carrying a gun does not justify a stop and frisk.

To be sure, restrictions on public carry also affect people who are unlikely to misuse guns. But intermediate scrutiny tolerates laws that are more extensive than necessary to serve the government's interests as long as they are not unreasonably so. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001) ("'the least restrictive means' is not the standard"). And courts should be "loath to second-guess the Government's judgment to that effect." *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 478 (1989). Thus, courts consistently have upheld laws prohibiting felons from possessing firearms, even though those laws "could be criticized as 'wildly overinclusive' for encompassing nonviolent offenders." *United States v. Yancey*, 621 F.3d 681, 685 (7th Cir. 2010) (*per curiam*). Here, the legislature's interest in reducing gun violence would not be as effectively served by a licensing regime, because, contrary to plaintiffs' suggestion, it is impossible to

predict everyone who can "be trusted to carry a firearm in public." Shepard Br. 55-56.

Because every criminal was at one time a law-abiding citizen, strategies for preventing gun violence are under-inclusive when they target only prior offenders. *See* Philip J. Cook, *et al.*, *Criminal Records of Homicide Offenders*, 294 JAMA 598, 600 (2005) (homicide prevention strategies targeted toward prior offenders "leave a large portion of the problem untouched"). Indeed, according to one study, concealed handgun permit holders killed at least 428 private citizens and 12 law enforcement officers in the last five years. *See* Violence Policy Center ("VPC"), *Concealed Carry Killers*, http://vpc.org/ccwkillers.htm (last visited May 3, 2012). And even plaintiffs' *amici* cite data in their brief that authorities in just four States revoked substantial numbers of individual gun permits. Brief *Amici Curiae* of Michael Hall, Kenneth Pacholski, Kathryn Tyler and the National Rifle Association of America, Inc., in Support of Plaintiffs-Appellants ("NRA Br.") 18-19 (collecting data for Florida, North Carolina, Tennessee, and Texas).[8] In short, the Illinois legislature acted within its authority when it concluded that a general prohibition on carrying ready-to-use firearms in public would more effectively prevent gun violence than a licensing scheme.

Nevertheless, plaintiffs' *amici* argue that allowing individuals to carry guns in public improves public safety rather than threatens it, criticizing contrary

[8] As of the filing of this brief, the NRA's motion for leave to file its *amicus* brief was pending.

studies. *See* NRA Br. 5-28. Those criticisms are misguided from the start, however, for they focus unduly on the State's interest is crime prevention, whereas in fact Illinois advances its broader, and indisputable, interest in preventing the dangerous discharge of firearms in public. *See supra* Part III.B.

But even aside from the fact that these critiques are off point, they fail on their own terms. For example, the *amici* attack a study by Hemenway and Azrael finding far fewer defensive gun uses than Gary Kleck and Don B. Kates, Jr., reported in their study, contending that the Hemenway/Azrael "study has been discredited for misrepresenting its own survey results: his actual data indicate at least *six times* as many defensive gun uses as the estimates he reports in the article." NRA Br. 6-7. That is an overstatement, however, and it overlooks that the study disclosed its reason for omitting some data from its analysis—namely, that these data were unreliable. *See* Hemenway & Azrael, *The Relative Frequency of Offensive & Defensive Gun Uses* at 259-71. Specifically, as Hemenway later explained, people over-report their defensive uses of guns and under-report their criminal uses, a bias for which his study (unlike Kleck/Kates') attempts to account. *See* David Hemenway & Mary Vriniotis, *Comparing the Incidence of Self-Defense Gun Use & Criminal Gun Use*, http://www.hsph.harvard. edu/research/hicrc/ files/Bullet-ins_Spring_2009.pdf (last visited May 3, 2012).

The study by the National Research Council of the National Academies of Sciences ("NRC"), on which plaintiffs' *amici* itself rely, *see* NRA Br. 7-10, 14-15,

makes this same point. As the NRC explained, determining whether a gun use was defensive or criminal is often difficult, and over- and under-reporting occurs depending on how the data are collected. *See* Charles F. Wellford, *et al.*, *Firearms & Violence: A Critical Review* 103-14 (2005); *id.* at 109 ("[I]t is widely thought that inaccurate response biases the estimates of defensive gun use."). The NRC also noted criticisms of the Kleck/Kates approach and concluded that "[i]t is not known . . . whether Kleck's, Hemenway's, or some other assumptions are correct." *Id.* at 110. Without consistently reliable data on whether defensive gun uses are "common," it is impossible to know whether they are "effective" at preventing crime, as the *amici* posit. *See* NRA Br. 6, 9. Likewise, while the NRC identified "19 other surveys" with numbers similar to Kleck's and Kates', *see* NRA Br. 8-9; Wellford, *Firearms & Violence* at 103, the *amici* omit the NRC's ultimate conclusion—it "found no comfort" in these repeated results, for "[m]ere repetition does not eliminate bias," *id.* at 113. Far from unequivocally supporting plaintiffs, therefore, the NRC's inconclusive findings show that a reasonable legislature considering the available data could reach competing conclusions, *see Alameda Books,* 535 U.S. at 437; *G.M. Enters.*, 350 F.3d at 639, and that the Illinois General Assembly therefore acted within its police power in concluding that operable firearms in public spaces threaten public safety.

Finally, plaintiffs' *amici* contend that studies supporting the General Assembly's choice show a mere statistical correlation—rather than a causal

link—between gun regulations and a reduction in crime. *See* NRA Br. 11, 24, 25 n.7. But the *amici*'s critique again falls short, for it asks too much of nearly any study. After all, not even the *amici*'s preferred studies, *see, e.g.*, *id.* at 8, 12-13, 23-24, concluded that more guns *cause* less crime, *see* Wellford, *Firearms & Violence* at 120 ("[I]t is not clear a priori that [right-to-carry laws] deter[ ] [crime]."). Cause-in-fact need not be proven to support passage of a law, and here there is abundant data and literature on which a legislature could rely for a link between firearms regulation and a reduction in violent crime. Intermediate scrutiny requires "logic" and "data," not empirical perfection. *See Skoien*, 614 F.3d at 642; *Ezell*, 651 F.3d at 708. Likewise, while the *amici* criticize the "vignettes" on the VPC's website, *see* NRA Br. 15-17; *see id.* at 12 (questioning reliance on interviews of criminals), it offers no authority requiring legislatures to confine themselves to statistical data in crafting regulation, particularly when the data merely reinforce common sense. *See Florida Bar*, 515 U.S. at 628.

In the end, even if the parties' data and logic point to different or inconclusive results regarding crime rates, *see* NRA Br. 24-25, plaintiffs still cannot avoid dismissal of their complaint. This is so chiefly because, again, the challenged laws exist to prevent the discharge of firearms in public, not merely to reduce crime. *See supra* Part III.B. But in any event, the State's data need not conclusively support an ideal solution for, as explained, under intermediate scrutiny the government "does not bear the burden of providing evidence that rules out every theory . . .

inconsistent with its own." *Alameda Books*, 535 U.S. at 437 (plurality op.). Even if crime control were the sole reason for the challenged Illinois laws, that lawmakers "might have reached a different and equally reasonable conclusion" on the link between firearms regulation and violent crime "is not sufficient to vitiate the result reached" by the Illinois General Assembly. *G.M. Enters.*, 350 F.3d at 639.

In sum, this Court should hold that the challenged statutes survive a traditional intermediate scrutiny analysis.

E. The Challenged Laws Also Survive The Standard Applied In *Ezell*.

As discussed above, the challenged regulations do not implicate core Second Amendment rights, and thus the standard applied in *Ezell* is inapplicable. In the alternative, the challenged regulations survive even *Ezell* scrutiny.

Ezell did not precisely define the State's evidentiary burden under "not quite 'strict scrutiny,'" stating only that there must be a "genuine and serious" threat to public safety and a "close fit" between the law and "the actual public interests it serves." 651 F.3d at 708-09. Regardless, the challenged provisions satisfy this standard without need for remand. First, as explained, Illinois has an "extremely strong" interest in preventing serious bodily injury or death resulting from the discharge of firearms in public. *Id.* at 708. In addition, the "logic and data" detailed above bind that legislative objective into a close fit with the statutory means to accomplish it. *See Skoien*, 614 F.3d at 642. And because *Ezell* did not apply strict scrutiny, that fit need not be "necessarily perfect." 651 F.3d at 708.

F. If The Complaints Are Reinstated, This Court Should Remand For An Evidentiary Hearing.

Alternately, if this Court disagrees with defendants and holds both that the regulations fall within the scope of the Second Amendment and fail on the existing record under means-ends testing, the Court should remand to permit the district courts in the first instance to make the factual findings necessary to determine whether the State can demonstrate a sufficient fit between the challenged statutes and their public-safety purpose. *See United States v. Carter*, 669 F.3d 411, 421 (4th Cir. 2012).

* * *

In sum, plaintiffs are unlikely to succeed on the merits, the harms suffered by the public and the State outweigh any harms suffered by plaintiffs, and the district courts thus properly denied plaintiffs' requests for injunctive relief. *See St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 625 (7th Cir. 2007). Moreover, because the challenged statutes are constitutional, plaintiffs' claims fail as a matter of law and the complaints were properly dismissed.

IV. Governor Quinn Is Not A Proper Party.

Finally, the Shepard plaintiffs name Governor Quinn as a defendant, but the Governor lacks the constitutional authority to commit the conduct that plaintiffs allege and therefore is not a proper party. Plaintiffs in both suits seek to enjoin enforcement of a criminal statute. *See* Moore Doc. 5; Shepard Doc. 2. But Illinois law vests prosecutorial authority in the Illinois Attorney General and in county

State's Attorneys, *see People v. Buffalo Confectionery Co.*, 401 N.E.2d 546, 549 (Ill. 1980), not the Governor. As a result, the Governor cannot initiate prosecutions on behalf of the State, and "the Attorney General possesses the *exclusive* constitutional power and prerogative to conduct the state's legal affairs." *Scachitti v. UBS Fin. Servs.*, 831 N.E.2d 544, 553 (Ill. 2005). Accordingly, Governor Quinn should be dismissed.

CONCLUSION

Defendants respectfully request that this Court affirm the district courts' judgments.

May 9, 2012

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RULE 32(a)(7)(B) CERTIFICATION

I certify that this brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B)(I) in that it contains 13,828 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In preparing this certificate, I relied on the word count of WordPerfect X4.

/s/ David A. Simpson
DAVID A. SIMPSON

CERTIFICATE OF SERVICE

I certify that on May 9, 2012, 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 the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ David A. Simpson
DAVID A. SIMPSON

Defendants' Exhibit No. 2

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MICHAEL MOORE, CHARLES HOOKS, PEGGY FECHTER, JON MAIER, SECOND AMENDMENT FOUNDATION, INC. and ILLINOIS CARRY,

Plaintiffs-Appellants,

v.

LISA MADIGAN, in her Official Capacity as Attorney General of the State of Illinois, and HIRAM GRAU, in his Official Capacity as Director of the Illinois State Police,

Defendants-Appellees.

MARY SHEPARD and the ILLINOIS STATE RIFLE ASSOCIATION,

Plaintiffs-Appellants,

v.

LISA M. MADIGAN, in her Official Capacity as Attorney General of the State of Illinois, PATRICK L. QUINN, in his official capacity as Governor of the State of Illinois, TYLER R. EDMONDS, in his official capacity as the State's Attorney of Union County, Illinois, and SHERIFF DAVID LIVESAY, in his official capacity as Sheriff of Union County,

Defendants-Appellees.

