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

SHAWN GOWDER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	No. 11-cv-1304
CITY OF CHICAGO, *et al.*,	)	
	)	Judge Der-Yeghiayan
	)	
Defendants.	)	

PLAINTIFF'S REPLY IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT

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I. PROCEDURAL ISSUES.

Defendants assert that plaintiff's statutory construction argument "has no place in the constitutional analysis and has already been denied." This makes no sense. Despite defendants' argument that plaintiff's "statutory construction claim is entirely independent from his constitutional claims," Def. Response at 15, plaintiff has not asserted a separate statutory construction "claim." Rather, both plaintiff's administrative review claim and his constitutional claim are premised in part upon the fact that there are two possible ways to construe MCC § 8-20-110, one of which raises a substantial constitutional question, and one of which does not. The construction required by the canon of constitutional avoidance, and urged by the plaintiff in both the Department of Administrative Hearings and in this Court, is the construction that does not raise a constitutional question. The ordinance does not define the term "use" when it prohibits the issuance of a CFP to any person convicted in any jurisdiction of the "unlawful use" of a firearm. Because the ordinance refers to unlawful "use" as that term is understood in jurisdictions generally, it must be given its ordinary meaning in general usage of active employment or discharge. *Bailey v. United States*, 516 U.S. 137, 143 (1995). Construing the ordinance this way renders it inapplicable to plaintiff, who was convicted only of carrying or possessing a firearm in a public place, not actively employing or discharging it. Contrary to defendants' assertion, this is not a separate claim, but rather an argument as to why plaintiff is entitled to summary judgment on both his administrative review and his constitutional claims: If MCC § 8-20-110 does not apply to plaintiff in the first instance, then the defendants' reliance upon that section of the ordinance to deny plaintiff's CFP application was erroneous and violated his Second Amendment rights. Only if the Court first construes MCC § 8-20-110 to apply to a misdemeanor conviction for carrying or possessing a firearm in public does the need to

determine whether that section of the ordinance constitutes a permissible infringement of plaintiff's Second Amendment rights arise.

The defendants' suggestion that the Court's partial denial of plaintiff's motion for judgment on the pleadings somehow forecloses him from making the foregoing argument is erroneous. The Court's order did not state the reasons for the denial of plaintiff's motion for judgment on the pleadings with respect to the administrative review claim, and the Court did not even rule on the motion with respect to plaintiff's constitutional claim. The Court issued its October 18, 2011 order following a status hearing at which it advised the parties that it did not wish to make a dispositive ruling in this case based solely upon the pleadings. The Court's order did not preclude plaintiff from seeking, nor the Court from granting, summary judgment on either plaintiff's administrative review claim or his constitutional claim, whether on the basis of the canon of constitutional avoidance or any other grounds asserted in plaintiff's motion for summary judgment. *See Schor v. Abbott Laboratories*, 457 F.3d 608, 615 (7th Cir. 2006) (denial of a motion under Rule 12 or Rule 56 is not a final judgment and has no preclusive effect). And even if the Court denies summary judgment with respect to the administrative review claim, there is no reason why the Court could not grant summary judgment to plaintiff on his constitutional claim on the grounds that the canon of constitutional avoidance requires the Court to construe MCC 8-20-110 to be inapplicable to plaintiff because his conviction was not for unlawful "use" of a weapon. Defendants have cited no authority to support their suggestion that plaintiff is precluded from asserting the canon of constitutional avoidance as one of the grounds for his motion for summary judgment, and that suggestion has no merit.

Defendants argue that plaintiff cannot pursue a facial challenge to MCC § 8-20-110(b)(3)(iii), because he cannot show that the ordinance, as applied to him, is unconstitutional.

