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

SHAWN GOWDER	)	
	)	
	)	
Plaintiff,	)	
v.	)	
	)	
	)	**CASE NO. 11-CV-1304**
CITY OF CHICAGO, a municipal corporation, the CITY OF CHICAGO DEPARTMENT OF ADMINISTRATIVE HEARINGS, MUNICIPAL HEARINGS DIVISION, SCOTT V. BRUNER, Director of the City of Chicago Department of Administrative Hearings, the CITY OF CHICAGO DEPARTMENT OF POLICE, and JODY P. WEIS, Superintendent of the City of Chicago Department of Police	)	
	)	
Defendants.	)	

DEFENDANTS' UNOPPOSED MOTION FOR LEAVE
TO FILE BRIEF IN EXCESS OF FIFTEEN PAGES

Defendants City of Chicago (the "City"), City of Chicago Department of Administrative Hearings ("DOAH"), Scott Bruner ("Bruner"), Chicago Police Department ("CPD"), and Jody P. Weis ("Weis"), by and through their attorney, Stephen R. Patton, Corporation Counsel for the City of Chicago, hereby move this Court to permit them to file a memorandum of law that exceeds the fifteen page limit by four pages. In support of this motion, Defendants state as follows:

1. Pursuant to Local Rule 7.1 Defendants' memorandum in response to Plaintiff's motion for summary judgment is not to exceed fifteen pages, unless leave of court is granted to file

a longer brief.

2. Plaintiff's memorandum of law, filed on March 19, 2012, asserts numerous, lengthy legal and historical arguments.

3. Defendants worked hard to condense their reply into the fifteen-page limitation. However, in order to adequately address all of the issues raised in Plaintiff's motion, Defendants required four additional pages for their memorandum.

4. Counsel for Defendants conferred with counsel for Plaintiff, who stated that Plaintiff has no objection to this request.

5. Accordingly, Defendants hereby request leave to file a nineteen (19) page memorandum in opposition to Plaintiff's motion for summary judgment, a copy of which is attached hereto as Exhibit E.

WHEREFORE, Defendants request the entry of an order granting this motion for leave to file a memorandum in excess of the page limit.

Respectfully Submitted,

STEPHEN R. PATTON
CORPORATION COUNSEL
CITY OF CHICAGO

BY: /s/ Rebecca Alfert Hirsch

Michael A. Forti
Mardell Nereim
William M. Aguiar
Rebecca Alfert Hirsch
Andrew W. Worseck
Assistant Corporation Counsel

30 N. LaSalle Street, Suite 1230
Chicago, IL 60602
(312)744-9018/2-0260

Dated: April 30, 2012

CERTIFICATE OF SERVICE

The undersigned, an attorney of record for the Defendants, hereby certifies that on April 30, 2012 she served a copy of the foregoing **Defendants' Motion For Leave to File Brief In Excess of Fifteen Pages** on counsel of record listed below by electronic means pursuant to Electronic Case Filing (ECF):

Stephen Kolodziej
Ford & Britton, P.C.
33 N. Dearborn Street, Suite 300
Chicago, IL 60602

/s/ Rebecca Alfert Hirsch

EXHIBIT A

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

SHAWN GOWDER	)	
	)	
	)	
Plaintiff,	)	
v.	)	
	)	
	)	**CASE NO. 11-CV-1304**
CITY OF CHICAGO, a municipal corporation, the CITY OF CHICAGO DEPARTMENT OF ADMINISTRATIVE HEARINGS, MUNICIPAL HEARINGS DIVISION, SCOTT V. BRUNER, Director of the City of Chicago Department of Administrative Hearings, the CITY OF CHICAGO DEPARTMENT OF POLICE, and JODY P. WEIS, Superintendent of the City of Chicago Department of Police	)	
	)	
	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Michael A. Forti
Mardell Nereim
Andrew W. Worseck
William Macy Aguiar
Rebecca Alfert Hirsch
City of Chicago, Department of Law
Constitutional and Commercial Litigation Division
30 North LaSalle Street, Suite 1230
Chicago, Illinois 60602
(312) 742-0260

Attorneys for Defendants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

The City's Responsible Gun Ownership Ordinance (the "Ordinance"), § 8-20-110(b)(3)(iii), prohibits criminals like Plaintiff, who have been convicted of unlawful use of firearms, from obtaining a Chicago Firearms Permit ("CFP"), and thus from legally possessing firearms within the City. The Supreme Court has recognized, and the Seventh Circuit has upheld, similar categorical exclusions of risky individuals - including those with criminal convictions, habitual drug users, or the mentally incapacitated – because they are not the "law-abiding, responsible citizens" identified in *Heller* who enjoy the full benefit of the Second Amendment. By choosing to flout the City's long-established gun laws and put the public's safety at risk, Plaintiff has shown that he is neither law-abiding nor responsible, and thus can be prohibited from gun ownership.