Appeals from the United States District Court
for the Central District of Illinois
No. 3:11-CV-3134, the Honorable Sue E. Myerscough, Judge Presiding, and
for the Southern District of Illinois
No. 11-CV-405-WDS, the Honorable William D. Stiehl, Judge Presiding.

BRIEF AMICI CURIAE OF THE CITY OF CHICAGO, LEGAL COMMUNITY AGAINST VIOLENCE, MAJOR CITIES CHIEFS ASSOCIATION, BOARD OF EDUCATION OF THE CITY OF CHICAGO, AND CHICAGO TRANSPORTATION AUTHORITY IN SUPPORT OF DEFENDANTS-APPELLEES

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 12-1269 & 12-1788

Short Caption: Moore, et al. v. Madigan, et al./Shepard, et al. v. Madigan, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Legal Community Against Violence

The Major Cities Chiefs Association

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Katten Muchin Rosenman LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

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Attorney's Printed Name: Jonathan K. Baum

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INTEREST OF AMICI CURIAE

The City of Chicago, the third largest city in the United States, faces a serious problem of firearms violence.[1] More than 300 people are murdered with firearms each year in Chicago, and the vast majority of those occur outside the home. In order to keep firearms out of the hands of gang members, criminals, and others who may misuse them to kill or injure others, Chicago police officers actively enforce the Illinois provisions at issue here, and the City has an ordinance that similarly prohibits firearms possession outside the home. See Municipal Code of Chicago, Ill. §§ 8-20-020, 8-20-030. These firearms restrictions play an important role in attempting to reduce the devastating impact of firearms in Chicago.

Legal Community Against Violence ("LCAV") is a national law center dedicated to preventing gun violence. Founded after an assault weapon massacre at a San Francisco law firm in 1993, LCAV provides legal and technical support for gun-violence prevention. LCAV tracks and analyzes federal, state, and local firearms legislation, as well as legal challenges to firearms laws. As an amicus, LCAV has provided informed analysis to the courts in a variety of Second Amendment cases, including District of Columbia v. Heller, 554 U.S. 570 (2008); McDonald v. City of Chicago, 130 S. Ct. 3020 (2010); and Wilson v. Cook County,

[1] All parties in appeal Nos. 12-1269 and 12-1788 have consented to the filing of this brief. This brief is submitted under Fed. R. App. P. 29(a). No party's counsel authored this brief in whole or in part, nor did any party or its counsel, or any person other than amici, contribute money intended to fund preparing or submitting the brief.

No. 112026 (Ill.).

The Major Cities Chiefs Association ("MCCA") is a professional association of chiefs and sheriffs of seventy of the largest law enforcement agencies in the United States and Canada. Its members serve over 76.5 million people (68 U.S., 8.5 Canada) with a workforce of 177,150 (159,300 U.S., 17,850 Canada) officers and non-sworn personnel. Because firearms are the primary tools used in serious assaults and homicides, MCCA has a long term interest in public policy effecting their possession and use.

Amicus Board of Education of the City of Chicago educates more than 404,000 children in 675 elementary and high schools. So far this school year, 17 Chicago public school students have been killed and 221 have been injured by firearms.

Amicus Chicago Transit Authority ("CTA") operates the nation's second largest public transportation system, providing over 515 million trips per year and serving 40 suburbs, in addition to the City of Chicago. On an average weekday, 1.6 million rides are taken on CTA. The CTA strives to provide transportation to the public that is, above all, safe and secure. The carrying of firearms onto crowded buses or train cars would expose CTA passengers to injury from possible accidental or inadvertent discharge of a firearm. The firearm restrictions at issue in this case play an important role in supporting the CTA's mission to provide safe transportation to its passengers

ARGUMENT

To address an epidemic of gun violence that has killed thousands of its residents, the State of Illinois has placed stringent restrictions on the ability of individuals to carry firearms in public. Under Illinois law, carrying firearms in most places outside one's home is prohibited, and will constitute the offense of unlawful use of a weapon ("UUW"), 720 ILCS 5/24-1(a)(4); id. § 24-1(a)(10); it is aggravated unlawful use of a weapon ("AUUW"), when the firearm is carried in a vehicle or on a person while uncased, loaded, and immediately accessible, id. § 24-1.6(a). These provisions are a valuable component of effective policing strategies aimed at keeping guns out of the hands of gang members and other criminals before shootings occur. These restrictions are, therefore, crucial to the State's objective of reducing gun violence, and plaintiffs' Second Amendment challenges to them should be rejected.

This court has applied a two-step inquiry to such Second Amendment challenges. First, the court determines whether the regulated activity is covered by the Amendment at all – that is, whether it is within the "scope" of the Second Amendment. Ezell v. City of Chicago, 651 F.3d 684, 701 (7th Cir. 2011). If within the scope, an "appropriate standard of review" must be selected, and the regulation judged by it. Id. at 706. The court takes a sliding-scale approach to determining the appropriate level of scrutiny. Laws that impose a "severe burden" on the Second Amendment right of armed self-defense "require an extremely strong public-interest justification and a close fit between the government's means and its end."

Id. at 708. On the other hand, "laws restricting activity lying closer to the margins . . . may be more easily justified." Id.

Plaintiffs' challenges fail at both steps of the inquiry.[2] The historical evidence about the public understanding of the pre-existing right to keep and bear arms as it was understood in England before the Framing, and during the Framing-era in America, demonstrates that tight restrictions on public carry coexisted alongside the right to keep and bear arms and were not considered off-limits under that right. Moreover, even if some public carry of firearms falls within the scope of Second Amendment protection, stringent regulations – even prohibitions – of carrying firearms in public are constitutional. Such firearms regulations are substantially related to the important governmental interest of reducing firearms violence because they curtail the presence of firearms in public and, as a result, decrease death and injury from firearms violence.

I. CARRYING FIREARMS OUTSIDE ONE'S HOME FOR SELF-DEFENSE PURPOSES IS NOT WITHIN THE SCOPE OF THE SECOND AMENDMENT.

The scope of the Second Amendment is determined by examining Second Amendment "text and relevant historical materials," to discern "how the Amendment was understood at the time of ratification." Ezell, 651 F.3d at 700. That is because "[t]he Constitution was written to be understood by the voters," Heller, 554 U.S. at 576, and "Constitutional rights are enshrined with the scope

[2] We refer to the plaintiffs in Moore v. Madigan, No. 12-1269, as "Moore"; to the plaintiffs in Shepard v. Madigan, No. 12-1788, as "Shepard"; and to both sets of plaintiffs, collectively, as "plaintiffs."

they were understood to have when the people adopted them," id. at 634-35. Nothing in Heller or in the history of the right to keep and bear arms supports a broad expansion of the Heller-recognized right to keep and bear arms in the home for self-defense to also protect carrying guns for self-defense outside the home, where most firearms violence occurs.

A. Heller Did Not Hold That The Second Amendment Protects A Right To Carry Outside The Home For Self-Defense Purposes.

In Heller, the Court held that the Second Amendment protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635. The Court did not decide whether carrying firearms for other purposes or in public places lies within the scope of Second Amendment protection.

Plaintiffs attempt to stretch the bounds of Heller into a holding that "bear arms" means to carry outside the home, including in public for self-defense. Moore Br. 26; Shepard Br. 23. They base this on the Court's refusal in Heller to assign a strictly militia-related meaning to the term "bear arms," and its conclusion that the meaning of the words "bear arms" in the Second Amendment means to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." 554 U.S. at 584 (citation omitted). Neither this quote, nor any other part of Heller, decides whether the *public* carrying of firearms was historically understood to be protected under the right to keep and bear arms codified in the Second Amendment. In fact, the Court made clear that the scope of

the right did not include all carrying, declaring that the right to keep and bear arms is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." Id. at 626 (citation omitted). The Court cautioned against reading too much into its decision, expressly noting, that nothing in its holding should "cast doubt" on a non-exhaustive list of "longstanding prohibitions," which are "presumptively lawful." Id. at 626-627; id. at 627 n.26; see also McDonald v. City of Chicago, 130 S. Ct. 3020, 3047 (2010) (plurality opinion) ("repeat[ing] those assurances"). The Court further noted that most "19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." Heller, 554 U.S. at 626.

Plaintiffs argue that the word "bear" would be read out of the Second Amendment if carrying firearms in public were not protected. Moore Br. 25; Shepard Br. 23. That is not correct. To "bear" arms under the Second Amendment has at least two meanings other than the right to go about armed in public places at all times. First, consistent with the purpose of codifying the Second Amendment – namely, to preserve the militia, see Heller, 554 U.S. at 599 – carrying arms during government-related militia service is protected. Second, Heller holds the Second Amendment protects carrying arms "in defense of hearth and home." Id. at 635. Indeed, the remedy ordered by the Court was to allow Heller "to register his handgun" and "issue him a license to *carry it in the home*." Id. (emphasis added). So, clearly, the term "bear" has meaning; just not the meaning plaintiffs assign it.

Given that Heller did not announce a broad right to carry guns in public, it is not surprising that courts have repeatedly declined to read the Court's decision to include such a right. See Piszczatoski v. Filko, No. 10-6110, 2012 WL 104917, *22 (D.N.J. Jan. 12, 2012) (Heller "does not recognize or even suggest a broad general right to carry arms."); Kachalsky v. Cacace, 817 F. Supp. 2d 235, 264 (S.D.N.Y. 2011) (open carrying of firearms is "outside the core Second Amendment concern articulated in Heller"); Williams v. State, 10 A.3d 1167, 1177 (Md. 2011), cert. denied, 132 S. Ct. 93 (2011) (rejecting argument that Heller and McDonald recognized a right to carry guns in public); Little v. United States, 989 A.2d 1096, 1101 (D.C. App. Ct. 2010) (defendant who was "not in his own home" was "outside the bounds identified in Heller"); People v. Yarbrough, 169 Cal. App. 4th 303, 313-19 (Cal. Ct. App. 2008) (restrictions on public carry of loaded and concealed weapons in public places did not implicate Second Amendment right recognized in Heller).

B. The Historical Evidence Demonstrates That Public Carry For Self-Defense Is Not Within The Scope Of The Second Amendment.

Heller interpreted the meaning of the Second Amendment based on historical documents that reflected how the public understood the right to keep and bear arms at the time of Second Amendment ratification. See 554 U.S. at 579-619.[3] The

[3] Ezell stated that, for States, the scope "depends on how the right was understood when the Fourteenth Amendment was ratified" in 1868, rather than when the Second Amendment was ratified in 1791. 651 F.3d at 702. McDonald rejects the argument that a different version of the Bill of Rights applies to the States, and held that the Fourteenth Amendment incorporates "the Second

historical understanding of the *pre-existing* English right to keep and bear arms was crucial, since "the Second Amendment was not intended to lay down a novel principle, but rather codified a right inherited from our English ancestors," id. at 599 (internal quotations omitted), and "it has always been widely understood that the Second Amendment . . . codified a pre-existing right" in English law, id. at 592. Thus, if history indicates that the public understanding of the right to keep and bear arms was that it did not extend to a certain activity, then that activity is not protected by the Second Amendment, either. Applying this methodology here, the historical evidence reveals that the Framing-era public did not understand the right to keep and bear arms to include the right to carry guns in public for self-defense.

