Nos. 12-1269 & 12-1788

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MICHAEL MOORE, *et al.*,
APPELLANTS,

v.

LISA MADIGAN, *et al.*,
APPELLEES.

MARY E. SHEPARD, *et al.*,
APPELLANTS,

v.

LISA MADIGAN, *et al.*,
APPELLEES.

ON APPEAL FROM JUDGMENTS OF THE UNITED STATES DISTRICT COURTS
FOR THE CENTRAL AND SOUTHERN DISTRICTS OF ILLINOIS

BRIEF FOR THE DISTRICT OF COLUMBIA AS AMICUS CURIAE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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STATEMENT OF INTEREST

The District of Columbia agrees with the State of Illinois that its challenged laws are fully constitutional. The laws do not regulate conduct within the scope of the Second Amendment and may be sustained on that ground alone. The laws also satisfy means-end scrutiny. Should this Court reach the issue, the District files this amicus brief to provide the Court with additional explanation why the level of scrutiny it applies to the laws at issue should be highly deferential to the legislature. The District has a strong interest in establishing that courts considering Second Amendment claims defer to legislatures' views on how best to regulate firearms. The District has a particular interest in this case because its statutes regulating the carrying of firearms resemble the challenged Illinois laws in many respects. *See* D.C. Code §§ 22-4504, 22-4504.01, 22-4504.02, 22-4505.

The District is authorized to file this brief as amicus curiae under Federal Rules of Appellate Procedure 1(b) and 29(a).

ARGUMENT

Assuming the challenged laws even fall within the Second Amendment's scope, nothing like strict scrutiny should apply here. Courts should apply strict scrutiny only where it is truly warranted. The test sharply limits the discretion of the political branches, and immoderate application could lead judges to dilute the test, thereby imperiling cherished civil liberties properly associated with strict scrutiny. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978).

As the Supreme Court has done in other contexts, this Court in identifying a level of scrutiny should look to the nature of the right, the reason why the Framers chose to protect

the right in the Constitution, and the extent to which the challenged laws burden the ends the right was meant to protect. Considering these factors, the Court should not apply strict scrutiny or anything approaching strict scrutiny here. That conclusion is not, as appellants suggest, inconsistent with normal constitutional principles. Far from it. Instead, the neutral application of those principles requires application of the reasonable-regulation test that state courts apply or, failing that, intermediate scrutiny. That is so even though the right at issue is fundamental, for three reasons. *First*, the pre-existing right the Second Amendment codified has always been subject to broad regulation, consistent with the Framers' ideal of ordered liberty. *Second*, the laws at issue have nothing to do with the Amendment's purpose for codification, which was to prevent legislation that would eliminate the militia. *Third*, the laws at issue do not meaningfully burden either militia-related conduct or self-defense in the home.

I. Normal Constitutional Principles Require Deference To Legislatures On Issues Like Those Posed Here And Do Not Call For The Application Of Strict Scrutiny Or Anything Approaching Strict Scrutiny.

A. Recognition that the right is fundamental marks the beginning of the inquiry, not the end.

Only a minority of enumerated rights—even those deemed fundamental—triggers strict scrutiny. Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 693-700 (2007). Thus, although the enumerated right the Second Amendment protects is fundamental, *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036-42 (2010), all the Circuits and most of the district courts that have chosen a level of scrutiny for particular Second Amendment claims have rejected strict scrutiny. *E.g.*, *Heller v. District of Columbia*, 670

F.3d 1244, 1256-58 (D.C. Cir. 2011); *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010); *cf. United States v. Darrington*, 351 F.3d 632, 635 (5th Cir. 2003) (clarifying that *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), did not adopt strict scrutiny). The Third Circuit explained: "the right to free speech, an undeniably enumerated fundamental right, is susceptible to several standards of scrutiny, depending upon the type of law challenged and the type of speech at issue. We see no reason why the Second Amendment would be any different." *Marzzarella*, 614 F.3d at 96-97 (citation omitted); *see* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1445-47 (2009).