Citing *United States v. Salerno*, 481 U.S. 739 (1987), defendants argue that because MCC applies to both misdemeanor and felony convictions, and to "multiple types of unlawful uses of a firearm," the ordinance cannot be held unconstitutional on its face. This argument, however, ignores the fact that the plaintiff's as-applied constitutional challenge turns, as set forth above, upon the construction given to the ordinance by the Court in the first instance. If the Court construes the ordinance to apply to plaintiff at all, it must necessarily construe the ordinance to ban the issuance of a CFP to any person convicted of a misdemeanor offense of unlawful use of a weapon. As set forth below, such a categorical ban is an impermissible infringement on the fundamental Second Amendment right to keep and bear arms. If the Court agrees and declares MCC § 8-20-110(b)(3)(iii) to be unconstitutional as applied to the plaintiff, it will necessarily be declaring the ordinance facially invalid to the extent that it imposes such an impermissible categorical ban on misdemeanants' right to keep and bear arms. For all practical purposes, the as-applied and facial challenges raised in this case are intertwined, if not identical, and defendants' attempt to draw a hard line between them is unavailing. *See Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 893 (2010) ("the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction. . . goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint").

Defendants also contend that they were "deprived" of the opportunity to take plaintiff's deposition, which they claim was "the one discovery request [they] deemed crucial to defending this case." Def. Response at 16. This argument is disingenuous, if not specious. It is undisputed that the plaintiff's CFP application was denied solely because of his prior misdemeanor

conviction for carrying or possessing a firearm in public. That fact alone was all that the City relied upon to deny plaintiff his fundamental right to keep and bear arms. Defendants have never explained how any information they might obtain from deposing the plaintiff would have any bearing on the denial of his CFP application. The Court itself acknowledged this at the October 18, 2011 hearing:

> THE COURT: I want to know what you'll get out of the plaintiff's deposition, why would you need it because there is an ordinance. It talks – the ordinance doesn't talk about plaintiff. It talks about individuals that fall into a category. It has nothing to do with what the plaintiff's name is, what his other backgrounds are, what his skin color is, what his eye color is. It doesn't matter. It applies to everybody that falls into a category. And based on what the government had, they denied him the permit.
>
> So you cannot now go expand beyond to say let me do a fishing expedition and find out, okay, did you murder somebody, ah-hah, I would have denied you because now you have admitted that you murdered somebody. It's not going to happen.
>
> So unless you persuade me that plaintiff's deposition is necessary based on the facts and claims in this case, plaintiff's deposition is not going to take place, okay.
>
> On the other issues, I will grant that to you. You could do your discovery.[1]

Exh. 14 to Defendants' LR 56.1 Statement of Additional Facts [Doc. #58] at p. 77 of 83.

[1] The Court's observation of the categorical ban imposed by the ordinance further underscores how the plaintiff's as-applied and facial constitutional challenges are inextricably intertwined.

Following this hearing, the defendants conducted no discovery whatsoever, and they never filed a motion seeking to persuade the Court why plaintiff's deposition was necessary and why they should be allowed to take it. Now, defendants argue that plaintiff has confirmed the relevance of his past by "putting his own conduct at issue" through arguing that there is no evidence that he presents any threat of violence. Citing the fact that plaintiff was arrested two times previously but never convicted, defendants argue that they should be allowed to question plaintiff "to test his claims about being law-abiding and nonviolent." Def. Response at 18. The Court should reject this argument out of hand.

As the Court noted in the quote above, defendants deemed the fact that plaintiff has a single misdemeanor conviction for carrying a firearm in public to be in and of itself a sufficient basis, without any other information, to deny plaintiff his fundamental Second Amendment rights. Yet defendants now glibly assert that they were "deprived" of the opportunity to obtain additional *post hoc* information from plaintiff in order to try to retroactively defend their decision to deny him his rights. Defendants' argument runs as follows: (1) persons with misdemeanor convictions are categorically dangerous and pose an increased risk of violence; (2) plaintiff has a misdemeanor conviction; and (3) defendants therefore should be allowed to depose plaintiff to determine whether he is dangerous and poses an increased risk of violence. This is the height of sophistry, and the Court should treat it as such. Moreover, defendants' reference to plaintiff's prior arrests that did not lead to convictions is also completely improper, as such prior bad acts evidence is inadmissible under Federal Rule of Evidence 403. *See, Cruz v. Safford*, 579 F.3d 840, 845 (7th Cir. 2009)*; Betts v. City of Chicago* 784 F.Supp.2d 1020, 1024 (N.D. Ill. 2011).