Moreover, it is immaterial that Plaintiff's unlawful use conviction was for a misdemeanor rather than a felony. In *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (*en banc*), the Seventh Circuit upheld a categorical ban on weapons possession by domestic violence misdemeanants because the regulation was substantially related to an important governmental purpose. Section 8-20-110(b)(3)(iii) is substantially related to the City's important goal of reducing gun violence because there is credible, empirical data showing that misdemeanants – even nonviolent ones – are at a higher risk for committing future, violent crimes. Accordingly, § 8-20-110(b)(3)(iii) is both constitutional on its face, and as-applied to Plaintiff. The Court should deny Plaintiff's Motion and, instead, grant judgment in favor of the City.

ARGUMENT

I. Intermediate Scrutiny Applies To The Ordinance.

In declaring the Second Amendment right of "law-abiding, responsible citizens to use arms

in defense of hearth and home," *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), the Supreme Court importantly recognized that the right was not absolute. "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill," or other "presumptively lawful regulatory measures." *Id.* at 627 & n.26. *See also McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010) ("We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill.'").

Plaintiff correctly notes that under *Ezell v. City of Chicago*, 651 F.3d 684, 701 (7th Cir. 2011), Second Amendment claims entail a two-step inquiry. First, the court must determine whether the regulated activity is covered by the "scope" of the Amendment. *Id.* If the activity falls outside the scope, "the analysis can stop there; the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review." *Id.* at 703. If the scope covers the activity, the court then must determine whether the regulation satisfies means-end scrutiny. This requires "select[ion of] an appropriate standard of review." *Id.* at 706. *Heller* did not establish a standard, although it rejected rational basis. *See* 554 U.S. at 629, n.27. The Seventh Circuit has since held that there is no one-size-fits-all approach, and the standard in a given case depends on a sliding scale: "a severe burden" on the core Second Amendment right of armed self-defense "will require an extremely strong public-interest justification and a close fit between the government's means and its end." *Ezell*, 651 F.3d at 708. On the other hand, "laws restricting activity lying closer to the margins" of the right, "laws that merely regulate rather than restrict," and "modest burdens" on the right "may be more easily justified. How much more easily depends on the relative severity of the burden and its proximity to the core of the right." *Id.*

The City does not disagree with Plaintiff that the ability to possess a firearm within one's home for self-defense lies at the core of the Second Amendment.[1] Nor does the City take issue with Plaintiff's assertion that, by prohibiting him from lawfully owning a firearm within his home, the Ordinance affects this core Second Amendment right. Plaintiff, however, stops the inquiry here and concludes that, because it denies him this core right, the Ordinance is either "categorically unconstitutional, or, at a minimum, subject to strict scrutiny." Plf. Mem., p. 3.

Plaintiff's analysis ignores the consistent and ever-expanding line of cases, however, upholding prohibitions on gun possession by certain categories of individuals – even within their home, and even for purposes of self-defense – based on prior behavior. In such cases, intermediate scrutiny applies. *See, e.g., United States v. Yancey*, 621 F.3d 681, 683 (7th Cir. 2010) (per curiam) (intermediate scrutiny applied to ban on gun possession by users of controlled substances); *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010) (intermediate scrutiny applied to prohibition on felons possessing firearms); *Skoien*, 614 F.3d 641 (intermediate scrutiny applied to prohibition on individuals convicted of misdemeanor crime of domestic violence). These cases recognize that the "core" right only extends to "law-abiding, responsible citizens," *Heller,* 554 U.S. at 635; thus, individuals (like Plaintiff) with past criminal convictions, or those displaying other risky behavior such as drug addiction, are not entitled to the full strength of the right. *See Ezell*, 651 F.3d at 708 ("Intermediate scrutiny was appropriate in *Skoien* because the claim was not made by a 'law abiding, responsible citizen.'"). *See also United States v. Carter*, 669 F.3d 411, 415 (4th Cir. 2012) ("The

---

[1] Plaintiff devotes a good deal of time briefing this noncontroversial issue which has already been settled by *Heller* and *McDonald*. Likewise, the *Brief of Amici Curiae Mary Shepard and the Illinois State Rifle Association* filed in support of Plaintiff focuses exclusively on the purported benefits of keeping guns within one's home for self-defense. As such, it is not relevant to the issues before the Court.

weight of right to keep and bear arms depends not only on the purpose for which it is exercised but also on relevant characteristics of the person invoking the right. . ."); *United States v. Chester*, - - F. Supp.2d - - , 2012 WL 456935, *6, n. 4 (S.D.W.V. Feb. 10, 2012) (plaintiff's prior conviction "diminished the vitality of [his] Second Amendment privilege, moving him away from the protection found at the core").

The outcome does not change merely because § 8-20-110(b)(3)(iii) applies to all criminal convictions for illegal use of firearms, including misdemeanors. The government "is not limited to case-by-case exclusions of persons who have been shown to be untrustworthy with weapons. . ." *Skoien*, 614 F.3d at 641. Surely persons who have knowingly chosen to violate the State's long-established gun laws have been shown to be untrustworthy with weapons. And even though *"Heller* singled out felons," this does not "cut[] against a finding that misdemeanants lack Second Amendment rights." Plf. Mem., p. 4. Rather, the Supreme Court admonished that "[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Heller*, 554 U.S. at 627 n. 26. As discussed above, bans on possession by nonfelons, such as domestic violence misdemeanants and illegal drug users, have already been upheld. *See Skoien*, 614 F.3d at 641; *Yancey*, 621 F.3d at 683.

