

IN THE SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_  
No. \_\_\_\_\_

LISA MADIGAN, PATRICK QUINN, HIRAM GRAU, and TYLER EDMONDS,

*Petitioners,*

*v.*

MICHAEL MOORE, CHARLES HOOKS, PEGGY FLETCHER, JON MAIER,  
SECOND AMENDMENT FOUNDATION, INC., MARY E. SHEPARD, and  
ILLINOIS STATE RIFLE ASSOCIATION,

*Respondents.*

\_\_\_\_\_  
**APPLICATION FOR AN EXTENSION OF TIME  
IN WHICH TO FILE A PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**  
\_\_\_\_\_

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Seventh Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.2, petitioners Lisa Madigan, Patrick Quinn, Hiram Grau, and Tyler Edmonds pray for a thirty-day extension of time to file their certiorari petition in this Court, up to and including June 24, 2013. The Seventh Circuit entered judgment for respondents on December 11, 2012, and denied petitioners' timely petition for rehearing en banc — over the dissent of four judges — on February 22, 2013 (attached). The time to file a petition for certiorari in this Court accordingly expires on May 23, 2013. This application is being filed ten days before that date. This extension should not delay the petition's consideration by the Court because it is currently due on May 23,

respondents are permitted at least thirty days to respond to this petition, see Sup. Ct. R. 13.5, and thus the petition likely would not be set for conference before the Court's summer recess even without this extension.

A copy of the Seventh Circuit's slip opinion (published at 702 F.3d 933) is attached as an exhibit hereto. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

1. The Seventh Circuit held that the Second Amendment bars Illinois from prohibiting law-abiding citizens from carrying loaded handguns in most public places. In so doing, the Court of Appeals "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," Sup. Ct. R. 10(a), and in conflict with a subsequent decision of the Illinois Appellate Court.

2. Specifically, the Seventh Circuit created a conflict as to three issues: (a) whether this Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), determined that the framers intended Second Amendment rights to apply outside the home; (b) if the Second Amendment does apply outside the home, what standard of review applies to the regulation of carrying loaded handguns in that setting; and (c) whether a state government should have the opportunity to file an Answer in response to a lawsuit challenging such regulations, and to present evidence to demonstrate the necessity and effectiveness of those regulations.

a. The Seventh Circuit held that *Heller* decided that the Second Amendment applies outside the home. Slip Op. 7, 18. The Second and Fourth Circuits disagree.

See *Woollard v. Gallagher*, No. 12-1437, 2013 WL 1150575, at \*6 (4th Cir. March 21, 2013) (recognizing that historical scope issue was not settled); *Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) (*Heller* did not settle “the scope of that right beyond the home”); *United States v. Masciandaro*, 638 F.3d 458, 467 (4th Cir. 2011) (“uncertainty remains as to the scope of [the *Heller*] right beyond the home”). In those three cases, the scope inquiry was ultimately irrelevant because the challenged statutes withstood scrutiny. Here, in contrast, the scope inquiry is necessary to the Seventh Circuit’s judgment, and its split with other circuits over this Court’s holding in *Heller* is squarely presented for certiorari review.

The Seventh Circuit’s opinion also conflicts with a subsequent decision of the Illinois Appellate Court rejecting a Second Amendment challenge to the same laws that the Seventh Circuit invalidated. While the Illinois Supreme Court’s opinion in a related case is pending, *People v. Aguilar*, 944 N.E.2d 816 (Ill. App. 2011), appeal allowed, 949 N.E.2d 1099 (Ill. May 25, 2011) (table), the Illinois Appellate Court declined to follow the Seventh Circuit’s analysis. See, e.g., *People v. Moore*, No. 1-11-0793, 2013 WL 1190275, at \*4 (Ill. App. March 22, 2013) (“we do not agree with the Seventh Circuit that the right to self-defense delineated in *Heller* . . . encompasses a right to carry a loaded, readily accessible firearm in public areas”).