While modern regulations need not "mirror limits that were on the books in 1791," United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010) (en banc), this court can extrapolate some guiding principles from the evidence about Framing-era understandings. For example, Framing-era regulations reflect that "public safety was a paramount value . . . that, in some circumstances, trumped the Second Amendment right to discharge a firearm in a particular place." Ezell, 651 F.3d at 714 (Rovner, J., concurring). And in Skoien, this court determined that, historically, the legislature could prohibit some categories of individuals from having firearms, and concluded that the legislature is still afforded substantial

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Amendment right recognized in Heller," 130 S. Ct. at 3048, 3050. Thus the original meaning as understood in 1791 applies to States, even if the Second Amendment did not apply to them until 1868.

leeway in deciding whether to expand upon those categories, 614 F.3d at 640. Here, too, the historical record reveals that the government has been afforded substantial leeway in deciding whether to prohibit carrying of firearms outside the home based on public safety concerns.

For centuries before the Framing-era, England criminalized the practice of carrying arms in public. The Statute of Northampton provided that, except while on the King's business, no man was permitted to "go nor ride armed by night nor by day, in fairs, markets, nor in the presences of the justices or other ministers, nor in no part elsewhere, upon pain to forfeit their armour to the King, and their bodies to prison at the King's pleasure." Statute of Northampton, 2 Edw. 3, c. 3 (1328) (Eng.). The Crown frequently called for the enforcement of the Statute of Northampton, especially in towns. See Patrick Charles, The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review, 60 Cleveland State L. Rev. 1, 14-22 (2012) (available on SSRN.com) (discussing orders and proclamations of Richard II, Henry IV, Elizabeth I). In Sir Knight's Case, 87 Eng. Rep. 75 (1686), the Chief Justice noted that carrying arms in public was not merely banned by the Statute of Northampton, but was "likewise a great offence at the common law," and an insult to the sovereign: "as if the King were not able or willing to protect his subjects." The Statute of Northampton was "but an affirmance" of the common law rule that there is no right to carry weapons in public, id., although it did not apply to Sir Knight, who was "cloaked with governmental authority," Charles, The Faces of the Second Amendment Outside the

Home, supra, at 28 (citations omitted).

Prominent English scholars agreed that there was no right to carry weapons for self-defense outside the home. William Blackstone, a "preeminent authority on English law for the founding generation," Heller, 554 U.S. at 593-94 (citation omitted), confirmed the continued applicability of the Statute of Northampton. "The offence of riding or going armed, with dangerous or unusual weapons," he wrote, "is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by the Statute of Northampton, . . . upon pain of forfeiture of the arms and imprisonment during the king's pleasure: in like manner as, by the laws of Solon, every Athenian was finable who walked about the city in armour." Blackstone, Commentaries on the Laws of England 148-49 (1769).

Lord Edward Coke, who was "widely recognized by the American colonists as the greatest authority of his time on the laws of England," Payton v. New York, 445 U.S. 573, 593-94 (1980) (citation omitted), confirmed that one could not "goe nor ride armed by night nor by day . . . in any place whatsoever." Coke, 3 Institutes of the Law of England 160 (1797). Coke explained that one could defend one's home, id. at 161, but would be guilty if he went armed in public even for "safeguard of his life," id. at 162. Thus, even if self-defense was a valid purpose for carrying firearms in the home, it was not elsewhere.

William Hawkins similarly explained that the Statute of Northampton permitted one to defend himself "in his own House" because "a man's house is as his castle," but did not allow one to "excuse the wearing [of] such Armour in Publick,"

even if he claimed "such a one threatened him, and that he wears it for the Safety of his Person from Assault." Hawkins, 1 Treatise of the Pleas of the Crown, ch. 63, § 8 (1716). Moore selectively quotes Hawkins, Moore Br. 37, highlighting the statement that "Persons of Quality" may carry "common Weapons" for "Ornament or Defence, in such Places, and upon such Occasions, in which it is the common Fashion to make use of them, without causing the least Suspicion of an intention to commit any Act of Violence or Disturbance of the Peace," Hawkins, supra § 9. And Shepard quotes Hawkins' statement suggesting a right to kill another in self-defense, when his assailant "shews an Intent to murder him." Shepard Br. 29 (citation omitted). It is clear from section 8, however, that carrying firearms in public for self-defense was generally prohibited. Thus, whether or not an individual could be criminally liable for killing an assailant in self-defense, and whatever "places" or "occasions" it was "common fashion" for "Persons of Quality" to make use of firearms, Hawkins was clear that neither of those principles suggested a general right to carry guns in public for self-defense purposes.

Moore suggests that the Statute of Northampton was "limited to prohibit the carrying of arms only with evil intent," conduct which would amount to "the ancient common law offense of affray." Moore Br. 36. Under the plain language of the statute, however, "bring[ing] force in affray" and "go[ing] [or] rid[ing] armed" were separately prohibited. 2 Edw. 3, c. 3 (1328) (Eng.). "[C]ommon carrying," in-and-of-itself, was considered "to the terrour of all people professing to travel and live peacably." Proclamation of Elizabeth I (Dec. 2, 1594). And Coke listed "affray"

separately from the additional offense of going or riding "armed by night [or] by day." Coke, supra, at 160. In the 18th Century, urban constables could arrest, not only persons who went "arm[ed] offensively" and "in affray of Her Majesties Subjects," but also all persons who wore or carried "any Daggers, Guns or Pistols Charged." Robert Gardiner, The Compleat Constable, 18 (3d ed. 1708).

For over 200 years since the Framing, the States likewise have exercised their police power to restrict the carrying of guns in public. Following the adoption of the Constitution, Massachusetts, North Carolina, and Virginia continued to prohibit going armed in public. See Patrick J. Charles, Scribble Scrabble, the Second Amendment, and Historical Guideposts: A Short Reply to Lawrence Rosenthal and Joyce Lee Malcolm, 105 Nw. U.L. Rev. Colloquy 227, 237 (2011) (citations omitted). After the Civil War, army prohibitions in certain locations included the sale and carrying of guns. See Carole Emberton, The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South, 17 Stan. L. & Pol'y Rev. 615, 621 (2006). And several States severely restricted the public carrying of pistols and other weapons. See, e.g., Tex. Act of Apr. 12, 1871, ch. 34, § 1 (prohibiting carrying of pistols unless there are "immediate and pressing" reasonable grounds to fear attack or for militia service); 1876 Wyo. Comp. Laws ch. 52, § 1 (forbidding "concealed or open[]" bearing of "any fire arm or other deadly weapon, within the limits of any city, town or village"); 1879 Tenn. Pub. Acts ch. 186, § 1 (prohibiting carrying "publicly or privately, any . . . belt or pocket pistol, revolver, or any kind of pistol, except the army or navy

pistol usually used in warfare"); Ark. Act of Apr. 1, 1881, ch. 96, § 1 (prohibiting "wear[ing] or carry[ing]" of "any pistol . . . except such pistols as are used in the army or navy"). Even in the "Old West," often mythologized for its gun culture, cattle towns like Dodge City, Kansas, banned the public carrying of guns. E.g., Dodge City, Kan., Ordinance No. 16, § XI (Sept. 22, 1876). State courts often upheld restrictions on the carrying of non-militia-related pistols and revolvers. See, e.g., Fife v. State, 31 Ark. 455, 461 (1876); Hill v. State, 53 Ga. 472, 475 (1874); Andrews v. State, 50 Tenn. 165, 186 (1871); English v. State, 35 Tex. 473, 478 (1872); State v. Workman, 35 W. Va. 367, 373 (1891).[2] And John Norton Pomeroy's treatise, cited in Heller as representative of "post-Civil War 19th-century sources" commenting on the right to bear arms, 554 U.S. at 618, stated that the right to keep and bear arms "is certainly not violated by laws forbidding persons to carry dangerous or concealed weapons . . . ." Pomeroy, An Introduction to the Constitutional Law of the United States 152-53 (1868).

In addition, bans on discharging guns in public, which contained no exceptions for self-defense, were common, especially in urban areas, showing that the right to keep and bear arms did not include use of firearms for self-defense beyond the home. For example, in 1787, the discharge of guns was banned in New

[2] Moore places Andrews on his side of the ledger, characterizing it as holding a weapons ban unconstitutional as applied to a revolver. Moore Br. 33. Andrews held that the ban on carrying "'a belt or pocket pistol,' is constitutional," except as applied to a revolver that is a part of the "usual equipment of the soldier." 50 Tenn. at 188-89. That holding does not support the notion that the public carrying of weapons other than those used for militia service was protected.

York City streets, lanes, alleys, gardens, and "any other place where persons frequently walk." Laws of the State of New York, Vol. II, Ch. 43 (1886) (enacted 1786). Similarly, in Boston in 1746, it was illegal to "discharge any gun or pistol" except during approved training, because "the Lives and Limbs of many Persons have been lost, and others have been in great Danger" by the "indiscreet firing of Guns." Act and Laws of Massachusetts-Bay, Chap. X, Firing of Guns (1746). See also Municipal Code of Chicago, Art. XX (1881) ("No person shall fire or discharge any gun, pistol, fowling-piece or other fire-arm within the corporate limits of the city of Chicago . . .").

In sum, stringent controls – even bans – on carrying guns in public have long been considered a proper exercise of the police power for the sake of public safety, the Second Amendment notwithstanding. For this reason, the public carrying of guns for self-defense lies outside the scope of Second Amendment protection.

II. EVEN IF CARRYING FIREARMS IN PUBLIC IS WITHIN THE SCOPE OF SECOND AMENDMENT PROTECTION, THE UUW AND AUUW PROVISIONS ARE CONSTITUTIONAL.

A. Intermediate Scrutiny Applies.

If this court concludes that the public carrying of firearms for self-defense is within the scope of the Second Amendment, intermediate scrutiny should be applied. In all but one case, this court has applied no more than intermediate scrutiny to laws restricting Second Amendment rights, even for laws that regulate the right to keep and bear arms for self-defense in the home. See United States v. Yancey, 621 F.3d 681, 683 (7th Cir. 2010) (applying intermediate scrutiny to uphold

statute barring narcotics addicts from possessing firearms); United States v. Williams, 616 F.3d 685, 692-93 (7th Cir. 2010) (applying intermediate scrutiny to uphold a statute barring felons from possessing firearms); Skoien, 614 F.3d at 641 (accepting government's concession that intermediate scrutiny is appropriate for reviewing statute prohibiting possession of firearms by domestic violence misdemeanants). Ezell applied more stringent review under its sliding scale approach, reasoning that a gun range ban placed a severe burden on the Second Amendment right to a handgun for self-defense in the home. 651 F.3d at 709. The UUW and AUUW provisions do not affect self-defense in the home, and so less stringent scrutiny is appropriate here.

Plaintiffs argue that no scrutiny needs to be applied at all because Illinois restrictions on public carry fail under any standard as a "wholesale prohibition of a constitutional right." Moore Br. 41; see also Shepard Br. 47. This argument cannot be squared with this court's cases, which make clear that even severe restrictions on Second Amendment rights are assessed to determine whether the regulation serves important public safety and crime-prevention objectives. Yancey, Williams, and Skoien, for example, involved laws that completely stripped certain categories of individuals of the ability to exercise Second Amendment rights, and each of those laws were subject to intermediate scrutiny. Moreover, applying intermediate scrutiny gives force to Heller's recognition that States retain "a variety of tools for combating" the serious problem of gun violence. 554 U.S. at 636. And intermediate scrutiny falls in line with historical understandings of the right to keep and bear

arms because, given the serious harm that deadly weapons inflict, the "full understanding of the citizenry at that time" reflects that "public safety was seen to supercede gun rights at times," Ezell 651 F.3d at 714 (Rovner, J., concurring).