The Court properly denied defendants leave to take plaintiff's deposition because the material facts of this case are not in dispute, and the deposition would not have led to any triable

issue. *Reynolds v. Jamison*, 488 F.3d 756, 762 (7th Cir. 2007). Indeed, defendants have managed, despite the lack of plaintiff's deposition, to fill approximately fifteen pages of their Response with argument – based on the opinions of expert witnesses who were never previously disclosed to plaintiff as required by FRCP 26(a)(2) -- as to why they believe misdemeanants like Mr. Gowder must be denied their fundamental Second Amendment Rights.

II. INTERMEDIATE SCRUTINY DOES NOT APPLY.

Chicago concedes, as it must, that prohibiting the possession of a firearm in the City burdens "the core Second Amendment right" to "possess a firearm within one's home for self-defense." Def. Response at 3. Thus, the City's argument for intermediate scrutiny necessarily rests on a claim that a misdemeanor gun-carriage offense moves a person's right to possess a firearm, even within the home, from the core "to the margins of the Second Amendment right." *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011). Original understanding establishes whether a particular activity lies at the core or the margins of the right to keep and bear arms, *see District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008); *Ezell*, 651 F.3d at 702-03, and Chicago has failed to establish that the people who ratified either the Second Amendment or the Fourteenth Amendment would have understood the activity at issue here as marginal.

1. Chicago argues that "most scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm 'unvirtuous citizens.' *United States v. Yancey*, 621 F.3d 681,685 (7th Cir. 2010), quoting *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010)." Def. Response at 5. But Chicago's own sources demonstrate that this argument fails to carry the day.

As an initial matter, those sources recognize that, regardless of the opinion of "most scholars," the "historical question" of whether "the right to bear arms does not preclude laws

disarming the unvirtuous citizen … has not been definitively resolved." *Vongxay*, 594 F.3d at 1118 (citing C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 714-28 (2009)).

But even if that question *was* definitively resolved, the very scholars and historical authorities relied on by *Vongxay* and *Yancey* (and, by extension, by Chicago), demonstrate that a person convicted of a single nonviolent misdemeanor offense is *not* captured by the "unvirtuous citizen" rubric. According to Glenn Harlan Reynolds, "[o]ne implication of this emphasis on the virtuous citizen is that the right to arms does not preclude laws disarming the unvirtuous," and thus "*felons* … were excluded from the right to arms." *Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 480 (1995) (emphasis added). Don B. Kates likewise argues that "there is every reason to believe that the Founding Fathers would have deemed persons convicted of any of the *common-law felonies* not to be among 'the [virtuous] people' to whom they were guaranteeing the right to arms." *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1360 (2009) (emphasis added). "At early common law," however, "the term 'felony' applied only to a few very serious, very dangerous offenses such as murder, rape, arson, and robbery." *Id*. at 1362. Kates thus concludes that "persons convicted of *serious* criminal offenses may be prohibited from possessing guns," *id*., and that "*some* kinds of prior felonious activity"—involving "violence to the person or which endanger[s] persons" or that "though nonviolent, [is] … grossly aberrant to responsible behavior," *id.* at 1363—may form the basis for disarmament. Under this understanding, laws disarming even certain other sorts of "felons" "would seem to be invalid on their face." *Id*. And "judge and professor Thomas Cooley," discussing the right to vote in his "massively popular 1868 Treatise on Constitutional Limitations," *Heller*, 554 U.S. at 616, acknowledged that "the *felon*" is among

the "[c]ertain classes [that] have almost universally been excluded" for want of "the virtue … essential to the proper exercise of the elective franchise." TREATISE ON CONSTITUTIONAL LIMITATIONS 29.

2. The historical understanding and practice of the right of private citizens to carry firearms outside of the home further undermines the argument that a conviction for the simple act of exercising this right can forever strip or diminish a person's Second Amendment rights. Chicago denies that carrying firearms in public was widespread and common at common law or at the time of the country's founding through Reconstruction. *Compare* Pl. Br. 7 *with* Chi. Br. 14-15. The Statute of Northampton, 2 Edw. III c. 3 (1328), was designed "to punish people who go armed *to terrify the King's subjects*." *Sir John Knight's Case*, 3 Mod. 117, 118, 87 Eng. Rep. 75, 76 (K.B. 1686). William Hawkins explained that "no wearing of arms is within the meaning of the statute unless it be accompanied with such circumstances as are apt to terrify the people . . . ." 1 HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN, ch. 63, § 9 (1716). Thus, "persons of quality are in no danger of offending against this statute by wearing common weapons," as it did not cause "the least suspicion of an intention to commit any act of violence or disturbance of the peace." *Id*.