b. The Seventh Circuit does not expressly adopt a level of scrutiny, but appears to apply a standard akin to strict scrutiny when it holds that petitioners failed to offer “extensive empirical evidence” sufficient to make a “strong showing

that a gun ban was vital to public safety.” Slip Op. 13-14. In contrast, the Second and Fourth Circuits recognize that, even assuming there is a right to carry firearms in public for self-defense, such a right is not at the core of the Second Amendment; accordingly, those courts hold that laws restricting public carry receive less rigorous scrutiny than laws prohibiting in-home firearm possession. See *Woollard*, 2013 WL 1150575, at \*7 (“as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense”) (quoting *Masciandaro*, 638 F.3d at 470-471); *Kachalsky*, 701 F.3d at 93 (“we believe that applying less than strict scrutiny when the regulation does not burden the ‘core’ protection of self-defense in the home makes eminent sense in this context and is in line with the approach taken by our sister circuits”) (collecting cases); *Masciandaro*, 638 F.3d at 471 (“a lesser showing is necessary with respect to laws that burden the right to keep and bear arms outside the home”). The Second and Fourth Circuits thus recognize a “longstanding out-of-the-home/in-the-home distinction [that] bears directly on the level of scrutiny applicable.” *Masciandaro*, 638 F.3d at 470; *Kachalsky*, 701 F.3d at 96; see also *Heller v. District of Columbia*, 670 F.3d 1244, 1262-64 (D.C. Cir. 2011) (“*Heller II*”). In clear conflict with these decisions, the Seventh Circuit declined to distinguish public-carry laws from laws regulating in-home possession, requiring petitioners to provide “extensive empirical evidence” to justify laws that do not infringe on the right to possess firearms in the home.

In further conflict with the Second Circuit’s decision in *Kachalsky*, the Seventh Circuit refused to defer to legislative policy judgments in cases, like this one, where the relevant empirical evidence is arguably inconclusive. Challengers to New York’s public-carry restrictions presented “studies and data” that countered the State’s public-safety empirics. *Kachalsky*, 701 F.3d at 99. Faced with this “conflicting evidence,” *id.*, the Second Circuit gave “substantial deference to the predictive judgments of [the legislature]” and therefore upheld the state laws. *Id.* at 97 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (brackets in original)). The court explained that, “[i]n the context of firearm regulations, the legislature is ‘far better equipped than the judiciary’ to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks,” and those judgments therefore warrant judicial respect. See *id.* (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994)); see also *id.* at 99 (“It is the legislature’s job, not ours, to weigh conflicting evidence and make policy judgments.”). The Seventh Circuit’s decision, striking down Illinois’ laws while conceding that “[a] gun is a potential danger to more people if carried in public than just kept in the home” and that the public safety effect of those laws is “uncertain,” Slip Op. at 8, squarely conflicts with *Kachalsky* (and is in obvious tension with this Court’s decisions in the *Turner Broadcasting* cases).

c. The Seventh Circuit also departed from the law in other circuits when it struck down the challenged regulations as unconstitutional without remanding to

allow petitioner to answer or present evidence regarding the need for and effectiveness of the challenged statutes. The instant consolidated cases have not proceeded beyond motions to dismiss in the district courts, yet the Seventh Circuit reasoned that there are “no evidentiary issues” remaining because “only legislative facts are relevant to the constitutionality” of the challenged regulations. Other circuits follow a contrary rule. See *Heller II*, 670 F.3d at 1258 & n.\*; *United States v. Carter*, 669 F.3d 411, 421 (4th Cir. 2012). In *Heller II*, the court thus remanded the case to permit the government to introduce evidence regarding the justifications for a firearms registration requirement. See 670 F.3d at 1258 & n.\* Likewise, in *Carter*, the court remanded to allow the government “to present sufficient evidence to substantiate” the challenged regulation. 669 F.3d at 421. In fact, courts routinely receive testimony on sociological and other facts not specific to a particular case when adjudicating a law’s facial validity, as when they evaluate the public harms incident to the exercise of certain forms of expression. See, e.g., *J.L. Spoons, Inc. v. Dragani*, 538 F.3d 379, 381-382 (6th Cir. 2008).

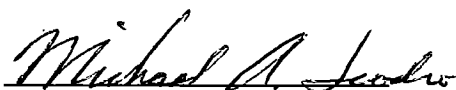
3. Good cause exists for this application. The undersigned counsel, who has principal responsibility for the certiorari petition in this case, serves as the Solicitor General in the Office of the Illinois Attorney General. In addition to the undersigned’s supervisory responsibilities over the Civil and Criminal Appeals Divisions of that office—including editing and revising briefs and assisting in preparing attorneys for oral argument—he is counsel of record for Illinois Attorney

General Lisa Madigan and other petitioners in *Madigan v. Levin* (U.S. 12-872), and petitioners' opening brief in that case is due on June 3, 2013.