B. The UUW And AUUW Statutes Satisfy Intermediate Scrutiny.

Under intermediate scrutiny, the State must show that the UUW and AUUW provisions are "substantially related to an important governmental objective." Skoien, 614 F.3d at 641. The vast majority of courts applying this standard to restrictions on carrying firearms in public have upheld those restrictions against Second Amendment challenges. See United States v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011) (upholding restrictions on carrying firearms in national park area); Piszczatoski, 2012 WL 104917, at *1 (rejecting Second Amendment challenge to restrictions on public carrying of firearms); Kachalsky, 817 F. Supp. 2d at 271-72 (rejecting Second Amendment challenge to restrictions on handgun permits); Peruta v. County of San Diego, 758 F. Supp. 2d 1106, 1117 (S.D. Cal. 2010) (rejecting Second Amendment challenge to restrictions on concealed carry). Indeed, since McDonald, the Illinois Appellate Court has twice upheld the very AUUW statute at issue here. See People v. Mimes, 953 N.E.2d 55, 75-77 (1st Dist. 2011); People v. Aguilar, 944 N.E.2d 816 (Ill. App. Ct. 2011), petition for leave to appeal allowed, 949 N.E.2d 1099 (Ill. 2011).[3] Illinois restrictions similarly pass muster under

[3] Two recent decisions fall out of line with the vast majority. Woollard v. Sheridan, No. 10-2068, 2012 WL 695674 (D. Md. 2012), struck down a law limiting public carry to those with a good and substantial reason, such as a particularized need for personal protection. That ruling is inconsistent with Masciandaro, which

intermediate scrutiny.

The government interest in reducing gun violence is indisputably important. As this court explained in Skoien, "no one doubts" that "preventing armed mayhem" is "an important governmental objective." 614 F.3d at 642. Indeed, the government interest in preventing crime is "compelling." United States v. Salerno, 481 U.S. 739, 750 (1987). Gun violence poses a serious threat to public safety in Illinois and nationwide, where firearms are responsible for more than 30,000 deaths and almost 70,000 injuries each year. See U.S. Dep't of Health & Human Servs., Center for Injury Prevention & Control, Web-Based Injury Statistics Query & Reporting System (fatal injury reports 2009, and non-fatal injury report 2010).[4] That includes thousands killed in Illinois. Between 1999-2007, for example, there were 10,086 firearms-related deaths in Illinois. See id. (fatal injury reports 1999-2007, search restricted to firearms deaths in Illinois). Many of those occur in Chicago, where 354 people were murdered by firearms in 2010 alone. Chicago Police Department,

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applied intermediate scrutiny and upheld a similar restraint on public carry, see 638 F.3d at 475. Defendants appealed, and the matter is pending in the Fourth Circuit. See Woollard v. Gallagher, No. 12-1437 (4th Cir.). In Bateman v. Perdue, No. 10-CV-265-H (E.D.N.C.) (Mar. 29, 2012 order), the court struck down a restriction on gun-carrying during declared states of emergency as applied to the plaintiff. The court applied strict scrutiny, not because it thought restrictions on public carry alone warranted that level of review, but because the law "[m]ost significantly" prohibited "purchasing and transporting *to their homes* firearms and ammunition needed for self-defense." Id. at 14 (emphasis added). The court's ruling with respect to those portions of the law restricting public carry are inconsistent with Masciandaro as well.

[4] Data available at http://www.cdc.gov/injury/wisqars/fatal.html.

Annual Report 2010 22.[5] Most of these murders occurred somewhere outside the home. See, e.g., Chicago Police Department, Crime at a Glance: District 1 13 (Jan.-June 2010) (82.7% of Chicago murders between January and June 2010 occurred in street, alley, automobiles, or other location aside from a residence).[6]

Moreover, gun violence poses a grave risk to law enforcement officers. In 2010, four members of CPD were shot and killed in the line of duty. CPD, Annual Report 2010 (dedication). Nationwide, 498 officers were killed in the line of duty by firearms between 2001-2010. See FBI, Uniform Crime Reports, Law Enforcement Officers Feloniously Killed, Type of Weapon, 2001-2010, Table 27.[7] In 2010, 20% of fatal shootings of officers were due to ambush-style attacks on officers. National Law Enforcement Officers Memorial Fund, December 2010 eNewsletter, Law Enforcement Fatalities Spike in 2010.[8]

Illinois' prohibitions on carrying firearms in public are substantially related to the State's important public-safety objectives in reducing firearms violence. To establish a substantial relationship, it is not necessary that "the statute's benefits are first established by admissible evidence," or "proof, satisfactory to a court" that

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[5] Report available at https://portal.chicagopolice.org/portal/page/portal/ClearPath/News/Statistical%20Reports/Annual%20Reports/10AR.pdf.

[6] Report available at https://portal.chicagopolice.org/portal/page/portal/ClearPath/News/Statistical%20Reports/Crime%20At%20A%20Glance/Crime%20At%20A%20Glance%202010%20by%20District/CAAG_Dist_01.pdf.

[7] This report available at http://www.fbi.gov/about-us/cjis/ucr/leoka/leoka-2010/tables/table27-leok-feloniously-type-of-weapon-01-10.xls.

[8] This report available at http://www.nleomf.org/newsroom/newsletters/enewsletters/dec-2010-enewsletter-1-2.html.

a regulation is "vital to the public safety." Skoien, 614 F.3d at 641. A substantial relationship can be shown with "logic and data." Id. at 642. Even when there is competing evidence, and one can "draw[] two inconsistent conclusions from the evidence," regulation is justified under intermediate scrutiny. Turner Broadcasting Systems, Inc. v. FCC, 520 U.S. 180, 211 (1997).

There is ample evidence that, when the number of guns increases, there are more victims of gun violence. For example, one study showed that "States with higher rates of household firearms ownership had significantly higher homicide victimization rates." Matthew Miller, David Hemenway, & Deborah Azrael, State-Level Homicide Victimization Rates in the United States in Relation to Survey Measures of Household Firearm Ownership, 2001-2003, 64 Social Science & Medicine 656, 660 (2007). See also Mark Duggan, More Guns, More Crime, 109 J. Pol. Econ. 1086, 1112 (2001) (study demonstrating "that increases in gun ownership lead to substantial increases in the overall homicide rate"). And another study showed that "an increase in gun prevalence causes an *intensification* of criminal violence – a shift toward a greater lethality, and hence greater harm to a community." Philip J. Cook & Jens Ludwig, The Social Costs of Gun Ownership, J. Pub. Econ. 379, 387 (2006). States with more guns also have a higher rate of unintentional firearm deaths. Matthew Miller, Deborah Azrael, & David Hemenway, Firearm Availability and Unintentional Firearm Deaths, 33 Accident Analysis & Prevention 477, 480 (July 2000) (study showing individuals "significantly more likely to die from unintentional firearms injuries if they lived in

states with more rather than fewer guns"). The State thus has an interest in reducing the number of guns in public places because there are more deaths and injuries from firearms when more guns are present.

The UUW and AUUW provisions reduce these harms by deterring individuals from carrying their guns in public, and enabling police officers to take these lethal weapons off the street before a shooting occurs. As the State explains, when a police officer encounters a person suspected of carrying a gun in public, that officer has reasonable suspicion to believe a law is being violated and may stop and frisk. Madigan Br. 45 (citations omitted). Then, upon finding the gun, the officer can make an arrest and remove the gun from the street. Id. Policing strategies often prioritize confiscating illegally-carried guns in high-crime areas. Chicago's Project Safe Neighborhoods is one example. See Andrew V. Papachristos, Tracey L. Meares, & Jeffrey Fagan, Attention Felons: Evaluating Project Safe Neighborhoods in Chicago, 4 J. Empirical Legal Stud. 223, 232-33 (2007). Aggressive enforcement of gun laws increases the likelihood that gang members will keep their guns at home; and, when they do not, their guns may be taken from them before they are used in crimes. See Lawrence Rosenthal, Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs, 41 Urb. Lawyer 1, 30-48 (2009). See also Philip J. Cook, Ludwig, Sudhir Venkatesh, & Anthony A. Braga, Underground Gun Markets, 117 Economic J. F558, F581-82 (2007) ("law enforcement efforts targeted at reducing gun availability at the street level seem promising").

Shepard's argument to the contrary – that "individuals who are disposed toward violent crime . . . will not be deterred by the relatively minor sanctions imposed for unlawfully carrying a firearm," Shepard Br. 57 – should be rejected. In fact, there is ample evidence that such aggressive policing strategies drive down firearms-related activity in the streets. In New York City, for example, patrols targeting illicit gun carrying have been a prominent feature of policing in the last two decades, and that city has enjoyed a substantial reduction in violent crime. See Rosenthal, supra, at 4-5, 25-44. And in Pittsburgh, the police department created a Firearm Suppression Patrol targeting illegal carrying with increased patrols during high-crime periods, and in two high-crime areas of the City. Jacqueline Cohen & Jens Ludwig, Policing Crime Guns in Jens Ludwig & Philip J. Cook, Evaluating Gun Policy, 217-50 (2003). A study of that policing strategy concluded that the tactic "may have reduced shots fired by as much as 34 percent and gunshot injuries by as much as 71 percent in the targeted areas." Id. at 238. Indianapolis conducted a similar experimental intervention in 1997, and experienced a 29% reduction in gun crimes in a district with increased patrols targeting suspicious behavior. Edmund F. McGarrell, Steven Chermak, & Alexander Weiss, Reducing Gun Violence: Evaluation of the Indianapolis Police Department's Directed Patrol Project 10 (2002).

These policing strategies can be more effective if public carry is also prohibited, rather than when carrying is allowed with a license or permit. That is because when carrying is allowed there is some question whether the mere

suspicion of a gun is a sufficient reason to stop an individual, or whether the officer must also suspect the possessor is unlicensed or that any other crime has occurred. See, e.g., United States v. Ubiles, 224 F.3d 213, 217-18 (3d Cir. 2000) (officers' suspicion that defendant had gun in crowded street festival was not a reason to believe criminal activity was afoot since there was no reason to believe defendant was unlicensed); Commonwealth v. Couture, 552 N.E.2d 538, 541 (Mass. 1990) ("The mere possession of a handgun was not sufficient to give rise to a reasonable suspicion that the defendant was illegally carrying that gun [without a license] . . . ."). Thus, the ability of police officers to stop, frisk, and arrest gang members and other criminals they see with guns could be undermined if carrying firearms were not unlawful, at least when there is no reason to believe another crime has been committed. Allowing public carry, therefore, could eliminate critical opportunities to remove guns from the streets before gun crimes occur.

Even though the prohibition on carrying guns also reaches individuals who are not likely to misuse guns, it is constitutional. Intermediate scrutiny tolerates laws that are over-inclusive so long as they are nevertheless "not broader" than the government "reasonably could have determined to be necessary." Board of Trustees v. Fox, 492 U.S. 469, 480 (1989) (citation omitted). The government is not required to adopt less restrictive alternatives when its important objective "would be achieved less effectively absent the regulation." Ward v. Rock Against Racism, 491 U.S. 781, 797, 799 (1989). And, as the State explains, Madigan Br. 46-47, the State's important interest would not be as effectively served by less-restrictive laws

that allow public carry while attempting to weed out "numerous dangerous or irresponsible individuals who may properly be denied the right to keep functional handguns," Moore Br. 45; see also Shepard Br. 56. That is because it is impossible to identify in advance every person who will be dangerous and irresponsible with firearms. One need look no further than the shooting of Congresswoman Gabrielle Giffords, one of 20 shot, including a 9-year-old child, by a perpetrator who was legally carrying a firearm in public outside a Tucson supermarket, to understand the dangers of weak state laws permitting guns in public places. Sam Quinones & Michael Muskal, Jared Loughner to be Charged in Arizona Shootings Targeting Gabrielle Giffords, L.A. Times, Jan. 9, 2011. Indeed, Shepard's *amici* point to statistics revealing more than 2,200 individuals in five states who had been issued licenses or permits, and who were later deemed not entitled to hold those licenses. See Brief *Amici Curiae* of Michael Hall, et al., at 18-19. And at least one study has shown that interventions to prevent violent crime that target only convicts or arrestees "leave a large portion of the problem untouched," and concluded that "[b]roader prevention strategies, including general deterrence and the regulation of the markets for 'criminogenic commodities' (firearms, alcohol, and drugs), may also be warranted." See Philip J. Cook, Ludwig, & Braga, Criminal Records of Homicide Offenders, 294 J. Am. Med. Assoc. 598, 600 (2005).