Blackstone wrote: "The offence of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land . . . ." 4 Blackstone, *Commentaries* *148. Carrying common weapons was not.

The Americans incorporated the same elements in their reenactments of the Statute of Northampton. Virginia's Act Forbidding and Punishing Affrays (1786) recited that no man shall "go nor ride armed . . . in terror of the country. . . ." 2 T. JEFFERSON, PAPERS 519 (1951). American courts rejected any application of the Statute as expressing a common-law offense of

merely carrying arms. *Simpson* v. *State*, 13 Tenn. Reports (5 Yerg.) 356 (1833) (citing Blackstone's stipulation that violence which terrifies the people must also be present). Even if such a common-law offense existed, it could not override a constitutional right: "By this clause of the constitution, an express power is given and secured to all the free citizens of the State to keep and bear arms for their defense." *Id*. at 360.

Chicago further claims that "from the founding era to reconstruction, broad prohibitions against the ban of carrying in public were upheld." Chi. Br. 15. Not so. Restrictions on concealed weapons were upheld only because openly carrying firearms was allowed. *State v. Reid*, 1 Ala. Reports 612, 616-17 (1840) ("A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional."); *Nunn* v. *State*, 1 Ga. 243, 251 (1846) ("The right of the whole people, old and young, men, women and boys, . . . to keep and bear arms").

Chicago's claim was true about only one class of persons—African-Americans had no right to bear arms. *State* v. *Newsom*, 27 N.C. 203, 204 (1844), upheld a provision "to prevent free persons of color from carrying fire arms" on the ground that "the free people of color cannot be considered as citizens." Or as (in)famously stated in *Dred Scott* v. *Sanford*, 60 U.S. (19 How.) 393, 417 (1857), freedmen and their descendants could not be considered as citizens, for otherwise they would have the rights "to hold public meetings upon political affairs, and to keep and carry arms wherever they went."

The first state law mentioned in *McDonald* as typical of what the Fourteenth Amendment would invalidate provided that "no freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her

county, shall keep or carry fire-arms of any kind . . . ." 1865 Miss. Laws p. 165, § 1, quoted in *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3038 (2010). "In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." *McDonald*, 130 S.Ct. at 3042.[2]

3. Chicago discounts original understanding, arguing that "the Seventh Circuit has 'already considered and rejected the notion that only exclusions in existence at the time of the Second Amendment's ratification are permitted.' " Def. Response at. 4 (quoting *Yancey*, 621 F.3d at 683). But the point is that because the original understanding establishes the scope of the right to keep and bear arms, an assertion that a certain activity is at "the margins" of the right must be evaluated in light of original understanding. The Court, in other words, must look to the "historical justifications" for "exceptions" to the right to keep and bear arms. *Heller*, 554 U.S. at 635.[3] And as has been shown, the "historical justification" offered by Chicago—that the unvirtuous did not enjoy the right to bear arms—would not have been understood to mean that a person with a single nonviolent misdemeanor conviction had diminished Second Amendment rights—particularly when that conviction was for the simple act of carrying a firearm in public.

4. Chicago cites several Seventh Circuit Second Amendment cases that have applied intermediate scrutiny, but those cases did not purport to establish intermediate scrutiny as the governing standard for all Second Amendment challenges. *See United States v. Skoien*, 614 F.3d

[2] Chicago cites Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 Cleveland L. Rev. No. 1 (2012), without giving any page numbers, for a supposed "historical overview of state laws banning public carry." That work contains no such analysis, and in any case the author believes that "[t]he historical underpinnings of *District of Columbia v. Heller* are not built upon a solid foundation." *Id*. at 3 n.9.

[3] *See* Tr. of Oral Argument at 77, *Heller*, No. 07-290 (Roberts, C.J.) (suggesting that focus should be on "restrictions that existed at the time the Amendment was adopted" and "lineal descendants" of such restrictions).