The Court thus should reject any suggestion that strict scrutiny inexorably applies whenever a fundamental right is involved. Brief of Appellants Mary Shepard *et al.* 48-50. If that were so and if *District of Columbia v. Heller*, 554 U.S. 570 (2008), itself made clear that the Second Amendment right is fundamental, as *McDonald* suggests, 130 S. Ct. at 3036, the *Heller* Court would have had no reason to refuse to adopt strict scrutiny. It not only expressly declined to identify an appropriate level of scrutiny, but presented a list of presumptively lawful measures that appears inconsistent with strict scrutiny. 554 U.S. at 626-27 & n.26, 628-35; *id.* at 688 (Breyer, J., dissenting); Brief of Appellees Lisa Madigan *et al.* ("Illinois Br.") 35. The meaningful question is thus not whether the right the Second Amendment protects is fundamental, but instead: why do fundamental rights trigger strict scrutiny in some contexts, but not others?

B. Nothing like strict scrutiny ever should apply to Second Amendment claims because the pre-existing right the Amendment codified has always been subject to comprehensive regulation, consistent with the Framers' ideal of ordered liberty.

Much as strict scrutiny does not apply to laws regulating commercial speech because this area is "traditionally subject to government regulation," *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-63 (1980), to voting laws because the "government must play an active role in structuring elections," *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992), and to laws regulating some conduct of juveniles because their characteristics "warrant increased state oversight," *Hutchins v. District of Columbia*, 188 F.3d 531, 541 (D.C. Cir. 1999) (*en banc*), strict scrutiny does not apply to gun laws. The Framers could not have intended anything like strict scrutiny to apply given their acceptance of comprehensive regulation of guns and their ideal of ordered liberty.

Adopting strict scrutiny with its presumption of unconstitutionality, *see San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973), would improperly make the right broader than it was when the Second Amendment was adopted. The Bill of Rights "did not create by implication novel individual rights overturning accepted political norms." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95-96 (1990) (Scalia, J., dissenting); *see Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897). In codifying the "*pre-existing*" right in the Second Amendment, *Heller*, 554 U.S. at 592, the Framers intended to accept existing "restrictions at common law," *Parker v. District of Columbia*, 478 F.3d 370, 399 (D.C. Cir. 2007), *aff'd sub nom. District of Columbia v. Heller*, 554 U.S. 570 (2008).

"Throughout our history," governments exercising police power have had "great latitude" to protect their citizens' lives and safety. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (2006). That great latitude undisputedly has encompassed gun laws. Broad regulation of guns was commonplace in early England and has been throughout American history. *See* Saul Cornell *et al.*, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 502-16 (2004); Lois Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 Chi.-Kent L. Rev. 27, 35-36 (2000); Illinois Br. 8-14. For instance, the 1689 English Declaration of Rights—"the predecessor to our Second Amendment"—allowed only Protestants to have "arms for their defense," and only those "suitable to their conditions," "as allowed by law." *Heller*, 554 U.S. at 593. This right was subject to "due restrictions" and "necessary restraints." 1 William Blackstone, *Commentaries on the Laws of England* 139-40 (1769). Unsurprisingly, then, "[h]undreds of individual statutes regulated the possession and use of guns in colonial and early national America." Robert Churchill, *Gun Regulation, the Police Power and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 Law & Hist. Rev. 139, 143 (2007). These included laws restricting gun ownership to those who took loyalty oaths, door-to-door gun censuses, detailed gun ownership requirements for those serving in militias, bans on firing guns in Boston, Philadelphia, and New York City, and much more. *Id.* at 161-65; Illinois Br. 13-14. Gun regulation increased after the Founding, and today all fifty states and the District regulate guns. Cornell, *supra*, at 512-16. There has never been "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626.

Strict scrutiny would be inconsistent with not only this tradition, but also our Framers' ideal of *ordered* liberty rather than absolute liberty. *McDonald*, 130 S. Ct. at 3032. "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses." *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941). Even the First Amendment allows prohibition of some speech directed to inciting crime, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (*per curiam*), and guns have a "unique potential to facilitate death and destruction and thereby to destabilize ordered liberty," *McDonald*, 130 S. Ct. at 3108 (Stevens, J., dissenting). As history shows, the Framers understood as much.