Nor is it true, as Plaintiff argues, that only longstanding historical exclusions directed at conduct involving violence can be presumed constitutional. Plf. Mem., p. 4. First, 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." *Yancey*, 621 F.3d at 683 (recognizing that Congress did not bar mentally ill or drug users from possessing guns until 1968). And *Heller*'s "law-abiding, responsible" requirement necessarily excludes a wider range of criminals and persons

engaging in risky behavior than solely those who are violent. Subsequent courts recognize that:

> Whatever the pedigree of the rule against even nonviolent felons possessing weapons . . . 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.' . . .

Yancey, 621 F.3d at 685, quoting *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010). True, *Skoien* relied in part on the fact that a finding of real or threatened violence was necessary to a domestic violence conviction, but it also recognized that many nonviolent criminals could be categorically excluded from gun possession. *See Skoien*, 614 F.3d at 640 (noting that felons like embezzlers and tax evaders are nonviolent but still disqualified from possession); *Yancey,* 621 F.3d at 685 ("As we've explained in a different context, most felons are nonviolent, but someone with a felony conviction in his record is more likely than a nonfelon to engage in illegal and violent gun use."). *See also People v. Hughes*, 83 A.2d. 960, 962, 921 N.Y.S.2d 300 (2d Dept., April 19, 2011) (statutory scheme banning firearm possession by persons convicted of 'any crime," including *any* misdemeanor, did not violate Second Amendment). Likewise, someone who has engaged in the risky behavior of flouting gun laws, even if the underlying crime did not involve violence, is more likely to commit a violent offense in the future. *See* Section II(B), *infra*.

Accordingly, by knowingly violating the state's gun laws, Plaintiff can no longer claim the full benefit of the core protection of the Second Amendment enjoyed by law-abiding citizens. For this reason, the Court should reject Plaintiff's invitation to find the Ordinance "categorically unconstitutional," like the ban in *Heller*, or subject to "strict scrutiny," like *Ezell*.[2] Plf. Mem., p. 7. Both of those cases involved prohibitory laws that applied broadly to *all* of the general public. *See*

---

[2] Contrary to Plaintiff's assertion, *Ezell* did not apply strict scrutiny; it stated that something "more rigorous" than *Skoien* should be required, but "not quite strict scrutiny." *Ezell*, 651 F.3d at 708.

Heller, 554 U.S. at 625 (prohibiting possession of handguns for all residents); *Ezell*, 651 F.3d at 709 (ban on firing ranges within City limits prohibited "'law-abiding, responsible citizens' of Chicago from engaging in target practice," while simultaneously requiring range training). In contrast, § 8-20-110(b)(3)(iii) applies to a limited category of *non*law-abiding citizens. The Seventh Circuit has addressed such categorical exclusions in three cases, and in each instance it has applied intermediate scrutiny. So too has every other Circuit court addressing the same or similar exclusions.[3] This Court should follow suit and apply intermediate scrutiny.

II. The Ordinance Satisfies Intermediate Scrutiny.

Regulations are valid under Second Amendment intermediate scrutiny so long as they are "substantially related to an important government objective." *Skoien*, 614 F.3d at 641. Section 8-20-110(b)(3)(iii) easily meets this test.

A. Section 8-20-110(b)(3)(iii) Serves An Important Governmental Purpose.

The stated purpose of the Ordinance is "protecting the public from the potentially deadly consequences of gun violence." SOAF ¶ 1 and Ex. 1 (Responsible Gun Ownership Ordinance).[4] Firearm violence in Chicago exacts a terrible human toll and destroys communities. For example, in 2009, Chicago had the second-highest murder and non-negligent manslaughter rate (16.1 per 100,000 residents) of the 10 U.S. cities with the largest population. SOAF ¶ 1 and Ex. 2 (Uniform

---

[3] *See, e.g., Heller v. District of Columbia*, - - F.3d - - , 2011WL 4551558, *10 (D.C. Cir. 2011); *United States v. Masciandaro*, 638 F.3d 458, 473-74 (4th Cir. 2011); *Nordyke v. King*, 644 F.3d 776, 783 (9th Cir. 2011) (rehearing *en banc* granted); *United States v. Marzzarella*, 614 F.3d 85, 96 (3rd Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800 (10th Cir. 2010). *See also United States v. Laurent*, - - F. Supp.2d - - , 2011 WL 6004606, *25 (E.D.N.Y. Dec. 2, 2011).

[4] References to the City's Local Rule 56.1(b)(3)(C) Statement of Additional Facts and Exhibits thereto are designated within this brief as "SOAF __."