Road rage incidents, too, can turn deadly when drivers carry guns. See Matthew Miller, Deborah Azrael, David Hemenway, Road Rage in Arizona: Armed and Dangerous, 34 Accident Analysis & Prevention 807, 814 (2002) (findings

suggest that "carrying a gun in a vehicle" is among the characteristics of drivers that "strongly predict which drivers are likely to behave aggressively toward other drivers"). Those with aggression and a gun at hand may just use it. For instance, one disgruntled motorist with a license to carry a gun shot at Alan Simons while he was on a bicycle ride with his 4-year-old son, hitting Simons's bicycle helmet and narrowly missing his head. Michael Luo, Guns in Public, and Out of Sight, N.Y. Times, Dec. 26, 2011.

In sum, Illinois properly exercised its police power to limit possession of firearms outside the home to address an epidemic of gun violence. The number of deaths caused by firearms is staggering. By enforcing the UUW and AUUW provisions, the police are able to protect the public and themselves before a weapon is used to commit a crime. These restrictions are, therefore, substantially related to important governmental objectives.

C. Even If The Complaints Are Reinstated, The District Court Properly Denied A Preliminary Injunction.

If it is not clear enough from the publically available empirical data alone that the challenged provisions survive intermediate scrutiny, the denial of a preliminary injunction nevertheless should be affirmed, and the cases remanded. To obtain a preliminary injunction, plaintiffs must show, among other things, that they are likely to succeed on the merits of their claim. Girl Scouts of Manitou Council v. Girl Scouts of the U.S.A., 549 F.3d 1079, 1086 (7th Cir. 2008). Plaintiffs are not likely to succeed on the merits. There is ample evidence that the UUW and

AUUW provisions satisfy intermediate scrutiny, as we explain above.

Indeed, Moore points to no evidence showing that public carry prohibitions are not substantially related to the State's interests in reducing firearms violence. In lieu of evidence, Moore highlights that States take a variety of approaches to allowing guns in public places, and argues that none other is quite as restrictive as Illinois. Moore Br. 42-43. Intermediate scrutiny does not measure the popularity of a law among the States. It leaves open to States a vast range of options – even when one State's approach may differ greatly from others – to deal with difficult problems in their jurisdictions, so long as those options are substantially related to important governmental interests. And, even if most States are not as restrictive as Illinois today, the historical record contains an array of similar regulations that co-existed alongside the right to keep and bear arms in England and America, as we explain in part I.B.

Shepard cites a couple of studies which claim a lack of evidence to show that carrying guns outside the home would impact social welfare. Shepard Br. 54-55. But other studies, such as the ones we discuss above, provide support for prohibiting the carrying of guns. That kind of support is sufficient to survive intermediate scrutiny, even when there is evidence on both sides and "two inconsistent conclusions" can be drawn "from the evidence." Turner Broadcasting Systems, 520 U.S. at 211.

Accordingly, if the dismissals of the cases are reversed, the denial of a preliminary injunction should be affirmed. Moreover, this court should not rule on

whether plaintiffs are entitled to a permanent injunction on this record, as plaintiffs urge. Moore Br. 44; Shepard Br. 64. The cases should be remanded for discovery. Thereafter, the evidence, along with publicly available information, can be presented on whether the provisions survive intermediate scrutiny. As in Illinois Association of Firearms Retailers v. City of Chicago, No. 10 CV 4184 (N.D. Ill.), in which summary judgment briefing is underway, such evidence can inform the court about the role of the UUW and AUUW provisions in policing strategies, and their relation to reducing gun violence.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

In accordance with Fed. R. App. P. 32(a)(7), I certify that the Brief of Amici Curiae the City of Chicago, Legal Community Against Violence, Major Cities Chiefs Association, Board of Education of the City of Chicago, and Chicago Transportation Authority complies with the type-volume limitation set forth in Fed. R. App. P. 29(d) because it contains 6,934 words, beginning with the words "INTEREST OF AMICI CURIAE" on page 1 and ending with the words "Respectfully submitted" on page 27. In preparing this certificate, I relied on the word count of the word-processing system used to prepare the brief, which was WordPerfect X3.

/s/ Suzanne M. Loose
SUZANNE M. LOOSE, Attorney

CERTIFICATE OF SERVICE

I certify that on May 16, 2012, I electronically filed the attached Brief of Amici Curiae with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Participants in this appeal who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Suzanne M. Loose
SUZANNE M. LOOSE, Attorney

Defendants' Exhibit No. 3

No. 12-1269 and 12-1788

IN THE

United States Court of Appeals for the Seventh Circuit

MICHAEL MOORE, et al., Plaintiffs-Appellants v. LISA MADIGAN and HIRAM GRAU Defendants-Appellees.	))))))))	Appeal from the United States District Court for the Central District of Illinois No. 11-3134 The Honorable Susan E. Myerscough, Judge Presiding.
MARY E. SHEPARD and ILLINOIS STATE RIFLE ASSOCIATION, Plaintiffs-Appellants, v. LISA MADIGAN and HIRAM GRAU Defendants-Appellees.	))))))))	Appeal from the United States District Court for the Southern District of Illinois No. 11-405 The Honorable William D. Stiehl, Judge Presiding.

BRIEF OF *AMICI CURIAE* BRADY CENTER TO PREVENT GUN VIOLENCE, INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, MAJOR CITIES CHIEFS ASSOCIATION, NATIONAL ASSOCIATION OF WOMEN LAW ENFORCEMENT EXECUTIVES, NATIONAL BLACK POLICE ASSOCIATION, AND POLICE FOUNDATION IN SUPPORT OF APPELLEES

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May 16, 2012

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: No. 11-3134; No. 11-405

Short Caption: Michael Moore, et al. v. Lisa Madigan, et al. ; Mary Shepard, et al. v. Lisa Madigan, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Brady Center To Prevent Gun Violence, International Brotherhood of Police Officers, Major Cities Chiefs Association, National Association of Women Law Enforcement Executives, National Black Police Association, and Police Foundation

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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Attorney's Signature: /s/ Alexander D. Marks Date: 5/16/12

Attorney's Printed Name: Alexander D. Marks

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CONSENT TO FILE

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, *amici* received consent from all parties to file this brief. No party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than *amici*, its members, or its counsel, contributed money intended to fund preparation of this brief.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus Brady Center to Prevent Gun Violence is the nation's largest non-partisan, non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. Through its Legal Action Project, the Brady Center has filed numerous *amicus curiae* briefs in cases involving firearms regulations, including *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), *United States v. Hayes*, 555 U.S. 415, 427 (2009) (citing Brady Center brief), and *District of Columbia v. Heller*, 554 U.S. 570 (2008). *Amicus* brings a broad and deep perspective to the issues raised by this case and has a compelling interest in ensuring that the Second Amendment does not impede reasonable governmental action to prevent gun violence.

Amicus International Brotherhood of Police Officers ("IBPO") is one of the largest police unions in the country, representing more than 50,000 members.

Amicus Major Cities Chiefs Association ("MCCA") is a professional association representing the largest cities in the United States and Canada. MCCA membership is comprised of chiefs and sheriffs of the 70 largest law enforcement agencies in the United States and Canada. Together they serve more than 76.5 million people (68 U.S., 8.5 Canada) with a combined sworn workforce of 177,150 (159,300 U.S., 17,850 Canada) officers.

Amicus National Association of Women Law Enforcement Executives ("NAWLEE") is the only organization established to address the unique needs of women holding senior management positions in law enforcement. It is in its 17th year and has over 500 members.

Amicus National Black Police Association represents approximately 35,000 individual members and more than 140 chapters.

Amicus Police Foundation is a national, non-partisan, non-profit organization with a long history of promoting public policies that enhance the safety of law enforcement officers and the public they serve.

SUMMARY OF ARGUMENT

As law enforcement officers tasked with protecting the public from crime and organizations that work to reduce gun violence, *amici* recognize all too well that the right to keep and bear arms recognized in *District of Columbia v. Heller*, 554 U.S. 570 (2008), "is unique among all other constitutional rights to the individual because it permits the user of a firearm to cause serious personal injury—including the ultimate injury, death—to other individuals, rightly or wrongly." *Piszczatoski v. Filko*, --- F. Supp. 2d ----, 2012 WL 104917, at *2 (D.N.J. Jan. 12, 2012). While the Supreme Court held in *Heller* that the Second Amendment protects a limited right of law-abiding, responsible people to possess a gun *in the home* for self-defense, it has *never* recognized a far broader right to carry guns in public places. *Heller*, 554 U.S. at 635. As recognized by numerous courts construing *Heller* as limited to the home, the dangers of firearms "would rise exponentially as one moved the right from the home to the public square," *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 756 (U.S. Nov. 28, 2011). Neither *Heller* nor the historical record undermine the longstanding police power authority of states to restrict or prohibit public carrying of guns.

Such restrictions and prohibitions on public carrying have deep roots in English and early American statutes and case law, and have long been recognized *not* to infringe the right to bear arms. The Court's decision in *Heller* stands firmly in that unbroken line of history. It left intact longstanding precedent that "the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons," *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897), and laws restricting public gun carrying, *English v. State*, 35 Tex. 473 (1871) (cited in *Heller*, 554 U.S. at 627), and approved of cases upholding "prohibitions on carrying concealed weapons," as well as "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.' " *Heller*, 554 U.S. at 626-27 & n.26.

The District Courts correctly upheld the Illinois statutes challenged by Appellants. An expansion of the Second Amendment that deprives states of the ability to bar public carrying of guns would constrain law enforcement in its efforts to protect the public, and would run counter to the "assurances" of *Heller* and *McDonald* that "reasonable firearms regulations" will remain permissible, and to the Court's longstanding recognition that the exercise of protected activity must be balanced against legitimate public interests—chief among which is public safety. *McDonald*, 130 S. Ct. at 3047; *Heller*, 554 U.S. at 626-27 & n.26. Illinois law governing the public carrying of weapons is precisely the sort of regulation that courts should uphold.

ARGUMENT

This Court should affirm the District Courts' holding that the provisions challenged here—720 ILCS 5/24-1, prohibiting Unlawful Use of Weapons ("UUW"), and 720 ILCS 5/24-1.6, prohibiting Aggravated Unlawful Use of Weapons ("AUUW")—are constitutional. *Moore v. Madigan*, --- F. Supp. 2d ----, 2012 WL 344760 (C.D. Ill. Feb. 3, 2012); *Shepard v. Madigan*, No. 11–CV–405–WDS, 2012 WL 1077146 (S.D. Ill. Mar. 30, 2012). The provisions further important governmental interests recognized by Illinois' legislature, and are fully in keeping with the historically understood meaning of the right to keep and bear arms.

I. 720 ILCS 5/24-1 and 720 ILCS 5/24-1.6(a) ARE PERMISSIBLE REGULATIONS THAT WOULD WITHSTAND THE APPROPRIATE LEVEL OF SCRUTINY.