There remains today both general consensus and strong empirical support for the principle that guns must be regulated. David Hemenway, *Private Guns, Public Health* 161-65 (2004). Given that legislatures are better equipped than courts to make empirical judgments, *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 195-96 (1997), that the question of which gun regulations work well is hotly debated but essentially incapable of proof based on empirical studies available today, Volokh, *supra*, at 1465-67; Winkler, *supra*, at 731, and that jurisdictions with different conditions need different gun laws, *McDonald*, 130 S. Ct. at 3046 (plurality op.), strict scrutiny would be unwarranted and impractical.

That strict scrutiny would be inconsistent with the Framers' intent also follows from the Second Amendment's text. *First,* it begins by referring to a "well regulated" militia. Although that may "impl[y] nothing more than the imposition of proper discipline and training," *Heller*, 554 U.S. at 597, the militia laws enacted before the Second Amendment's adoption make clear the Framers' understanding that the *government* would be providing

discipline and training through regulation: the militia was "[a] body of citizens *enrolled* for military discipline." *United States v. Miller*, 307 U.S. 174, 179, 182 (1939) (emphasis added); *see Parker*, 478 F.3d at 388-89 (discussing enrollment). By contrast, the First Amendment begins: "Congress shall make no law . . . ."

Second, the Amendment declares that the right shall not be "infringed." That word does not appear elsewhere in the Constitution. The First Amendment by contrast prevents Congress from "abridging" certain freedoms. Early American dictionaries cited favorably in *Heller*, 554 U.S. at 581, indicate that the two terms are different, with the word "abridge" suggesting a more stringent test than "infringe." "Abridge" meant to "contract," "lessen," or "diminish"—it would mean to "deprive of" *only* if followed by "from" or "of"—while "infringe" meant to "break," "violate," "destroy," or "hinder." Samuel Johnson, *A Dictionary of the English Language* (4th ed. 1777); Noah Webster, *An American Dictionary of the English Language* (1828). Such "use of two different terms is presumed to be intentional." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 172 (D.C. Cir. 1982). Indeed, the drafting history supports that conclusion: the Senate deliberately changed the word "infringed" in a House precursor of the First Amendment to "abridged" on the same day it substantially rewrote a House precursor of the Second Amendment but left the word "infringed." *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 85-86, 173-74 (Neil Cogan ed., 1997). The Court should conclude that the Framers intended to leave more room for regulation under the Second Amendment than under the First. Strict scrutiny is never the appropriate test under the Second Amendment.

C. Nothing like strict scrutiny should apply here because the laws at issue have nothing to do with the Amendment's purpose for codification, which was to prevent legislation that would eliminate the militia.

The challenged laws do not warrant strict scrutiny for the additional reason that they have nothing to do with why the Framers adopted the Second Amendment. "[T]he threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason th[e] right . . . was codified in a written Constitution." *Heller*, 554 U.S. at 599. Although self-defense in the home is the "central component" of the right, "prevent[ing] elimination of the militia" was "the purpose for which the right was codified." *Id.* (emphasis omitted). When a law does not affect that purpose, lesser scrutiny should apply.

Accounting for the purpose of codification honors the Framers' choice to include the Amendment's prefatory clause, which is "unique in our Constitution." *Id.* at 577. That clause does "not limit or expand the scope of the operative clause," *id.* at 578, but knowledge of the Framers' purpose is relevant to what level of scrutiny applies to particular laws that affect conduct that falls within the operative clause's scope. The *entire* Amendment was adopted "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces" and "must be interpreted and applied with that end in view." *Miller*, 307 U.S. at 178; *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect . . . .").