Crime Reporting Statistics – 10 cities). That rate was nearly double that of Los Angeles (8.1) and nearly triple that of New York City (5.6), the two cities with a higher population than Chicago. *Id.* And the total annual social cost of Chicago gun violence is estimated to be about $2.5 billion, or $2,500 per household, and estimated to depress total property values by around $30 billion and property tax revenues by $30 million per year. SOAF ¶ 2 and Ex. 3 & 4 (June 29, 2010 Ludwig Written Testimony for Chicago City Council Committee at C0398-401; J. Ludwig & P.J. Cook, *The Benefits of Reducing Gun Violence: Evidence from Contingent-Valuation Survey Data*, 22 Journal of Risk and Uncertainty 207-26 (2001)).

It cannot be seriously questioned that preventing this scourge of gun violence serves an important governmental purpose. *See Skoien*, 614 F.3d at 642 ("no one doubts" that "preventing armed mayhem" is "an important governmental objective"); *Carter*, 669 F.3d at 417 ("[W]e readily conclude that the government's interest in 'protecting the community from crime by keeping guns out of the hands of dangerous persons is an important governmental interest."); *Shepard v. Madigan,* 2012 WL 1077146 (S.D. Ill. March 30, 2012) (Illinois has substantial interest in protecting welfare of public at large from inherent dangers of loaded firearms). This interest is, in fact, "compelling." *United States v. Salerno*, 481 U.S. 739, 750 (1987) (government's interest in "protecting the community from crime" by keeping guns out of hands of dangerous persons is compelling).

B. The Ordinance Is Substantially Related To Combatting Gun Violence.

Plaintiff does not dispute that § 8-20-2210(b)(3)(iii) was enacted to serve this important objective. Instead, Plaintiff argues that the City cannot establish that, as applied to him, it is substantially related to serving this goal, because there is no evidence that banning possession by nonviolent misdemeanor firearms offenders helps decrease violent crimes. Plf. Mem., pp. 12-15.

This is simply not the case.

1. Empirical evidence shows that nonviolent misdemeanants pose an increased risk of committing violent and firearms-related offenses in the future.

The City Council heard live testimony from several gun safety experts in determining the underlying evidentiary basis for, and the appropriate scope of, the Ordinance's regulations. One of these was Dr. Daniel Webster, Co-Director of the Center for Gun Policy and Research at Johns Hopkins University, who testified that one the most effective policies for preventing gun violence "is proscribing the most high-risk people from possessing firearms." SOAF ¶ 3 and Ex. 5 (June 29, 2010 Webster Testimony to Chicago City Council at C0243-47; C0407-09). He further explained that convicted misdemeanants fall into this "high risk" category because they are more likely to commit violent crimes in the future. *Id.; see also* SOAF Ex. 6 (Garen J. Wintemute, *et al.*, *Prior Misdemeanor Convictions as a Risk Factor for Later Violent and Firearm-Related Criminal Activity Among Authorized Purchasers of Handguns*, 280 J. Am. Med. Ass'n. 2083, 2086 (Dec. 1998) ("Wintemute Study") (concluding that handgun purchasers who "had prior convictions for nonviolent firearm-related offenses such as carrying concealed firearms in public, but not for violent offenses, were at increased risk for later violent offenses.").

The Wintemute Study examined the criminal histories of 5923 individuals over 15 years who purchased handguns in California, dividing them into two groups: those who had at least one prior conviction for a misdemeanor offense at the time of purchase, and those who had no prior criminal record. SOAF ¶ 4, Ex. 6 at 2083. It found that overall, handgun purchasers with at least one misdemeanor conviction had a 7.5 times higher risk for a later offense. *Id.* at 2086, Table 4. The study further found that even those who, like Plaintiff, had prior misdemeanor convictions for

nonviolent, firearm related offenses were at a 6.4 times higher risk for later offenses in general; at a 4.4 times higher risk for violent offenses; and at a 7.7 times higher risk for a nonviolent firearms offense. *Id.*, Table 5. "Our findings indicate that the characterization of high risk also applies to handgun purchasers with prior convictions for misdemeanor offenses, regardless of the nature of those offenses." *Id.* at 2087. A similar study conducted in 2010 examined the incidence of "prohibitory crimes" (crimes that disqualify individuals from gun possession under both federal and state law) committed by lawful owners of handguns with past misdemeanor convictions. *See* SOAF ¶ 5 and Ex. 7 (Mona A.Wright, et al., *Felonious or Violent Criminal Activity that Prohibits Gun Ownership Among Prior Purchasers of Handguns: Incidence and Risk Factors*, J. Trauma Injury, Infection, & Critical Care (2010) ("Wright Study")). This study produced very similar results, finding that past misdemeanants were on average 5 times more likely to commit future prohibitory crimes. *Id.* at 3 and Table 2.

Two main factors lead to this conclusion. First, general recidivism rates: "It is well established that persons with a history of even a single prior arrest are, as a group, substantially more likely than persons with no such history to engage in criminal behavior in the future." Wintemute Study, SOAF Ex. 6. *See also, e.g.,* Baradaran, *Predicting Violence*, 90 Tex. L. Rev. 497, 527-30 (2012); Blumstein, et al., *Estimation of Individual Crime rates From Arrest Records*, 70 J. Criminal Law Criminology 561-585 (1979). Second, those with nonviolent, misdemeanor convictions 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. *See, e.g., Skoien*, 641 F.3d at 643 (discussing plea downs and "undercharging"as support for conclusion that misdemeanants can be as dangerous as felons). As a result, sound evidence supports a finding that banning gun-related

misdemeanants from possessing firearms helps reduce gun violence.