The Illinois provisions do not infringe on protected Second Amendment activity, as that right, properly understood, does not restrict states from prohibiting the carrying of guns in public. *See* Appellees' Br. 5-33. However, the laws at issue should be upheld even if this Court determines that they fall within the bounds of the Second Amendment. Those provisions withstand any appropriate level of scrutiny.

A. If the Court Determines That the Laws At Issue Here Implicate Protected Second Amendment Activity, They Are Not Subject to Strict Scrutiny.

Heller implicitly rejected any form of heightened scrutiny that would require the government to ensure that firearms legislation has a tight fit between means and ends, as the Court recognized that the Constitution provides legislatures with "a variety of tools for combating" the "problem of handgun violence," *Heller*, 554 U.S. at 636, and deemed a host of existing firearms regulations to be "presumptively lawful" without subjecting those laws to any analysis, much less heightened scrutiny. *Id.* at 626-27 & n.26. In the aftermath of *Heller* and *McDonald*, this Court and a majority of others have rejected strict scrutiny. *See, e.g.*, *United States v. Skoien*, 614 F.3d 638, 641-42 (7th Cir. 2010) (en banc); *United States v. Chester*, 628 F.3d 673, 682-83 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 98 (3d Cir. 2010).

While these courts have applied some form of intermediate scrutiny, it bears note that state courts construing analogous state rights to bear arms have long applied a more deferential "reasonable regulation" test.[1] By that test, a state "may regulate the exercise of [the] right [to bear arms] under its inherent police power so long as the exercise of that power is reasonable." *Robertson v. City & County of Denver*, 874 P.2d 325, 328 (Colo. 1994).[2]

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[1] *See* Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686-87, n. 12 (2007) (describing "hundreds of opinions" by state courts with "surprisingly little variation" that have adopted the "reasonableness" standard for right-to-bear-arms cases).

[2] Though more deferential than intermediate scrutiny, the test is more demanding than rational basis, and does not possess the fatal flaw in the "interest balancing" test suggested by Justice Breyer's *Heller* dissent, because it does not permit states to prohibit all firearm ownership. On the contrary, under "reasonable regulation" laws that "eviscerate," *State v. Hamdan*, 665 N.W.2d 785, 799 (Wis. 2002), render "nugatory," *Trinen v. City of Denver*, 53 P.3d 754, 757 (Colo. Ct. App. 2002), or result in the effective "destruction" of a Second Amendment right, *State v. Dawson*, 159 S.E.2d 1, 11 (N.C. 1968), would be struck down. The test focuses on whether "the restriction . . . is a reasonable exercise of the State's inherent police

B. The Laws At Issue Here Are Backed By Compelling Evidence Substantially Related to Illinois' Public Safety Goals.

By any measure, the laws at issue are constitutional. The people of Illinois, through their elected officials, have decided to protect public safety by restricting guns in public. This life-saving policy choice is reasonable and supported by "logic and data" that "establish a substantial relation" between Illinois' law and its public safety goals. *Skoein*, 614 F.3d at 642.

In light of the logic and overwhelming evidence supporting public gun carry restrictions, courts after *Heller* have continued to recognize the profound public safety basis for laws restricting armed gunmen in public:

> In his home, an individual generally may be better able to accurately assess a threat to his safety due to his familiarity with his surroundings and knowledge of his household's occupants. In public, however, there is no comparable familiarity or knowledge, and, thus, an increased danger that an individual carrying a loaded firearm will jump to inaccurate conclusions about the need to use a firearm for self-defense. The extensive training law enforcement officers undergo concerning the use of firearms attests to the degree of difficulty and level of skill necessary to competently assess potential threats in public situations and moderate the use of force.

People v. Williams, --- N.E.2d ----, 2011 WL 6945667 (Ill. App. Ct. Dec. 30, 2011) (quoting *People v. Mimes*, 953 N.E.2d 55, 77 (Ill. App. Ct. 2011). *See also People v. Yarbrough*, 169 Cal. App. 4th 303, 314 (2008) ("Unlike possession of a gun for protection within a residence, carrying a concealed firearm presents a recognized threat to public order, and is prohibited as a means of preventing physical harm to persons other than the offender. A person who carries a concealed firearm on his person or in a vehicle, which permits him immediate access to the firearm but impedes others from detecting its presence, poses an imminent threat to public safety. . . .") (citations omitted).

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powers." *State v. Cole*, 665 N.W.2d 328, 338 (Wis. 2003).

In Illinois and the ten other states (making up one-third of the nation's population) that restrict public gun carrying,[3] law enforcement may pre-emptively remove illegal guns from the streets before they are used to cause harm, through highly effective community policing targeting illegal street guns. In these states where public gun carrying may be restricted, possession of a concealed firearm by an individual in public is sufficiently unusual as to create a reasonable suspicion of danger, allowing police to investigate and remove illegal guns from the streets before a shooting occurs. Like Illinois, nearly all of the states that restrict public gun carrying have achieved gun death rates below the national average.[4]

By contrast, under an expansive Second Amendment regime, an officer might not be deemed to have cause to arrest, search, or stop a person seen carrying a loaded gun, even though far less risky behavior could justify police intervention. In Florida, for example, where law enforcement has no discretion to limit public gun carrying, "gangs have learned how to structure

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[3] Although *amicus* NRA states that Illinois is the only state that prohibits public gun carrying, NRA Br. at 6, the laws of nearly a dozen states restrict civilian handgun carrying in public. Illinois bans public carrying, while "may issue" states likewise greatly limit public carrying by giving police the discretion to deny carry permit applications. *See* Ala. Code §§ 9-11-304, 13A-11-52, 13A-11-59, 13A-11-73 – 13A-11-75; Cal. Penal Code §§ 12050 – 12054, 12590; Conn. Gen. Stat. §§ 29-28 – 29-30, 29-32 – 29-32b, 29-35, 29-37; Del. Code Ann. tit. 11, § 1441; Haw. Rev. Stat. Ann. § 134-9; 720 ILCS 5/24-1 et seq.; 520 ILCS 5/1.1 et seq.; Md. Code Ann., Pub. Safety §§ 5-301 – 5-314; Mass. Gen. Laws ch. 140, §§ 131, 131C, 131P, ch. 269, § 10; N.J. Stat. Ann. §§ 2C:58-3, 2C:58-4, 2C:39-5; N.Y. Penal Law §§ 400.00, 265.01, 265.20; R.I. Gen. Laws §§ 11-47-8 – 11-47-18; U.S. Census Bureau, *Population Change for the United States, Regions, States, and Puerto Rico: 2000 to 2010, available at* http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf (2010 data).

[4] States with restrictions on public carrying of loaded guns have the lowest gun death rates in the nation. Indeed, the five states with the lowest gun death rates all restrict public gun carrying (Connecticut, New York, New Jersey, Hawaii and Massachusetts). Violence Policy Center, *State Firearm Death Rates, Ranked by Rate* (2009), *available at* http://www.vpc.org/fadeathchart12.htm (last accessed May 11, 2012) (of these states, only Alabama, whose carry law is undermined by other weak gun laws, has a gun death rate substantially higher than the national average). *See* Brady Campaign to Prevent Gun Violence, *Alabama Scorecard 2011*, *available at* http://bradycampaign.org/stategunlaws/scorecard/AL/ (last accessed May 15, 2012).

their crews so that at least one of them can be legally armed. One member of a crew will have a concealed weapons permit . . . . The traffic stop ends with the guy holding the cocaine going to jail while the man with the concealed weapons permit was given back his gun and let go."[5] If guns were permitted to flood the streets of Illinois, law enforcement's ability to prevent gun deaths by pre-emptively removing illegal guns from the streets could be greatly restricted.

Unlike firearms in the home, which are primarily a threat to gun owners, their families, and guests,[6] guns in public threaten law enforcement and the community at large. Guns in public expose all members of society to great risks, as guns are "used far more often to intimidate and threaten than they are used to thwart crimes." David Hemenway & Deborah Azrael, *The Relative Frequency of Offensive and Defensive Gun Uses: Results From a National Survey*, 15 VIOLENCE & VICTIMS 257, 271 (2000).[7] In the last five years, concealed handgun permit holders

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[5] Jim DeFede, *A Night Inside South Florida's Gang Wars* (May 7, 2012), *available at* http://miami.cbslocal.com/2012/05/07/a-night-inside-south-floridas-gang-wars/ (last accessed May 15, 2012).

[6] *See, e.g.*, Matthew Miller *et al.*, *State-Level Homicide Victimization Rates in the US in Relation to Survey Measures of Household Firearm Ownership, 2001-2003*, 64 SOC. SCI. & MED. 656 (Feb. 2007) ("States with higher rates of firearm ownership had significantly higher homicide victimization rates"); Lisa M. Hepburn & David Hemenway, *Firearm Availability and Homicide: A Review of the Literature*, 9 AGGRESSION & VIOLENT BEHAV. 417 (2004) ("[H]ouseholds with firearms are at higher risk for homicide, and there is no net beneficial effect of firearm ownership"); Matthew Miller *et al.*, *Rates of Household Firearm Ownership and Homicide Across US Regions and States, 1988–1997*, 92 AM. J. PUB. HEALTH 1988, 1988 (Dec. 2002) ("[I]n areas where household firearm ownership rates were higher, a disproportionately large number of people died from homicide."); Mark Duggan, *More Guns, More Crime*, 109 J. POL'Y. ECON. 1086 (2001); Matthew Miller *et al.*, *Firearm Availability and Unintentional Firearm Deaths*, 33 ACCIDENT ANALYSIS & PREVENTION 477 (Jul. 2000) ("A statistically significant and robust association exists between gun availability and unintentional firearm deaths.").

[7] The NRA criticizes a separate statement in this study that guns are used "far more often to kill and wound innocent victims than to kill and wound criminals" and in self-defense. NRA Br. at 14. The NRA falsely claims that the underlying study "was thoroughly discredited," when in fact the National Research Council committee's review cited by the NRA concluded that "the

have shot and killed over 400 people, including a dozen law enforcement officers. *See* Violence Policy Center, *Concealed Carry Killers* (2012), *available at* http://vpc.org/ccwkillers.htm (last accessed May 15, 2012). The shooting death of unarmed teenager Trayvon Martin is only the most publicized killing by a licensed concealed gun carrier. *Id.*

Carrying firearms in public is not an effective form of self-defense and, in fact, repeatedly has been shown to *increase* the chances that one will fall victim to violent crime. Most states that broadly allow concealed carrying of firearms in public appear to "experience increases in violent crime, murder, and robbery when [those] laws are adopted." John Donohue, *The Impact of Concealed-Carry Laws*, EVALUATING GUN POLICY EFFECTS ON CRIME AND VIOLENCE 289, 320 (2003). Laws broadly allowing concealed carrying of weapons "have resulted, if anything, in an *increase* in adult homicide rates." Jens Ludwig, *Concealed-Gun-Carrying Laws and Violent Crime: Evidence from State Panel Data*, 18 INT'L REV. L. & ECON. 239 (1998). Likewise, "firearms homicides increased in the aftermath of [enactment of these] laws," and such laws may "raise levels of firearms murders" and "increase the frequency of homicide." David McDowall *et al.*, *Easing Concealed Firearms Laws: Effects on Homicide in Three States*, 86 J. CRIM. L. & CRIMINOLOGY 193, 202-203 (1995). Similarly, "[f]or robbery, many states experience increases in crime" after concealed carry laws are enacted. Hashem Dezhbakhsh & Paul Rubin, *Lives Saved or Lives Lost? The Effects of Concealed-Handgun Laws on Crime*, 88 AM. ECON. REV. 468 (May 1998).