Wherefore petitioner respectfully requests that an order be entered extending the time to file a certiorari petition to and including June 24, 2013.

April 26, 2013

Respectfully submitted,



Michael A. Scodro  
Solicitor General  
100 West Randolph Street, 12th Floor  
Chicago, Illinois 60601  
(312) 814-3698

## CERTIFICATE OF SERVICE

I, Michael A. Scodro, counsel of record for Petitioner Marcus Hardy, Warden, hereby declare that the APPLICATION FOR AN EXTENSION OF TIME IN WHICH TO FILE A PETITION FOR WRIT OF CERTIORARI was served on:

Charles J Cooper  
Cooper & Kirk PLLC  
1523 New Hampshire Avenue NW  
Washington, DC 20036

David Jensen PLLC  
61 Broadway  
Suite 1900  
New York, NY 10006

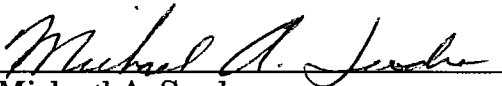
William N Howard  
Locke Lord LLP  
111 South Wacker Drive  
45th Floor  
Chicago, IL 60606-4410

Law Firm of David G. Sigale, P.C.  
739 Roosevelt Road  
Suite 304  
Glen Ellyn, IL 60137

Alan Gura, Attorney  
Gura & Possessky  
Suite 405  
101 N. Columbus Street  
Alexandria, VA 22314

Joseph A. Bleyer, Attorney  
Bleyer & Bleyer  
601 West Jackson  
P.O. Box 487  
Marion, IL 62959-0487

The foregoing document was served by U.S. Mail First Class Delivery, postage prepaid, on this 26th day of April, 2013.

  
Michael A. Scodro  
Solicitor General



**Exhibit**

In the  
**United States Court of Appeals**  
**For the Seventh Circuit**

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Nos. 12-1269, 12-1788

MICHAEL MOORE, *et al.*, and  
MARY E. SHEPARD, *et al.*,

*Plaintiffs-Appellants,*

v.

LISA MADIGAN, ATTORNEY GENERAL  
OF ILLINOIS, *et al.*,

*Defendants-Appellees.*

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Appeals from the United States District Courts for the  
Central District of Illinois and the Southern District of Illinois.  
Nos. 3:11-cv-3134-SEM-BGC and 3:11-cv-405-WDS-PMF—  
Sue E. Myerscough and William D. Stiehl, *Judges.*

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ARGUED JUNE 8, 2012—DECIDED DECEMBER 11, 2012

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Before POSNER, FLAUM, and WILLIAMS, *Circuit Judges.*

POSNER, *Circuit Judge.* These two appeals, consolidated for oral argument, challenge denials of declaratory and injunctive relief sought in materially identical suits under the Second Amendment. An Illinois law forbids a person, with exceptions mainly for police and other security personnel, hunters, and members of target shooting clubs,

720 ILCS 5/24-2, to carry a gun ready to use (loaded, immediately accessible—that is, easy to reach—and uncased). There are exceptions for a person on his own property (owned or rented), or in his home (but if it's an apartment, only there and not in the apartment building's common areas), or in his fixed place of business, or on the property of someone who has permitted him to be there with a ready-to-use gun. 720 ILCS 5/24-1(a)(4), (10), -1.6(a); see *People v. Diggins*, 919 N.E.2d 327, 332 (Ill. 2009); *People v. Laubscher*, 701 N.E.2d 489, 490–92 (Ill. 1998); *People v. Smith*, 374 N.E.2d 472, 475 (Ill. 1978); *People v. Pulley*, 803 N.E.2d 953, 957–58, 961 (Ill. App. 2004). Even carrying an unloaded gun in public, if it's uncased and immediately accessible, is prohibited, other than to police and other excepted persons, unless carried openly outside a vehicle in an unincorporated area and ammunition for the gun is not immediately accessible. 720 ILCS 5/24-1(a)(4)(iii), (10)(iii), -1.6(a)(3)(B).

The appellants contend that the Illinois law violates the Second Amendment as interpreted in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and held applicable to the states in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). *Heller* held that the Second Amendment protects “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” 554 U.S. at 635. But the Supreme Court has not yet addressed the question whether the Second Amendment creates a right of self-defense outside the home. The district courts ruled that it does not, and so dismissed the two suits for failure to state a claim.