In fact, a New York court recently rejected a constitutional challenge to an even broader exclusion than the one here – a ban on possession for persons previously convicted of *any* misdemeanor, not just misdemeanors involving firearms. *See Hughes*, 83 A.2d. 960 at 960. There, New York Penal Law §§ 265.02 and 265.03 prohibited individuals previously convicted of "any crime" from possessing firearms, even in their home. *Id.* at 961. Defendant was charged with such possession, and challenged the statute's constitutionality under *Heller*. The court noted that the definition of "crime" included misdemeanors and felonies, but that lesser matters such as violations and traffic infractions were not included. *Id.* The court then concluded that "[c]ritically, this is not an absolute ban on the possession of firearms . . . [T]he statutes represent a policy determination by the Legislature that 'an illegal weapon is more dangerous in the hands of a convicted criminal than in the possession of a novice to the criminal justice system.'" *Id.* at 962 (internal citations omitted).

Plaintiff lobs a couple of weak criticisms at the studies produced by the City, but they miss the mark. Plaintiff contends that the Wintemute Study is flawed because it does not compare "nonviolent offenders who purchase a firearm with nonviolent offenders who did not purchase a firearm." Plf. Mem., p. 14. In other words, Plaintiff claims that the study's results should be discounted because it does not take into account all of the nonviolent misdemeanants who were simply not interested in purchasing firearms. But this information is irrelevant to the issues in this case: The study importantly concluded that convicted misdemeanants *like Plaintiff*, who choose to own weapons – exactly what Plaintiff desired to do – are at an increased risk for committing future violent crimes. Plaintiff also argues that the Wright Study focuses on *all* nonviolent misdemeanors, and "does not place particular focus on individuals convicted of nonviolent firearms related

offenses." Plf. Mem., p. 15, n. 11. This argument actually cuts *against* Plaintiff, however, because if all nonviolent misdemeanants are at a greater risk for committing future crimes, then surely the City can choose to exclude only those who committed unlawful firearm misdemeanors.

More importantly, however, Plaintiff's criticisms of these studies are simply irrelevant. The City is afforded wide latitude in showing that its restrictions are substantially related to stemming the tide of violence in Chicago, and need not prove that the restrictions actually work. "*Heller* did not suggest that [a regulation] would be effective only if the statute's benefits are first established by admissible evidence," and there is no requirement of "proof, satisfactory to a court," that a regulation is "vital to the public safety." *Skoien*, 614 F.3d at 641. *See also Moore*, 2012 WL 344760 at *13 (not necessary to show that carry ban "truly" reduces risk of gun violence); *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 211 (1997) (government not required to prove that it is correct "as an objective matter"). Rather, a substantial relationship can be shown with nothing more than "logic and data." *Skoien*, 614 F.3d at 642. Indeed, in upholding bans on core conduct, *Skoien*, *Williams*, and *Yancey* relied on data compilations and studies that had neither been found reliable nor probative by a court, nor even subjected to adversarial testing. *See Skoien*, 614 F.3d at 642-644; *Williams*, 616 F.3d at 692-93; *Yancey*, 621 F.3d at 686.

Nor must the City's logic or data perfectly match the regulation. If the Second Amendment "leaves [cities] a variety of tools for combating" gun violence, *Heller*, 128 S.Ct. at 2822, "by no means eliminates" the ability of cities "to devise solutions to social problems that suit local needs and values," *McDonald*, 130 S.Ct. at 3046, and allows that "state and local experimentation with reasonable firearms regulations will continue," *id.*, Chicago must have leeway to adopt policies that may be novel or extend beyond current research findings or other evidence. Indeed, "[a]

municipality considering an innovative solution may not have data that could demonstrate the efficacy of its proposal because the solution would, by definition, not have been implemented previously." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 439-40 (2002) (plurality opinion). As the Fourth Circuit remarked: "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." *Masciandaro*, 638 F.3d at 475.

Accordingly, because Chicago need not prove the efficacy of the Ordinance or support it with admissible evidence, Plaintiff's criticisms are irrelevant. The court is "simply to determine whether the [applicable standard] is satisfied," and it can be met even when one can "draw[] two inconsistent conclusions from the evidence." *Turner Broadcasting*, 520 U.S. at 211. For instance, in *DiMa Corp. v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999), the plaintiff's expert evidence was "irrelevant" on summary judgment, because the court's task was not to "discover the objective truth," but only to ensure that there was "some evidence" supporting the town's conclusions. *Id.* at 831. *See also G.M. Enterps, Inc. v. Town of St. Joseph*, 350 F.3d 631, 639 (7th Cir. 2003) (affirming summary judgment for Town even though plaintiff's evidence "arguably undermin[ed] the Town's inference of the correlation of adult entertainment and adverse secondary effects, including a study that questions the methodology employed in the numerous studies relied upon by the [Town]").