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facts are in no doubt," and instead took issue with broader conclusions related to overall "crime and injury" rather than "[s]imple death counts." Charles F. Wellford *et al.*, *Firearms and Violence: A Critical Review* (2004) (hereinafter "NRC") at 118. While this committee may have chosen to limit its report to broader societal questions, the NRA is wrong to suggest that Illinois cannot base its public safety goals on lowering "death counts."

Analyses of the connection between increased gun prevalence and crime "indicate a rather substantial increase in robbery," John Donohue, *Guns, Crime, and the Impact of State Right-To-Carry Laws*, 73 FORDHAM L. REV. 623, 633 (2004), while "policies to *discourage* firearms in public may help prevent violence." McDowall *et al.*, *Easing Concealed Firearms Laws*, 86 J. CRIM. L. & CRIMINOLOGY at 203. Another study found that "gun possession by urban adults was associated with a significantly increased risk of being shot in an assault," and that "guns did not seem to protect those who possessed them from being shot in an assault." Charles C. Branas *et al.*, *Investigating the Link Between Gun Possession and Gun Assault*, 99 AMER. J. PUB. HEALTH 2034 (Nov. 2009). Likewise, another study found that:

> Two-thirds of prisoners incarcerated for gun offenses reported that the chance of running into an armed victim was very or somewhat important in their own choice to use a gun. Currently, criminals use guns in only about 25 percent of noncommercial robberies and 5 percent of assaults. If increased gun carrying among potential victims causes criminals to carry guns more often themselves, or become quicker to use guns to avert armed self-defense, the end result could be that street crime becomes more lethal.

Philip Cook *et al.*, *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1081 (2009).

The carrying of firearms in public negatively implicates other social issues and portends societal ills unlike firearms in the home. For one, if drivers carry loaded guns, road rage can become a more serious and potentially deadly phenomenon. David Hemenway, *Road Rage in Arizona: Armed and Dangerous*, 34 ACCIDENT ANALYSIS AND PREVENTION 807-14 (2002). Increases in gun prevalence in public may cause an intensification of criminal violence. Philip Cook & Jens Ludwig, *The Social Costs of Gun Ownership*, 90 J. PUB. ECON. 379, 387 (2006).

C. In Light of the Overwhelming Evidence Supporting Illinois' Law, *Amicus* NRA's Policy Disputes Are Irrelevant, and In Any Event Are Deeply Flawed.

Despite this overwhelming evidence supporting Illinois' law, *amicus* National Rifle Association ("NRA") lobbies this Court to make an essentially legislative finding that flooding the streets with loaded, hidden handguns would "promote[] public safety." NRA Br. at 6. In so doing, the NRA criticizes studies cited by the Brady Center and argues that this Court should instead rely on the NRA's selection of studies. *Id.* at 5 n.1. That is an argument for a legislature, not a court, and even if it were relevant the NRA's claims and studies are deeply flawed.

The NRA "relies principally" on findings by a National Research Council committee ("NRC") in a review of gun studies and a related survey, *id.* at 8 n.2, but the NRA's argument that this Court should limit itself to the NRC's general conclusions is contradicted by the NRC itself, which expressly examined broader questions about "how to improve the empirical foundation for discussions about firearms policy," while specifically cautioning that it was "not intended to, nor does it reach any conclusions about the issue of gun control." NRC at ix, 114. The NRC was not charged with and did not undertake a legislative policy-making inquiry about how to protect public safety. That is the Illinois legislature's role—and it has acted to protect public safety now based on the best available evidence of the severe risks of public gun carrying.[8]

The NRA claims that this Court should rely on a so-called "leading study" by Gary Kleck, which the NRA asserts is persuasive because it has been "replicated" 19 times. NRA Br.

[8] Similarly, the NRA cites to a Centers for Disease Control review that was focused on a "public health" analysis rather than legislative policymaking and which cautioned that its conclusion "does NOT mean that the intervention does not work." Robert Hahn *et al.*, *Firearms Laws and the Reduction of Violence: A Systematic Review*, 28 AM. J. PREV. MED. 40, 61 (2005); Community Preventive Services Task Force, *Systematic Review Methods* (Mar. 2012), *available at* http://www.thecommunityguide.org/about/methods.html#categories (last accessed May 15, 2012).

at 6. Yet the NRC debunked Kleck, finding that this claim of repetition gave them "no comfort" because "[m]ere repetition does not eliminate bias." NRC at 113. The NRC found Kleck's work to be plagued by substantial bias that clouded his facts, figures, and conclusions. Thus, while the NRA claims Kleck found "roughly 2.5 million defensive gun uses" per year, NRA Br. at 6, the NRC found Kleck's conclusion to be prone to "invalid response errors" and "high degrees of sampling error" because of the "relatively small subsamples of persons who report using firearms defensively." NRC at 112. Similarly, the NRC also concluded that the NRA's assertion that guns protect crime victims, NRA Br. at 9-10, is subject to "obvious concerns about inaccurate reporting associated with subjective questions." NRC at 117.[9]

One critique similarly found that Kleck's sample size was so small that his purported self-defensive gun uses amounted to only 1.33% of those surveyed, allowing him to reach a result of 2.5 million defenses gun uses only by multiplying 1.33% by about 200 million adults, massively magnifying error and bias.[10] Furthermore, the NRC was extremely concerned about error and bias in Kleck's claims, pointing out that even Kleck admits that "respondents may be inclined to 'remember with favor their marksmanship' and may tend to exaggerate the seriousness of the event." NRC at 112. Yet Kleck failed to screen his data so that it may include supposed self-defense claims by people who actually were engaging in "illegal carrying and possession" and "some uses against supposed criminals may legally amount to aggravated assault," such that a purported defender may actually be "a perpetrator." NRC at 106. The NRC

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[9] Moreover, while the NRA claims that Kleck found that "as many as 63% [of self-defense gun uses] involve citizens carrying a firearm while outside their homes," NRA Br. at 6, Kleck himself admitted that a majority of these actually "may or may not have entailed public carrying" at all. Gary Kleck, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 174 (Fall 1995).

[10] David Hemenway, *Survey Research and Self-Defense Gun Use: An Explanation of Extreme Overestimates*, 87 J. CRIM. L. & CRIMINOLOGY 1430 (1997).

worried that Kleck used "potentially error ridden" data, yet he "assumes these data are fully accurate" and thus uses the data "to make implausible and unsubstantiated assumptions about the accuracy of self-reported measures of resistance" which "may lead to substantial biases." NRC at 116-17.

The NRC also takes issue with the NRA's claim that public carrying may reduce crime, finding possible "offsetting adverse consequences" which "may motivate more criminals to carry firearms and thereby *increase* the amount of violence that is associated with crime" and "allowing individuals to carry concealed weapons may *increase* accidental injuries or deaths or *increase* shootings during arguments." NRC at 120 (emphasis added). The NRA's assertions that gun carrying may prevent crime are largely based on studies by John Lott which the NRC specifically refuted: "Lott's and Whitley's figure shows estimated trends in crime levels before and after adoption of right-to carry laws, and they claim that these trends support the conclusion that adoption of right-to-carry laws reduces crime. The committee disagrees." NRC at 137. The NRC noted that other researchers found that "the use of plausible alternative data, control variables, specifications, or methods of computing standard errors, weakens or reverses the results" found by Lott. NRC at 127.

While the NRA cannot deny that hundreds of people have been killed by concealed carry licensees and thousands of licensees have committed crimes requiring license revocation, the NRA essentially argues that not enough people have been killed or victimized to justify a public safety response. NRA Br. at 17-18. The NRA urges the Court to disregard evidence that at least a dozen law enforcement officers and more than 400 people have been killed by concealed carry licensees, arguing that some shootings were accidental and thus somehow irrelevant, even though accidental shootings involved small children who accessed a permit holder's gun and

killed themselves. The NRA likewise argues that suicides are irrelevant, even though dozens involved murder-suicides where many innocent people were killed.

The NRA also points to several thousand concealed carry licensees in a few states it selected who had licenses revoked to argue against a legislative response. NRA Br. at 18-19. The NRA even misrepresents this data, for example, citing only 168 Florida revocations for permit holders who committed gun crimes when in fact 6,143 Florida permit holders committed a crime after receiving a concealed carry permit.[11] Further, 522 had licenses revoked for committing a crime before they even received their Florida license. Similarly, Utah revoked 2,796 concealed carry licenses since 2007, including for crimes of kidnapping, murder, and child abuse.[12] As Utah's experience shows, people licensed to carry guns have committed crimes dangerous enough to warrant license revocation and they pose a threat to public safety even if their victim suffered crimes other than gun crimes, such as kidnapping or child abuse.[13]

States have significant interests in averting the gun crimes and accidental shootings that result from unrestricted public carrying. The people's representatives in Illinois have decided on

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[11] Fla. Dep't of Agric. and Consumer Serv. Div. of Licensing, *Concealed Weapon or Firearm License Summary Report* (Oct.1987 – Apr. 2012), *available at* http://licgweb.doacs.state.fl.us/stats/cw_monthly.pdf.

[12] Utah Dep't of Pub. Safety, *Concealed Firearm Permit and Brady Bill Statistical Data*, *available at* http://publicsafety.utah.gov/bci/brady_statistics.html (last accessed May 15, 2012).

[13] A comparison of New York and Florida is worth noting. In 1987, Florida and New York ranked as the top two states in the nation for violent crime rates. Federal Bureau of Investigation (FBI), *Uniform Crime Reports*, *available at* http://www.fbi.gov/about-us/cjis/ucr/ucr (last accessed May 15, 2012) (Brady Center calculations). Florida broadly allowed concealed carrying in 1987, while New York maintained restrictions on public gun carrying. Since then, Florida has ranked in the top five states for violent crime rates every year, while New York's violent crime rate has declined dramatically, with New York dropping out of the top ten states with the highest violent crime rates in 1996 and out of the top twenty in 2004. *Id.* New York now has a violent crime rate nearly half Florida's and one of the lowest gun death rates in the nation. *Id.*

a life-saving policy that is well-tailored to accomplish their interest in fostering public safety and is supported by a substantial body of evidence. Any policy disagreements about this decision of the people of Illinois should be raised in the legislature. This Court should uphold the constitutionality of Illinois's statutes.

II. THE ILLINOIS UNLAWFUL USE OF WEAPONS STATUTES ARE IN KEEPING WITH SUPREME COURT PRECEDENT AND HISTORICALLY RECOGNIZED POLICE POWER AUTHORITY.

As courts in Illinois and across the nation have recognized, *Heller*'s limited holding does not restrict the state's police power authority to limit or prohibit carrying guns in public. *See, e.g.*, *People v. Dawson*, 934 N.E.2d 598 (Ill. App. Ct. 2010); *People v. Aguilar*, 944 N.E.2d 816 (Ill. App. Ct. 2011). *Heller* recognized that the Second Amendment protects "the right of law-abiding, responsible citizens to use arms *in defense of hearth and home*," and the Court only recognized Heller's right "*to carry* [] *in the home*," *Heller*, 554 U.S. at 635 (emphasis added). *See also Ezell v. City of Chicago*, 651 F.3d 684, 701, 715 (7th Cir. 2011). The right of individuals "to keep and bear arms to defend their homes, families or themselves" is not infringed by Illinois's restrictions on public carrying. *Heller*, 554 U.S. at 615 (internal quotation marks omitted).