Applying lesser scrutiny to laws that do not implicate the Amendment's militia-related purpose comports not only with the history of comprehensive gun regulation, but also with Supreme Court precedent in other contexts. When the Court devised the strict scrutiny

test for race-based classifications, it did so based on "the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964); *see Slaughterhouse Cases*, 83 U.S. 36, 81 (1873). Certain other classifications that implicate the Equal Protection Clause but not the purpose of codification do not trigger such exacting review. *E.g.*, *Heller v. Doe*, 509 U.S. 312, 319-20 (1993) (rational-basis review for certain non-suspect classifications); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (intermediate scrutiny for legitimacy-based classifications); *Craig v. Boren*, 429 U.S. 190, 197-98 (1976) (same for gender-based classifications).

The Supreme Court also has looked to the purpose of a right's codification when determining a level of scrutiny under the First Amendment. In considering laws restricting distribution of pamphlets or leaflets—which function like other content-neutral restrictions warranting only intermediate review, *see Kovacs v. Cooper*, 336 U.S. 77, 86-89 (1949)—the Court has applied exacting scrutiny in part because the Framers codified speech and press rights with this very activity in mind. *Schneider v. State*, 308 U.S. 147, 161-64 (1939); *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938).

Any interpretation of the Second Amendment similarly should consider the reason for its codification. Lesser scrutiny thus should apply to the laws at issue because there is not even a suggestion that they interfere with any militia.

D. Nothing like strict scrutiny should apply here because the laws at issue do not meaningfully burden either militia-related conduct or self-defense in the home.

The right to keep and bear arms is not an "intrinsic" right, valued for its own sake, but "instrumental"—a means to the ends of protecting the militia and enabling self-defense in the home. Illinois Br. 5-34; *McDonald*, 130 S. Ct. at 3047-48 (plurality op.). That does not render the right an anomaly, or non-fundamental. "[Q]uite a few of the rights previously held to be incorporated—for example the right to counsel and the right to confront and subpoena witnesses—are clearly instrumental by any measure." *McDonald*, 130 S. Ct. at 3047-48 (plurality op.). Strict scrutiny should apply, however, only to those restrictions on instrumental rights that substantially burden the "end" the constitutional provision was designed to protect. This Court should apply lesser scrutiny here (assuming the challenged laws even fall within the Second Amendment's scope) because the laws at issue do not meaningfully burden either militia-related conduct or self-defense in the home. *See Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011).

While regulation of arms should be accorded more deference than regulation of speech, support for this approach exists in First Amendment jurisprudence. Speech restrictions that implicate individual freedom of thought and expression by "suppress[ing], disadvantag[ing], or impos[ing] differential burdens upon speech because of its content" receive "the most exacting scrutiny." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641-42 (1994). Speech restrictions that do not implicate this "end"—in particular, content-neutral restrictions—receive lesser scrutiny "because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Id.*; *e.g.*, *Ward v. Rock*

Against Racism, 491 U.S. 781, 791 (1989); *see* Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. Ill. L. Rev. 783, 786-800 (2007). Similarly, more exacting scrutiny applies to limitations on election-related expenditures than to limitations on contributions because the former "impose far greater restrains on the freedom of speech and association." *Buckley v. Valeo*, 424 U.S. 1, 14-23, 44-45 (1976) (*per curiam*).

Sixth Amendment jurisprudence is also instructive. The right to counsel is also instrumental rather than intrinsic, with the "end" being a fair trial. *McDonald*, 130 S. Ct. at 3048 (plurality op.); *Strickland v. Washington*, 466 U.S. 668, 685 (1984). The right does not entail strict scrutiny. Rather, "taking its purpose—to ensure a fair trial—as the guide," the Court has held that "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* at 686, 689. Similarly, given the Framers' purposes in adopting the Second Amendment, deferential review rather than anything approaching strict scrutiny is appropriate here.

E. This Court should apply the deferential reasonable-regulation test, and failing that no test less deferential than intermediate scrutiny.