The parties and the amici curiae have treated us to hundreds of pages of argument, in nine briefs. The main focus of these submissions is history. The supporters of the Illinois law present historical evidence that there was no generally recognized private right to carry arms in public in 1791, the year the Second Amendment was ratified—the critical year for determining the amendment’s historical meaning, according to *McDonald v. City of Chicago*, *supra*, 130 S. Ct. at 3035 and n. 14. Similar evidence against the existence of an eighteenth-century right to have weapons in the home for purposes of self-defense rather than just militia duty had of course been presented to the Supreme Court in the *Heller* case. See, e.g., Saul Cornell, *A Well-Regulated Militia* 2–4, 58–65 (2006); Lois G. Schworer, “To Hold and Bear Arms: The English Perspective,” 76 *Chi.-Kent L. Rev.* 27, 34–38 (2000); Don Higginbotham, “The Second Amendment in Historical Context,” 16 *Constitutional Commentary* 263, 265 (1999). The District of Columbia had argued that “the original understanding of the Second Amendment was neither an individual right of self-defense nor a collective right of the states, but rather a civic right that guaranteed that citizens would be able to keep and bear those arms needed to meet their legal obligation to participate in a well-regulated militia.” Cornell, *supra*, at 2; see also Paul Finkelman, “‘A Well Regulated Militia’: The Second Amendment in Historical Perspective,” 76 *Chi.-Kent L. Rev.* 195, 213–14 (2000); Don Higginbotham, “The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship,” 55 *William & Mary Q.* 39, 47–50 (1998); Roy G. Weatherup,

"Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment," 2 *Hastings Constitutional L.Q.* 961, 994-95 (1975).

The Supreme Court rejected the argument. The appellees ask us to repudiate the Court's historical analysis. That we can't do. Nor can we ignore the implication of the analysis that the constitutional right of armed self-defense is broader than the right to have a gun in one's home. The first sentence of the *McDonald* opinion states that "two years ago, in *District of Columbia v. Heller*, we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense," *McDonald v. City of Chicago, supra*, 130 S. Ct. at 3026, and later in the opinion we read that "*Heller* explored the right's origins, noting that the 1689 English Bill of Rights explicitly protected a right to keep arms for self-defense, 554 U.S. at 593, and that by 1765, Blackstone was able to assert that the right to keep and bear arms was 'one of the fundamental rights of Englishmen,' *id.* at 594." 130 S. Ct. at 3037. And immediately the Court adds that "Blackstone's assessment was shared by the American colonists." *Id.*

Both *Heller* and *McDonald* do say that "the need for defense of self, family, and property is *most* acute" in the home, *id.* at 3036 (emphasis added); 554 U.S. at 628, but that doesn't mean it is not acute outside the home. *Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one's home, as when it says that the amendment "guarantee[s] the individual right to possess and

carry weapons in case of confrontation." 554 U.S. at 592. Confrontations are not limited to the home.

The Second Amendment states in its entirety that "a well regulated Militia, being necessary to the security of a free State, the right of the people to keep *and bear* Arms, shall not be infringed" (emphasis added). The right to "bear" as distinct from the right to "keep" arms is unlikely to refer to the home. To speak of "bearing" arms within one's home would at all times have been an awkward usage. A right to bear arms thus implies a right to carry a loaded gun outside the home.

And one doesn't have to be a historian to realize that a right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home. Suppose one lived in what was then the wild west—the Ohio Valley for example (for until the Louisiana Purchase the Mississippi River was the western boundary of the United States), where there were hostile Indians. One would need from time to time to leave one's home to obtain supplies from the nearest trading post, and en route one would be as much (probably more) at risk if unarmed as one would be in one's home unarmed.

The situation in England was different—there was no wilderness and there were no hostile Indians and the right to hunt was largely limited to landowners, Schworer, *supra*, at 34-35, who were few. Defenders of the Illinois law reach back to the fourteenth-century Statute of Northampton, which provided that unless on King's business no man could "go nor

ride armed by night nor by day, in Fairs, markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere." 2 Edw. III, c. 3 (1328). Chief Justice Coke interpreted the statute to allow a person to possess weapons inside the home but not to "assemble force, though he be extremely threatened, to go with him to church, or market, or any other place." Edward Coke, *Institutes of the Laws of England* 162 (1797). But the statute enumerated the locations at which going armed was thought dangerous to public safety (such as in fairs or in the presence of judges), and Coke's reference to "assemble force" suggests that the statutory limitation of the right of self-defense was based on a concern with armed gangs, thieves, and assassins rather than with indoors versus outdoors as such.