638, 641-42 (7th Cir. 2010) (en banc) (applying intermediate scrutiny to case at hand but declining to "get more deeply into the 'levels of scrutiny' quagmire"); *Yancey*, 621 F.3d at 683 ("reserv[ing] the question whether a different kind of firearm regulation might require a different approach"); *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010) (examining "claim using the intermediate scrutiny framework without determining that it would be the precise test applicable to all challenges to gun restrictions).

And the propriety of stricter scrutiny here is demonstrated by the heavier burden Chicago places on core activity than the laws challenged in those cases. *Skoien* concerned disarmament of *violent* domestic abusers. 614 F.3d at 640-41.[4] *Williams* concerned application of the federal *felon* disarmament statute to "a *violent* felon." 616 F.3d at 693.[5] And *Yancey* concerned disarmament of "drug abusers," *i.e.*, "habitual criminals" who could "regain" their right to arms "simply by ending [their] drug abuse." 621 F.3d at 685-86.[6]

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[4] *See also United States v. Booker*, 644 F.3d 12, 24-25 (1st Cir. 2011) (recognizing that same ban, "in covering only those with a record of violent crime, … is arguably more consistent with the historical regulation of firearms than [ban on felons possessing firearms], which extends to violent and nonviolent offenders alike"); *United States v. Chester*, CRIM.A. 2:08-00105, 2012 WL 456935, at *8 (S.D. W. Va. Feb. 10, 2012) ("As reflected in both the *Skoien* and *Booker* decisions, this violence requirement is of some moment.").

[5] Indeed, the Court recognized the potential for "an overbreadth challenge at some point because of [the statute's] disqualification of all felons, including those who are non-violent." *Id.*

[6] Although plaintiff does not concede that the cases Chicago cites on this point from other circuits were all correctly decided, they are similarly distinguishable. *See* Chi. Br. 6. n.3; *Heller v. District of Columbia*, 670 F.3d 1244, 1257-58, 1262 (D.C. Cir. 2011) (adopting intermediate scrutiny for review of D.C. gun registration requirements and assault weapons ban because "none of [the registration requirements] prevents an individual from possessing a firearm in his home or elsewhere" and the assault weapons ban likewise did not "prevent a person from keeping a suitable and commonly used weapon for protection in the home"); *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011) (concluding that "a lesser showing [than strict scrutiny] is necessary with respect to laws that burden the right to keep and bear arms *outside* of the home"); *Nordyke v. King*, 644 F.3d 776, 786 & n.9 (9th Cir. 2011) (holding that "regulations which substantially burden the right to keep and to bear arms trigger heightened scrutiny," without deciding what type of heightened scrutiny applies), *en banc rehearing granted*, 664 F.3d 774 (9th Cir. 2011); *United States v. Marzzarella*, 614 F.3d 85, 97-98 (3d Cir. 2010) (applying

Indeed, because Chicago has failed to demonstrate that nonviolent misdemeanants like Gowder have diminished Second Amendment rights, its law banning such persons from obtaining the license necessary to lawfully possess a firearm is flatly unconstitutional. *See Heller*, 554 U.S. at 635 ("Assuming that Heller is not disqualified from the exercise of Second Amendment rights, *the District must permit him to register his handgun and must issue him a license to carry it in the home*."); *Ezell*, 651 F.3d at 703. At the very least, the law imposes "a severe burden on the core Second Amendment right of armed self-defense" and thus demands strict scrutiny. *Ezell*, 651 F.3d at 708.[7]

III. THE BAN FAILS CONSTITUTIONAL SCRUTINY.

Because intermediate scrutiny does not apply, and because Chicago does not even argue that its ban satisfies any form of review more rigorous than intermediate scrutiny, this Court should grant Gowder's motion for summary judgment. Application of intermediate scrutiny leads to the same result.