2. Individuals with prior unlawful use of firearms convictions have shown they are untrustworthy with weapons.

In addition to empirical evidence showing an established link between nonviolent misdemeanants and increased violent or gun-related crimes, § 8-20-110(b)(3)(iii) is also justified by the *nature* of the misdemeanor: Unlawful use of a firearm. The provision does not apply to any and all nonviolent misdemeanants – instead, it applies only to those individuals who have chosen to put

the public's safety at risk by flouting state firearms laws.

Plaintiff's decision to illegally carry a loaded firearm on a public street in the City posed a serious threat to public safety. First, in dense, urban areas like Chicago, public carry presents a high risk that routine conflicts and minor crimes will escalate into gun injury and death, because guns make violent events more lethal compared to crimes involving other weapons. SOAF Ex.3 at 398; *see also* SOAF ¶ 7 Ex. 8 (Franklin Zimring: *Is Gun Control Likely to Reduce Violent Killings?*, 35 U. Chic.L. Rev. 721 (1968)); Ex. 9 (Zimring, *The Medium Is The Message: Firearm Caliber As A Determinant Of Death From Assault*, 1 Journal of Legal Studies 97 (1972)); *Skoien*, 614 F.3d at 642. Second, carrying of firearms in public makes it harder to combat the rampant gang violence in Chicago, because gang members and professional criminals regularly engaged in crime intimidate and commit crimes merely by "brandishing the weapon." SOAF ¶ 8, Ex. 10 (Philip J. Cook, et al., Underground Gun Markets, The Economic Journal 117 (2007) at F563). *See also* SOAF ¶ 8, Ex. 11 (June 29, 2010 Written Testimony of Chicago Police Department Deputy Superintendent Ernest Brown for Chicago City Council at C0392) ("Intimidation by gangs in particular would increase if gang members could lawfully carry arms in public."). Third, public carry also increases the risk of accidental shootings and threats to law enforcement when responding to calls for assistance. SOAF ¶ 9, Ex. 12 ((July 1, 2010 Legislative Findings of City Council Committee on Police and Fire at C0788). Thus, the City is entitled to enact laws to keep firearms out of the hands of criminals, like Plaintiff, who have knowingly broken these laws and put the public at grave risk.

Plaintiff attempts to undermine § 8-20-110(b)(3)(iii)'s validity by contending that the constitutionality of Illinois' carry ban "is doubtful, to put it mildly...," since "the practice of carrying firearms was common and widespread at the founding." Plf. Mem., p. 6. But Plaintiff's collateral

attack on the underlying constitutionality of the carry ban is both improper and historically incorrect. First, Plaintiff cannot attack the ban's constitutionality because he has not brought a constitutional challenge to the Illinois statutes, nor named the State as a defendant as required; therefore, the issue of its constitutionality is not properly before the Court. Furthermore, unless and until a court actually holds that the statute is unconstitutional, it is presumed constitutional. *See, e.g., Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993). And contrary to Plaintiff's contention regarding the carry ban's "questionable" constitutionality, every Illinois court that has reviewed the law post-*Heller* has, in fact, upheld its constitutionality. *See Shepard v. Madigan,* 2012 WL 1077146 (S.D. Ill. March 30, 2012); *Moore v. Madigan*, - - F. Supp.2d - - , 2012 WL 344760 (C.D. Ill. Feb. 3, 2012); *People v. Aguilar*, 408 Ill. App.3d 136 (1st Dist. 2011).[5] Accordingly, it would be improper to allow Plaintiff to challenge § 8-20-110(b)(3)(iii) by bootstrapping a collateral constitutional attack on his underlying conviction for carrying a weapon when the statute remains in full force.

Second, Plaintiff is wrong that it would be "untenable" for him to forfeit his Second Amendment rights simply by carrying a firearm in public because carrying in public was widespread and common at the time of the country's founding. Plf. Mem., p. 7. In fact, history demonstrates that neither English statutory nor common law provided any right to carry weapons in public.[6] Rather, under centuries-old English law, public carry was prohibited, even for self-defense. *See, e.g.*, Statute of Northampton, 2 Edw. 3, c. 3 (1328) (Eng) (banning public carry of dangerous weapons); *Sir John Knight's Case*, 87 Eng. Rep. 75 (K.B. 1686) (going armed in public was "a great offense

---

[5] *Aguilar* is currently on appeal before the Illinois Supreme Court, and *Moore* and *Shepard* are currently being briefed before the Seventh Circuit.

[6] English treatment of the arms right is instructive because the Second Amendment "was not intended to lay down a novel principle, but rather codified a right inherited from our English ancestors." *Heller*, 128 S.Ct. at 2801-02. *See also id.* at 2797

at the common law"). Blackstone, who "constituted the preeminent authority on English law for the founding generation," *Heller*, 554 U.S. at 625, affirmed that "going armed with dangerous or unusual weapons" in public was "a crime against the public peace, by terrifying the good people of the land." Blackstone, 4 *Commentaries on the Laws of England* 148-49 (5th ed. 1773). Based on this historical framework, from the founding era to reconstruction, broad prohibitions against the ban of carry in public were upheld. *See, e.g.*, 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) (providing historical overview of state laws banning public carry).