In similar vein *Sir John Knight's Case*, 87 Eng. Rep. 75, 76 (K.B. 1686), interpreted the statute as punishing "people who go armed to terrify the King's subjects." Some weapons do not terrify the public (such as well-concealed weapons), and so if the statute was (as it may have been) intended to protect the public from being frightened or intimidated by the brandishing of weapons, it could not have applied to all weapons or all carriage of weapons. Blackstone's summary of the statute is similar: "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 *Commentaries on the Law of England* 148-49 (1769) (emphasis added). *Heller* treated Blackstone's reference to "dangerous or unusual weapons" as evidence that the ownership of *some* types of

firearms is not protected by the Second Amendment, 554 U.S. at 627, but the Court cannot have thought *all* guns are “dangerous or unusual” and can be banned, as otherwise there would be no right to keep a handgun in one’s home for self-defense. And while another English source, Robert Gardiner, *The Compleat Constable* 18–19 (3d ed. 1707), says that constables “may seize and take away” loaded guns worn or carried by persons not doing the King’s business, it does not specify the circumstances that would make the exercise of such authority proper, let alone would warrant a prosecution.

Blackstone described the right of armed self-preservation as a fundamental natural right of Englishmen, on a par with seeking redress in the courts or petitioning the government. 1 Blackstone, *supra*, at 136, 139–40. The Court in *Heller* inferred from this that eighteenth-century English law recognized a right to possess guns for resistance, self-preservation, self-defense, and protection against both public and private violence. 554 U.S. at 594. The Court said that American law was the same. *Id.* at 594–95. And in contrast to the situation in England, in less peaceable America a distinction between keeping arms for self-defense in the home and carrying them outside the home would, as we said, have been irrational. All this is debatable of course, but we are bound by the Supreme Court’s historical analysis because it was central to the Court’s holding in *Heller*.



Twenty-first century Illinois has no hostile Indians. But a Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower. A woman who is being stalked or has obtained a protective order against a violent ex-husband is more vulnerable to being attacked while walking to or from her home than when inside. She has a stronger self-defense claim to be allowed to carry a gun in public than the resident of a fancy apartment building (complete with doorman) has a claim to sleep with a loaded gun under her mattress. But Illinois wants to deny the former claim, while compelled by *McDonald* to honor the latter. That creates an arbitrary difference. To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*. It is not a property right—a right to kill a houseguest who in a fit of aesthetic fury tries to slash your copy of Norman Rockwell's painting *Santa with Elves*. That is not self-defense, and this case like *Heller* and *McDonald* is just about self-defense.

A gun is a potential danger to more people if carried in public than just kept in the home. But the other side of this coin is that knowing that many law-abiding citizens are walking the streets armed may make criminals timid. Given that in Chicago, at least, most murders occur outside the home, Chicago Police Dep't, *Crime at a Glance: District 1 13* (Jan.–June 2010), the net effect on crime rates in general and murder rates in particular of allowing the carriage of guns in public is uncertain both as a matter of theory and empirically.

"Based on findings from national law assessments, cross-national comparisons, and index studies, evidence is insufficient to determine whether the degree or intensity of firearms regulation is associated with decreased (or increased) violence." Robert A. Hahn et al., "Firearms Laws and the Reduction of Violence: A Systematic Review," 28 *Am. J. Preventive Med.* 40, 59 (2005); cf. John J. Donohue, "The Impact of Concealed-Carry Laws," in *Evaluating Gun Policy Effects on Crime and Violence* 287, 314–21 (2003). "Whether the net effect of relaxing concealed-carry laws is to increase or reduce the burden of crime, there is good reason to believe that the net is not large.... [T]he change in gun carrying appears to be concentrated in rural and suburban areas where crime rates are already relatively low, among people who are at relatively low risk of victimization—white, middle-aged, middle-class males. The available data about permit holders also imply that they are at fairly low risk of misusing guns, consistent with the relatively low arrest rates observed to date for permit holders. Based on available empirical data, therefore, we expect relatively little public safety impact if courts invalidate laws that prohibit gun carrying outside the home, assuming that some sort of permit system for public carry is allowed to stand." Philip J. Cook, Jens Ludwig & Adam M. Samaha, "Gun Control After *Heller*: Threats and Sideshows from a Social Welfare Perspective," 56 *UCLA L. Rev.* 1041, 1082 (2009); see also H. Sterling Burnett, "Texas Concealed Handgun Carriers; Law-Abiding Public Benefactors," [www.ncpa.org/pdfs/ba324.pdf](http://www.ncpa.org/pdfs/ba324.pdf) (visited Oct. 29, 2012). But we note with disapproval that the opening brief