1. Although Chicago attempts to minimize its evidentiary burden, to satisfy intermediate scrutiny Chicago's showing "must be strong." *Skoien*, 614 F.3d at 641; *see also*

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intermediate scrutiny to ban on possessing firearms with obliterated serial numbers that "are of particular value to those engaged in illicit activity" because the ban "leaves a person free to possess any otherwise lawful firearm he chooses"); *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010) (applying intermediate scrutiny because law disarmed person subject to a court order prohibiting him from threatening or abusing his ex-wife and their children); *United States v. Laurent*, No. 11-CR-322, 2011 WL 6004606, at *25 (E.D.N.Y. Dec. 2, 2011) (applying intermediate scrutiny to firearm restriction on persons under felony indictment because it "only criminalizes shipping, transportation, or receipt of a firearm, not possession," and it "only applies for the limited period between indictment and either acquittal or conviction").

[7] While *Ezell* applied scrutiny more rigorous than intermediate but "not quite strict," *id.*, it certainly did not rule out strict scrutiny in future cases. Indeed, the Court recognized that certain burdens on First Amendment freedoms require strict scrutiny and held that "general principles" distilled from the First Amendment context should govern selection of a level of scrutiny in the Second Amendment context. *Id.* at 707-08. And it is difficult to get more burdensome than flatly banning a class of citizens from possessing firearms in the City.

United States v. Virginia, 518 U.S. 515, 533 (1996) ("The burden of justification is demanding and it rests entirely on the State."). "The government has the burden of demonstrating that its objective is an important one and that its objective is advanced by means substantially related to that objective." *Williams*, 616 F.3d at 692; *see also United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010). Where, as here, Chicago argues that the regulation serves to avert harms, "[i]t must demonstrate that the recited harms are real, not conjectural, and that the regulation will in fact alleviate those harms in a direct and material way." *Turner v. FCC*, 512 U.S. 622, 664 (1994); *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (government cannot rely on "speculation or conjecture"). Chicago "must supply actual, reliable evidence to justify" its restriction, *Ezell*, 651 F.3d at 709, and it cannot "get away with shoddy data or reasoning," *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 426, 438 (2002) (plurality).

Moreover, Chicago's burden is at its zenith because it permanently bans the exercise of protected conduct. Under intermediate scrutiny, the purported "benefits" of a law must "be compared with the detriments." *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 465 (7th Cir. 2009); *see also DiMa v. Town of Hallie*, 185 F.3d 823, 831 (7th Cir. 1999) (explaining that the Court had "no reason to believe that" the challenged regulation amounted to a "significant impairment," and emphasizing that it "would expect a municipality defending a more substantial set of regulations to create a more substantial record in support of summary judgment"). In the First Amendment context, this means that a regulation may "be consistent with the First Amendment if it is likely to cause a *significant* decrease in secondary effects and a *trivial* decrease in the quantity of speech." *Annex Books*, 518 F.3d at 465. (emphasis added, quotation marks omitted). Accordingly in the Second Amendment context, a law that "permanently disarms … require[s] the government to make a heightened evidentiary showing"

that is more "fulsome" than that "necessary to justify" a less restrictive law. *United States v. Carter*, 669 F.3d 411, 418-19 (4th Cir. 2012).

2. Rather than addressing the extensive evidence cited by Gowder and his *amici* regarding the value of keeping a gun in the home for self-defense, Chicago dismisses it as "not relevant." Def. Response at 3. n.1. But given that intermediate scrutiny requires Chicago to make a substantial showing that the benefits of its law are likely to outweigh its costs, evidence of the defensive value of guns cannot be ignored. Indeed, having a gun for protection in the home is particularly important in Chicago where, as the City emphasizes, criminal violence is rampant. *See* Def. Response at 6-7. Because it has ignored this side of the cost-benefit analysis, Chicago simply cannot show that, on balance, its ban is likely to reduce gun violence (or overall violence, which is the more pertinent metric).

3. Furthermore, the data Chicago adduces on the cost side of the equation is far from persuasive. The City principally relies on two studies purporting to find that nonviolent misdemeanants who purchase a handgun are at a higher risk for a future offense than handgun purchasers with no criminal record. *See* Chi. SOF Ex. 6 ("Wintemute Study") & Chi. SOF Ex. 7 ("Wright Study"). But this tells us next to nothing about the likely effect of Chicago's law. To determine whether gun possession is associated with increased criminality by nonviolent misdemeanants (and thus whether banning nonviolent misdemeanants from possessing guns is likely to have any public safety benefit), a study would at a minimum have to compare the outcomes of misdemeanants who possessed a gun with those who did not, in order to assess the efficacy of this ban.[8] At any rate, the studies fail even to establish that a handgun purchaser with