III. Plaintiff's Argument That The Ordinance Does Not Apply To Him Has No Place In The Constitutional Analysis And Has Already Been Denied.

Plaintiff contends that the Ordinance cannot pass any form of heightened scrutiny because, as an initial matter, it does not apply to him. Plf. Mem., pp. 9-12. In other words, Plaintiff attempts to revive Count I of his Complaint – which seeks administrative review of DOAH's finding that the Ordinance applied to Plaintiff because prohibited public possession of firearms means "use" under Illinois law – by weaving it into his constitutional claims. But this makes no logical sense. Plaintiff's statutory construction claim is entirely independent from his constitutional claims, and it has no place in the analytical framework for determining whether the Ordinance survives the appropriate level of scrutiny. Indeed, Plaintiff himself has consistently and repeatedly acknowledged that Count I stands alone, and only if the Court first finds that the Ordinance applies to Plaintiff would the Court even need to reach his constitutional claims. *See, e.g.*, Plf.'s Motion for Judgment on the Pleadings, p. 6 (Dckt # 26).

Moreover, the Court has already denied judgment on this claim. In ruling on Plaintiff's Motion for Judgment on the Pleadings, the Court stated that "Plaintiff's motion for judgment on the

pleadings is denied to the extent Plaintiff seeks administrative review of the decision by DOAH and the Court will state its reasons when ruling on dispositive motions." Oct. 18, 2011 Minute Order (Dckt # 33). Thus, Plaintiff's statutory construction argument has already been decided, and rejected, by the Court. To the extent that the Court chooses to revisit this claim, the City hereby incorporates its arguments for why the Ordinance was properly applied to Plaintiff set forth in the City's Response to Plaintiff's Motion for Judgment on the Pleadings, pp. 2-10 (Dckt # 30).

IV. By Putting His Own Conduct At Issue Plaintiff Shows Why The City Should Have Been Given the Opportunity to Take His Deposition.

Plaintiff also contends that the City cannot meet its burden because the City did not take or produce any discovery beyond its Rule 26(a)(1) disclosures. Plf. Mem., pp. 12-13. But the legislative findings, studies, and empirical evidence cited above more than sufficiently establish the Ordinance's substantial relationship to combatting gun violence. And although most of these *were* produced to Plaintiff, they need not have been, *see Skoien*, 614 F.3d at 641; indeed, Plaintiff himself cites to numerous articles and historical sources that he did not produce to the City.[7]

More importantly, however, the City was deprived of the one discovery request it deemed crucial to defending this case: Plaintiff's deposition. On May 16, 2011, the City served a Notice of

---

[7] Likewise, the City was not required to supplement its initial disclosures because the purposes of the Ordinance, and the testimony of individuals with knowledge of and support for those purposes on which the City now relies, were identified to Plaintiff through the City's document production. The duty to supplement discovery responses applies only "if the additional or corrective information *has not otherwise been made known to the other parties during the discovery process or in writing.*" Fed. R. Civ. P. 26(e)(2) (emphasis added); *Westefer v. Snyder*, 422 F.3d 570, 584 (7th Cir. 2005) (purpose of Fed. R. Civ. P. 26(e)(2) is to prevent "unfair surprise"by ensuring that other party has adequate notice of new information). Where the other party has notice of potential witnesses or evidence through other sources, such as their own knowledge, document production, or deposition testimony, there is no duty to supplement written discovery responses. *See, e.g., Gutierrez v. AT&T Broadband*, 382 F.2d 725, 732-34 (7th Cir. 2004) (evidence not excluded because defendants had knowledge through deposition testimony); *Moore v. Vital Prods., Inc.*, 2009 WL 275475, *16 (N.D. Ill., February 3, 2009) (deposition testimony "obviated the need for plaintiff to supplement his interrogatory response.").

Deposition on Plaintiff for June 28, 2011. SOAF ¶ 10, Ex.13 (Notice of Deposition). Plaintiff objected and filed a Motion for Protective Order, arguing that the City should be foreclosed from taking *any* discovery or, at the very least, barring Plaintiff's deposition as irrelevant. *See* Plf. Motion For Protective Order (Dckt # 24). The Court granted the motion and stayed all discovery pending the outcome of Plaintiff's Motion for Judgment on the Pleadings. June 28, 2011 Minute Order (Dckt # 29). On October 18, 2011, the Court denied Plaintiff's Motion and set a discovery schedule, but as part of this discovery *refused to allow the City to take Plaintiff's deposition. See* SOAF ¶ 11, Ex. 14 (Oct.18, 2011 Hearing Transcript, pp. 18, 23).