Consistent with this analysis, the most stringent standard that the Court should apply is intermediate scrutiny. But, like the State of Illinois, the District believes it would be more appropriate to apply the deferential reasonable-regulation test. Illinois Br. 40-42. That test is applied uniformly by state courts construing state constitutional arms provisions, none of which has adopted strict scrutiny. *Mosby v. Devine*, 851 A.2d 1031, 1044 (R.I. 2004); Volokh, *supra*, at 1458; Winkler, *supra*, at 686-87. The "experience of state courts" is generally informative in interpreting the federal Constitution. *Bartkus v. Illinois*, 359 U.S.

121, 134 (1959). That experience is especially informative in this context. Most gun regulation has occurred at the state level, and states have long experience in construing their own arms provisions to allow reasonable regulation, *e.g.*, *State v. Reid*, 1 Ala. 612, 616-17 (1840), whereas *Heller* was the Supreme Court's "first in-depth examination of the Second Amendment," 554 U.S. at 635. Further, given that the right now applies against the states, *McDonald*, 130 S. Ct. at 3026, adoption of the reasonable-regulation test would minimize disruption of longstanding state practices.

Under the reasonable-regulation test, the government may not prohibit firearm ownership, but "may regulate the exercise of th[e] right . . . so long as the exercise of that power is reasonable." *Robertson v. City & County of Denver*, 874 P.2d 325, 328 (Colo. 1994) (*en banc*). The test is deferential, but is violated by laws that "eviscerate[]" the right or render it "nugatory." *State v. Hamdan*, 665 N.W.2d 785, 799 (Wis. 2003); *Trinen v. City of Denver*, 53 P.3d 754, 757 (Colo. Ct. App. 2002). It is more rigorous than rational-basis review in four ways: first, the standard is stricter—"reasonable" as opposed to "rational"; second, the reasonable-regulation test looks to the extent of the burden on protected conduct; third, a court should consider the legislature's actual purpose rather than any legitimate purpose that may be conceived; and fourth, no matter what the legislature's purpose is and how reasonable it may seem, the right leaves a core of protected conduct inviolate. *See* Winkler, *supra*, at 716-18; Volokh, *supra*, at 1458.

Courts that have rejected application of the reasonable-regulation test based on the notion that it is more lenient than what *Heller* envisioned have erred. The *Heller* Court left the level of scrutiny open so that lower courts could decide what level makes sense in

particular contexts. The reasonable-regulation test makes sense under the Second Amendment because the nation has long accepted comprehensive gun regulation, and in this context in particular because the laws do not meaningfully burden militia-related conduct or self-defense in the home.

Application of the reasonable-regulation test (and, for that matter, intermediate scrutiny) is also consistent with *Heller*'s rejection of an "interest-balancing" approach suggested by Justice Breyer. The Court was considering an entirely different type of law—a handgun ban—that violated the core "right of law-abiding, responsible citizens to use arms in defense of hearth and home," and it thought Justice Breyer would have eviscerated that right. 554 U.S. at 634-35. The Court rejected application of an interest-balancing test in those circumstances: "We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach." *Id.* It did not suggest, however, that balancing tests would be inappropriate when matters outside the "core" were at issue, or where the test could not be applied to eviscerate the right. Nor would that be sensible given that balancing tests are commonplace in constitutional law. *E.g.*, *Burdick*, 504 U.S. at 433-34; *Mathews v. Eldridge*, 424 U.S. 319, 339-49 (1976).

If anything, *Heller* provides support for a reasonable-regulation test. It makes clear that the fear of disarmament was a key motivation of the Second Amendment. 554 U.S. at 594-95, 598-99; *see id.* at 607 (quoting 1825 commentator's view that Second Amendment prevented Congress from "disarm[ing] the people"). Laws like those at issue do not approach disarmament. They thus deserve the great deference applied under the reasonable-regulation test.

CONCLUSION

The Court should affirm the judgments below.

Respectfully submitted,

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May 2012

CERTIFICATE OF SERVICE

I certify that on May 16, 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/ Todd S. Kim
TODD S. KIM

CERTIFICATE OF COMPLIANCE

I further certify that this brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 3676 words, excluding exempted parts. This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6), as modified by Circuit Rule 32(b), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 13 point.

/s/ Todd S. Kim
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