[8] Even then, the study would not establish that banning non-violent misdemeanants from possessing guns would actually deter those inclined to commit criminal violence from obtaining

a single nonviolent misdemeanor conviction is any more likely to commit a criminal offense than the average citizen. Indeed, the Wintemute Study did not address the issue, and the Wright Study found that California handgun purchasers with a single misdemeanor conviction on their record were arrested at a *lower* rate than the general adult population of California. Wright Study at 6, Table 4. The Wright Study did find that the conviction rate was higher for one-time misdemeanants. *See id.* But given the study's finding that "age was inversely associated with absolute risk for all [crime] outcomes," *id.* at 6, this finding is undermined by the fact that the age range of the study sample of misdemeanants is 21-49, while the comparison general adult population encompassed ages 18-69, *see id.* at 6, Table 4; *see also* BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE UNITED STATES, 1980-2008 3, Table 1 (November 2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/htus8008.pdf ("Homicide Trends").[9]

4. Chicago's logic is also faulty. First, citing only *Skoien*, the City argues that nonviolent misdemeanants "often engaged in felonious or violent conduct, but for a variety of reasons they were either charged with a lesser offense or they pled down for purposes of avoiding trial." Def. Response at 9. Whether or not it would be constitutional, at the most this would justify banning gun possession by nonviolent misdemeanants who had in fact engaged in violent behavior. At any rate, *Skoien* concluded that many perpetrators of domestic violence, due to difficulties with prosecuting crimes committed against family members, "end up with no conviction, or a misdemeanor conviction, *when similar violence against a stranger would produce a felony conviction*." *Skoien*, 614 F.3d at 643 (emphasis added). *Skoien* thus

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a firearm. *See* Chi. SOF Ex. 10 at F560 (concluding that "Chicago's handgun ban … was ineffective in reducing the prevalence of gun ownership in the City").

[9] Another study cited in passing by Chicago concludes that "a single past conviction … hardly appears to predict any increased dangerousness" for defendants on release prior to trial. Baradaran, *Predicting Violence*, 90 TEX. L. REV. 497, 530 (2012).

distinguishes domestic abuse from other offenses, undermining Chicago's argument and leaving the City with nothing but its own conjecture to support it.

Second, Chicago points to "general recidivism rates," *i.e.*, that "persons with a history of even a single arrest are, as a group, substantially more likely than persons with no such history to engage in criminal behavior in the future." Def. Response at 9 (quotation marks omitted). To be sure, *Skoien*, *Williams*, and *Yancey* relied on propensity evidence, but in those cases the evidence went to concerns regarding the defendants' own past violent conduct or current irresponsible behavior. *See Skoien*, 614 F.3d at 644 ("No matter how you slice these numbers, people convicted of domestic violence *remain* dangerous to their spouses and partners.") (emphasis added); *Williams*, 616 F.3d at 693 (intermediate scrutiny satisfied by "pointing to Williams' *own violent past*") (emphasis added); *Yancey*, 621 F.3d at 686 ("These studies amply demonstrate the connection between *chronic drug abuse* and violent crime.") (emphasis added). The concern in those cases, in other words, was with the defendants simply continuing in their own past or current bad behavior.

Here, by contrast, Chicago relies on the Wright and Wintemute studies not out of concern that a nonviolent misdemeanant will once again commit a nonviolent offense, but rather that he will commit a *different* type of offense in the future, *i.e.*, a violent one. If Chicago's reasoning is correct, under intermediate scrutiny the City could justify disarming any person with a demographic characteristic that a study or two finds is associated with a likelihood of violent criminal behavior. A person who had been arrested but not convicted of any wrongdoing could be disarmed. Gun ownership could be reserved to those over, say, 34. *See* Wintemute Study at 4, Table 2 (finding that 35-49-year-old handgun purchasers with no criminal history were roughly 10 and 30 times less likely to be convicted of a felony or violent misdemeanor than their

25-34-year-old and 21-24-year-old counterparts, respectively). Men could be prohibited from owning weapons. *See* Homicide Trends at 3, Table 1 (from 1980-2008, 89.5% of murderers were male). Regardless of whether the use of propensity evidence in *Skoien, Williams*, and *Yancey* was proper, extending such use in this manner surely amounts to forbidden reliance upon "statistically measured but loose-fitting generalities." *Craig v. Boren*, 429 U.S. 190, 209 (1976).