for the plaintiffs in appeal no. 12-1788, in quoting the last sentence above from the article by Cook and his colleagues, deleted without ellipses the last clause—"assuming that some sort of permit system for public carry is allowed to stand."

If guns cannot be carried outside the home, an officer who has reasonable suspicion to stop and frisk a person and finds a concealed gun on him can arrest him, as in *United States v. Mayo*, 361 F.3d 802, 804-08 (4th Cir. 2004), and thus take the gun off the street before a shooting occurs; and this is argued to support the ban on carrying guns outside the home. But it is a weak argument. Often the officer will have no suspicion (the gun is concealed, after all). And a state may be able to require "open carry"—that is, require persons who carry a gun in public to carry it in plain view rather than concealed. See *District of Columbia v. Heller*, *supra*, 554 U.S. at 626; James Bishop, Note, "Hidden or on the Hip: The Right(s) to Carry After *Heller*," 97 *Cornell L. Rev.* 907, 920-21 (2012). Many criminals would continue to conceal the guns they carried, in order to preserve the element of surprise and avoid the price of a gun permit; so the police would have the same opportunities (limited as they are, if the concealment is effective and the concealer does not behave suspiciously) that they do today to take concealed guns off the street.

Some studies have found that an increase in gun *ownership* causes an increase in homicide rates. Mark Duggan's study, reported in his article "More Guns, More

Crime," 109 *J. Pol. Econ.* 1086, 1112 (2001), is exemplary; and see also Philip J. Cook & Jens Ludwig, "The Social Costs of Gun Ownership," 90 *J. Pub. Econ.* 379, 387 (2006). But the issue in this case isn't ownership; it's carrying guns in public. Duggan's study finds that even the concealed carrying of guns, which many states allow, doesn't lead to an increase in gun ownership. 109 *J. Pol. Econ.* at 1106-07. Moreover, violent crime in the United States has been falling for many years and so has gun ownership, Patrick Egan, "The Declining Culture of Guns and Violence in the United States," [www.themonkeycage.org/blog/2012/07/21/the-declining-culture-of-guns-and-violence-in-the-united-states](http://www.themonkeycage.org/blog/2012/07/21/the-declining-culture-of-guns-and-violence-in-the-united-states) (visited Oct. 29, 2012); see also Tom W. Smith, "Public Attitudes Towards the Regulation of Firearms" 10 (University of Chicago Nat'l Opinion Research Center, Mar. 2007), <http://icpgv.org/pdf/NORCPoll.pdf> (visited Oct. 29, 2012)—in the same period in which gun laws have become more permissive.

A few studies find that states that allow concealed carriage of guns outside the home and impose minimal restrictions on obtaining a gun permit have experienced increases in assault rates, though not in homicide rates. See Ian Ayres & John J. Donohue III, "More Guns, Less Crime Fails Again: The Latest Evidence From 1977-2006," 6 *Econ. J. Watch* 218, 224 (2009). But it has not been shown that those increases persist. Of another, similar paper by Ayres and Donohue, "Shooting Down the 'More Guns, Less Crime' Hypothesis,"

55 *Stan. L. Rev.* 1193, 1270–85 (2003), it has been said that if they “had extended their analysis by one more year, they would have concluded that these laws [laws allowing concealed handguns to be carried in public] reduce crime.” Carlisle E. Moody & Thomas B. Marvell, “The Debate on Shall-Issue Laws,” 5 *Econ. J. Watch* 269, 291 (2008). Ayres and Donohue disagree that such laws reduce crime, but they admit that data and modeling problems prevent a strong claim that they *increase* crime. 55 *Stan. L. Rev.* at 1281–82, 1286–87; 6 *Econ. J. Watch* at 230–31.