As the City has consistently maintained, facts regarding the specific circumstances of Plaintiff's arrest, his other criminal history, and other past conduct may be *highly* relevant to his as-applied challenge. *See* Resp. to Plf.'s Motion for Judgment on the Pleadings, pp. 13-15; *see also Williams*, 616 F.3d at 693 (evidence of plaintiff's own violent past help prove substantial relationship between § 922(g)(1) and government's objective of preventing felons' access to guns). Now, Plaintiff confirms this relevance by putting his own conduct at issue, stating that "[t]here is no evidence" that he "presents any threat of violence," Plf. Mem., p. 5, and that he has been "law-abiding for many years." *Id.* at 15.[8] The City is entitled to question Plaintiff under oath to test these assertions, and gather additional, potentially relevant facts. For instance, Plaintiff's own record shows two other arrests: one in 1993 for obstruction of service of process, and one in 2004 for assault. *See* SOAF ¶ 12, Ex. 15 (Plaintiff's Criminal History Data). While neither of these arrests

[8] The fact that Plaintiff's conviction was in 1995 does not change the analysis. *See, e.g., Schrader v. Holder*, 2011 WL 6651231, *7 (D.D.C. Dec. 23, 2011) (person convicted of common-law misdemeanor assault and battery 40 years earlier with no subsequent arrests remained nonlaw-abiding for purposes of denying permit for possession of firearm).

resulted in a conviction, the more recent assault charge certainly involved *at least* the "threat of violence," and arrest "is often used as a measure of the incidence of new criminal activity." SOAF Ex. 7. The City should have been given the chance to question Plaintiff about the facts of these past incidents – facts which are not apparent on the face of his arrest record – to test his claims about being law-abiding and nonviolent. Because the City was not allowed to do so, Plaintiff should be barred from relying on one-sided description's of his prior conduct.

V. Plaintiff's Facial Challenge Necessarily Falls.

Finally, because Plaintiff cannot show that § 8-20-110(b)(3)(iii), as applied to him, is unconstitutional, he cannot pursue his facial challenge. *See, e.g., Skoien*, 614 F.3d at 645 (person to whom statute properly applied cannot obtain relief based on arguments that differently situated person might present), citing *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Nevertheless, even if Court were to address Plaintiff's facial challenge, the Ordinance survives. First, in order to be successful on a facial challenge, "the challenger must establish that no set of circumstances exists under which the [legislation] would be valid." *Salerno*, 481 U.S. at 745; *Skoien*, 614 F.3d at 645. But Plaintiff cannot show that § 8-20-110(b)(3)(iii) is unconstitutional in *all* of its applications, to all persons and in every situation. On its face, § 8-2-110(b)(3)(iii) is not limited to only misdemeanor convictions, or only possession and carry uses; instead, the provision applies to both misdemeanor and felony convictions, and to multiple types of unlawful uses of a firearm. For example, 720 ILCS § 5/24-1 provides that a person commits the misdemeanor offense of unlawful use of a weapon when he, among other things: (1) possesses a firearm with intent to use it unlawfully against another (5/24-1(a)(2)); (2) sells, manufactures, purchases, possesses or carries a machine gun (5/24-1.(a)(7)); or (2) carries or possesses a firearm in any place licensed to sell

intoxicating beverages (5/24-1.(a)8)). Plaintiff has not shown that § 8-20-110(b)(3)(iii) would be unconstitutional if applied to these unlawful uses, and he certainly could not successfully do so. Thus, § 8–20-110(b)(3)(iii) survives a facial challenge.

Instead, Plaintiff rests his facial challenge on a narrow reading of the Ordinance: He contends that the provision is facially invalid because the denial of a CFP for a misdemeanor conviction for unlawful carry or possession violates the Second Amendment. Plaintiff cannot create a facial challenge by selectively imposing his own limited application of the Ordinance, however. And even if he could, the argument still fails, because as discussed above, there are many possible situations where a conviction for "mere possession" could have attendant aggravating circumstances: unlawful possession in a crowded area such as a street festival or bar; unlawful possession by an individual only days or weeks before applying for a carry permit; or unlawful possession by an individual where the facts prove that he had been brandishing the weapon dangerously, or even actually discharged the weapon, but was charged with the lesser offense for various reasons. Plaintiff cannot show that the Ordinance would be unconstitutional in these and all other circumstances.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiff's Motion for Summary Judgment, grant judgment in favor of Defendants, and grant any and all other relief the Court deems appropriate.

Respectfully Submitted,

STEPHEN R. PATTON
CORPORATION COUNSEL
CITY OF CHICAGO

BY: /s/ Rebecca Alfert Hirsch

Michael A. Forti
Mardell Nereim
William M. Aguiar
Rebecca Alfert Hirsch
Andrew W. Worseck
Assistant Corporation Counsel
30 N. LaSalle Street, Suite 1230
Chicago, IL 60602
(312)744-9018/2-0260

Dated: April 30, 2012

CERTIFICATE OF SERVICE

The undersigned, an attorney of record for the Defendants, hereby certifies that on April 30, 2012 she served a copy of the foregoing **Defendants' Response to Plaintiff's Motion For Summary Judgment** on counsel of record listed below by electronic means pursuant to Electronic Case Filing (ECF):

Stephen Kolodziej
Ford & Britton, P.C.
33 N. Dearborn Street, Suite 300
Chicago, IL 60602

/s/ Rebecca Alfert Hirsch