5. Chicago additionally claims that Gowder's offense of carrying a firearm in public "put the public at grave risk." Def. Response at 13. But Dr. Philip Cook, one of the researchers Chicago relies on for this point, conceded in the wake of *Heller* that "the issue of public carry standing alone seems more likely to be a source of litigation than a serious threat to social welfare." Philip J. Cook, et al., *Gun Control After Heller*, 56 U.C.L.A. L. REV. 1041, 1083 (2009). Indeed, the late James Q. Wilson concluded that "the best evidence we have is that [right-to-carry laws] impose no costs but may confer benefits" by "help[ing] drive down the murder rate." Dissent by James Q. Wilson at 270-71, *in* NATIONAL RESEARCH COUNCIL, FIREARMS AND VIOLENCE (Wellford, et al., eds. 2004).[10] *See also* Response to Chi. Add'l Facts 7-9.

This conclusion is consistent with research demonstrating that "[c]arrying guns in public places is common in the United States, is primarily done for protection, and is rarely done for the purposes of committing a violent crime." Gary Kleck & Marc Gertz, *Carrying Guns for Protection*, 35 J. RESEARCH IN CRIME & DELINQUENCY 193, 218 (1998). The data "impl[ies] that less than one in a thousand instances of gun carrying involve a violent crime committed with a gun," *id*. at 210, and that guns carried in public places are used hundreds of thousands of times a

[10] The report from which Wilson dissented also does not help Chicago, for it concluded that the data was insufficient to draw a firm judgment, not that right-to-carry laws harm public safety. *See id.* at 7 ("The evidence to date does not adequately indicate either the sign or the magnitude of a causal link between the passage of right-to-carry laws and crime rates.").

year to thwart crimes, *id.* at 195. Such defensive gun use is effective, as "gun-wielding victims are less likely to be injured, lose property, or otherwise have crimes completed against them than victims who either do nothing to resist or who resist without weapons." *Id* at 194.; *see also* Gary Kleck & Marc Gertz, *Armed Resistance to Crime*, 86 J. CRIM. L. & CRIMINOLOGY 150, 180-81 (1995). Gun carrying by civilians also deters crime by making criminals less likely even to attempt an attack. *See, e.g.*, Lawrence Southwick, Jr., *Guns and Justifiable Homicide: Deterrence and Defense*, 18 ST. LOUIS U. PUB. L. REV. 217 (1999) (concluding that "[s]omewhere around 0.8 to 2.0 million violent crimes are deterred each year because of gun ownership and use by civilians"); J. WRIGHT & P. ROSSI, ARMED AND CONSIDERED DANGEROUS 146-47 (2nd ed. 2008) (56% of convicted felons agreed or strongly agreed that "[a] criminal is not going to mess around with a victim he knows is armed with a gun"; 39% "had at some time in their lives decided not to do a crime because they 'knew or believed the victim was carrying a gun' ").

In short, the simple act of carrying a gun does not "put the public at grave risk."

Conclusion

Chicago has failed to meet its burden of demonstrating that MCC § 8-20-110(b)(3)(iii) is a constitutionally permissible infringement on the fundamental right to keep and bear arms under the Second Amendment. For the reasons stated and based upon the authorities cited herein and in plaintiff's motion for summary judgment and supporting memorandum, and in plaintiff's LR 56.1 statement and response to defendants' 56.1 statement, plaintiff is entitled to judgment as a matter of law. Plaintiff respectfully prays that the Court enter summary judgment in his favor and against defendants on all counts of plaintiff's amended complaint, grant plaintiff the relief prayed for in his motion for summary judgment, and grant plaintiff such other and further relief

as may be appropriate, including but not limited to costs of suit and reasonable attorney's fees pursuant to 42 U.S.C. § 1988.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephen A. Kolodziej, an attorney, hereby certify that on May 21, 2012, service of the foregoing is being made in accordance with the General Order on Electronic Case Filing section XI to the following:

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