Heller did not disturb *Robertson v. Baldwin*, 165 U.S. at 281-82, which recognized the long understood view that "the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons." Indeed, *Heller*, though expounding upon a wide range of gun laws beyond those directly at issue, and aware that District law barred Mr. Heller from carrying guns in public, explicitly stated that it only recognized his right to "carry [] in the home," without as much as hinting that the District's ban on public carrying was constitutionally suspect. *Heller*, 554 U.S. at 635; D.C. Code § 22-4504.

In *McDonald*, the Court "repeat[ed]" *Heller*'s "assurances" regarding its limited scope, and agreed that "state and local experimentation with reasonable firearms regulations will continue under the Second Amendment." *McDonald*, 130 S. Ct. at 3046-47 (internal citation omitted). Similarly, the Court did not question either *Robertson* or Illinois's ban on the public carrying of firearms.

The District Courts' holdings are in line with the reasoning of numerous courts in and outside of Illinois that have upheld restrictions or prohibitions on public gun carrying, post-*Heller*.[14] *See, e.g.*, *Moore*, 2012 WL 344760, at *7 (collecting cases). These courts have recognized the potentially grave risks to the public in expanding the right into public spaces. In refusing to "push *Heller* beyond its undisputed core holding," the Fourth Circuit properly reasoned:

> This is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights. It is not far-fetched to think the *Heller* Court wished to leave open the possibility that such a danger would rise exponentially as one moved the right from the home to the public square.

United States v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 756 (U.S. Nov. 28, 2011).[15]

This reading of the Second Amendment as not restricting public carry laws such as Illinois' is in keeping with the historical tradition embraced by the Supreme Court. The Supreme

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[14] On three occasions, the *Moore* Appellants state that reading *Heller* as limited to the home is an inappropriate restriction of *Heller* "to its facts." *See* Moore, et al. Br. at 8, 15, 30. To the contrary, that interpretation is a proper construction of the holding, as stated by the Court itself.

[15] Two district courts within the Fourth Circuit have improperly disregarded their Circuit court's warning, and relied instead on Judge Niemeyer's minority views expressed in his *Masciandaro* concurrence. *Bateman v. Perdue*, No. 5:10-CV-265-H, slip op. at 9-10 (E.D.N.C. Mar. 29, 2012); *Woollard v. Sheridan*, --- F. Supp. 2d ----, 2012 WL 695674, at *6 (D. Md. Mar. 2, 2012).

Court has stated that the Second Amendment was a preexisting right, "inherited from our English ancestors . . . subject to certain well-recognized exceptions . . . which continue to be recognized as if they had been formally expressed." *Robertson*, 165 U.S. at 281; *see also Heller*, 554 U.S. at 592-95, 600-03, 605-19, 626-28 (tracing the right to bear arms through Anglo-American origins and state analogues); *McDonald*, 130 S. Ct. at 3056 ("[T]raditional restrictions" on the Second Amendment "show the scope of the right," just as they do "for *other* rights.") (Scalia, J., concurring). The *Heller* Court stated specifically that its opinion was not "to cast doubt on longstanding prohibitions" in the history of Anglo-American jurisprudence. *Id.*

Among the "longstanding prohibitions" cited in *Heller* were "prohibitions on carrying concealed weapons." *Heller*, 554 U.S. at 626; *see also Robertson*, 165 U.S. at 281-82 (identifying "laws prohibiting the carrying of concealed weapons" as one such prohibition). *Heller* also recognized the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons,' " a limitation construed to allow for prohibitions on the public carrying of handguns.

Heller cited as authority for this "historical tradition" the 19th-century case *English v. State*, 35 Tex. 473 (1871) (cited in *Heller*, 554 U.S. at 627), in which the Texas Supreme Court upheld a conviction for carrying a pistol in public under a statute banning the public carry of deadly weapons, including handguns. In reaching that conclusion, the court traced the history of analogous statutes, noting that Blackstone had characterized "the offense of riding around or going around with dangerous or unusual weapons" as a crime. 35 Tex. at 476. *English* traced the roots of such statutes back further through "the statute of Northampton (2 Edward III, c.3)," the "early common law of England," and even to "the laws of Solon" in ancient Greece. *Id.* The court was dismissive of the argument that the Second Amendment prohibited such laws, noting

that it was a "little short of ridiculous, that any one should claim the right to carry upon his person any of the mischievous devices inhibited by the statute, into a peaceable public assembly, as, for instance into a church . . . or any other place where ladies and gentlemen are congregated together." *Id.* at 478-79. The *English* court recognized that prohibiting the public carry of deadly weapons was important to prevent crime, quoting John Stewart Mill: " 'It is one of the undisputed functions of government, to take precautions against crime before it has been committed, as well as to detect and punish afterwards,' " given " '[t]he right inherent in society to ward off crimes against itself by antecedent precautions . . . .' " 35 Tex. at 478.

English recognized that restrictions and prohibitions on public carrying were widespread: "It is safe to say that almost, if not every one of the states of this Union have a similar law upon their statute books, and, indeed, so far as we have been able to examine them, they are more rigorous than the act under consideration." *Id.* at 479. Indeed, even Wyatt Earp prohibited gun carrying in Dodge City. *See* Dodge City, Kan., Ordinance No. 16, § XI (Sept. 22, 1876); *see also* 1876 Wyo. Comp. Laws ch. 52, § 1 (1876 Wyoming law prohibiting anyone from "bear[ing] upon his person, concealed or openly, any firearm or other deadly weapon, within the limits of any city, town or village"); Ark. Act of Apr. 1, 1881; Tex. Act of Apr. 12, 1871; *Fife v. State*, 31 Ark. 455 (1876) (upholding carrying prohibition as a lawful "exercise of the police power of the State without any infringement of the constitutional right" to bear arms); *Hill v. State*, 53 Ga. 472, 474 (1874) ("at a loss to follow the line of thought that extends the guarantee"—the state constitutional "right of the people to keep and bear arms"—"to the right to carry pistols, dirks, Bowieknives, and those other weapons of like character, which, as all admit, are the greatest nuisances of our day."); *State v. Workman*, 35 W. Va. 367, 373 (1891); *Aymette v. State*, 21 Tenn. 154, 159-61 (1840) ("The Legislature, therefore, have a right to prohibit the

wearing or keeping weapons dangerous to the peace and safety of the citizens, and which are not usual in civilized warfare, or would not contribute to the common defence."); *State v. Buzzard*, 4 Ark. 18, 21 (1842); *State v. Jumel*, 13 La. Ann. 399, 400 (1858).[16]

Another authority cited by *Heller*, 554 U.S. at 608, 613, 629, *Andrews v. State*, 50 Tenn. 165, 1871 WL 3579, 8 Am.Rep. 8, 10 (1871), similarly drew a sharp distinction between carrying firearms at home and in public, explaining that "no law can punish" a man "while he uses such arms at home or on his own property,"

> Yet, when he carries his property abroad, goes among the people in public assemblages where others are to be affected by his own conduct, then he brings himself within the pale of public regulation, and must submit to such restriction on the mode of using or carrying his property as the people through their Legislature, shall see fit to impose for the general good.

Accordingly, the historic scope of the right to keep and bear arms properly includes the understanding that restricting and—as seen in *English*—the banning of public carry was not understood to implicate the right.[17] *See* Patrick J. Charles, *The Faces of the Second Amendment Outside the Home*, 60 CLEVELAND ST. L. REV. ___ (forthcoming Mar. 2012) (hereinafter Charles, *Outside the Home*), manuscript at 7 (quoting 2 Edw. 3, c.3 (1328) (Eng.)); Darrell A. H. Miller, *Guns As Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV.

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[16] *Bliss v. Commonwealth*, 12 Ky. 90, 91, 93 (1822), in which Kentucky's Supreme Court held Kentucky's concealed-weapons ban in conflict with its Constitution, is recognized as an exception to this precedent. *See* Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 125, at 75-76 (1868). The legislature corrected the anomalous decision by amending its constitution to allow a concealed weapons ban. *See* Ky. Const. of 1850, art. XIII, § 25.

[17] *Heller* cited two other 19th-century cases that struck down severe restrictions, both of which involved laws that could prohibit the carrying of guns in the home. *Andrews v. State*, 50 Tenn. 165, 188–189 (1871) (law could severely punish a man "If a man should carry such a weapon about his own home"); *Nunn v. State*, 1 Ga. 243, 246 (1846) (under the law "[i]t might be insisted, and with much plausibility, that even sheriffs, and other officers therein enumerated, might be convicted for keeping, as well as carrying, any of the forbidden weapons, while not in the actual discharge of their respective duties").

1278, 1318 n.246 (2009) (noting that Blackstone compared the Statute of Northampton to "the laws of Solon," under which "every Athenian was finable who walked about the city in armour") (quoting 2 William Blackstone, Commentaries *149).

Noted scholars and commentators have long recognized that a right to keep and bear arms does not prevent states from restricting or forbidding guns in public places. For example, a treatise which *Heller* cited as representative of "post-Civil War 19th-century sources" commenting on the right to bear arms, 554 U.S. at 618, stated that the right to keep and bear arms "is certainly not violated by laws forbidding persons to carry dangerous or concealed weapons . . . ." John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* 152-53 (1868). Similarly, Judge John Dillon explained that even where there is a right to bear arms, "the peace of society and the safety of peaceable citizens plead loudly for protection against the evils which result from permitting other citizens to go armed with dangerous weapons." Hon. John Dillon, *The Right to Keep and Bear Arms for Public and Private Defense (Part 3)*, 1 CENT. L. J. 259, 287 (1874). And an authoritative study published in 1904 concluded that the Second Amendment and similar state constitutional provisions had "not prevented the very general enactment of statutes forbidding the carrying of concealed weapons," which demonstrated that "constitutional rights must if possible be so interpreted as not to conflict with the requirements of peace, order and security." Ernst Freund, *The Police Power, Public Policy and Constitutional Rights* (1904).[18]

[18] An authority cited by the *Heller* Court on the Second Amendment's original meaning concluded that the only public carrying of firearms protected by the Second Amendment "is such transportation as is implicit in the concept of a right to possess—*e.g.*, transporting them between the purchaser or owner's premises and a shooting range, or a gun store or gun smith and so on." Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 267 (1983).

Such "restrictions began appearing on the carrying or using of 'arms' as a means to prevent public injury" since "the Norman Conquest." Patrick J. Charles, *Scribble Scrabble, the Second Amendment, and Historical Guideposts: A Short Reply to Lawrence Rosenthal and Joyce Lee Malcolm*, 105 NW. U. L. REV. COLLOQUY 225, 227 (2011). *See also* Darrell A. H. Miller, *supra*, at 1351, 1354 (2009) ("[S]tates and municipalities, far more sensitive to local needs and gun cultures, should be given free reign to design gun control policy that fits their specific demographic."). To hold that the Constitution dictates that public carry *must* be permitted carves into stone a rule that prevents state and local governments from adopting arms regulations which have been recognized since antiquity as one of the ways in which government protects the public good. The District Courts' holdings protect that legislative discretion that Appellants now seek to eliminate.

CONCLUSION

For all of the foregoing reasons, as well as those contained in the brief of Appellees, this Court should affirm the decision of the District Courts.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,934 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32 as modified by Circuit Rule 32(b) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in Times New Roman 12-point font.

CIRCUIT RULE 31(e) STATEMENT

The undersigned hereby certifies that he has filed electronically, pursuant to Circuit Rule 31(e), versions of the brief and all of the appendix items that are available in non-scanned PDF format.

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I certify that on May 16, 2012, I electronically filed the foregoing Brief of *Amici Curiae* 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 the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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