Concealed carriage of guns might increase the death rate from assaults rather than increase the number of assaults. But the studies don’t find that laws that allow concealed carriage increase the death rate from shootings, and this in turn casts doubt on the finding of an increased crime rate when concealed carriage is allowed; for if there were more confrontations with an armed criminal, one would expect more shootings. Moreover, there is no reason to expect Illinois to impose *minimal* permit restrictions on carriage of guns outside the home, for obviously this is not a state that has a strong pro-gun culture, unlike the states that began allowing concealed carriage before *Heller* and *MacDonald* enlarged the scope of Second Amendment rights.

Charles C. Branas et al., “Investigating the Link Between Gun Possession and Gun Assault,” 99 *Am. J. of Pub. Health* 2034, 2037 (2009), finds that assault victims are more likely to be armed than the rest

of the population is, which might be thought evidence that going armed is not effective self-defense. But that finding does not illuminate the deterrent effect of knowing that potential victims may be armed. David Hemenway & Deborah Azrael, "The Relative Frequency of Offensive and Defensive Gun Uses: Results from a National Survey," 15 *Violence & Victims* 257, 271 (2000), finds that a person carrying a gun is more likely to use it to commit a crime than to defend himself from criminals. But that is like saying that soldiers are more likely to be armed than civilians. And because fewer than 3 percent of gun-related deaths are from accidents, Hahn et al., *supra*, at 40, and because Illinois allows the use of guns in hunting and target shooting, the law cannot plausibly be defended on the ground that it reduces the accidental death rate, unless it could be shown that allowing guns to be carried in public causes gun ownership to increase, and we have seen that there is no evidence of that.

In sum, the empirical literature on the effects of allowing the carriage of guns in public fails to establish a pragmatic defense of the Illinois law. Bishop, *supra*, at 922-23; Mark V. Tushnet, *Out of Range: Why the Constitution Can't End the Battle over Guns* 110-11 (2007). Anyway the Supreme Court made clear in *Heller* that it wasn't going to make the right to bear arms depend on casualty counts. 554 U.S. at 636. If the mere possibility that allowing guns to be carried in public would increase the crime or death rates sufficed to justify a ban, *Heller* would have been decided the other way, for that possibility was as great in the District of Columbia as it is in Illinois.

And a ban as broad as Illinois's can't be upheld merely on the ground that it's not irrational. *Ezell v. City of Chicago*, 651 F.3d 684, 701 (7th Cir. 2011); *United States v. Yancey*, 621 F.3d 681, 683 (7th Cir. 2010) (per curiam); see also *Heller v. District of Columbia*, *supra*, 554 U.S. at 628 n. 27; *United States v. Chester*, 628 F.3d 673, 679–80 (4th Cir. 2010). Otherwise this court wouldn't have needed, in *United States v. Skoien*, 614 F.3d 638, 643–44 (7th Cir. 2010) (en banc), to marshal extensive empirical evidence to justify the less restrictive federal law that forbids a person “who has been convicted in any court of a misdemeanor crime of domestic violence” to possess a firearm in or affecting interstate commerce. 18 U.S.C. § 922(g)(9). In *Skoien* we said that the government had to make a “strong showing” that a gun ban was vital to public safety—it was not enough that the ban was “rational.” 614 F.3d at 641. Illinois has not made that strong showing—and it would have to make a stronger showing in this case than the government did in *Skoien*, because the curtailment of gun rights was much narrower: there the gun rights of persons convicted of domestic violence, here the gun rights of the entire law-abiding adult population of Illinois.

A blanket prohibition on carrying gun in public prevents a person from defending himself anywhere except inside his home; and so substantial a curtailment of the right of armed self-defense requires a greater showing of justification than merely that the public *might* benefit on balance from such a curtailment, though there is no proof it would. In contrast,

when a state bans guns merely in particular places, such as public schools, a person can preserve an undiminished right of self-defense by not entering those places; since that's a lesser burden, the state doesn't need to prove so strong a need. Similarly, the state can prevail with less evidence when, as in *Skoien*, guns are forbidden to a class of persons who present a higher than average risk of misusing a gun. See also *Ezell v. City of Chicago*, *supra*, 651 F.3d at 708. And empirical evidence of a public safety concern can be dispensed with altogether when the ban is limited to obviously dangerous persons such as felons and the mentally ill. *Heller v. District of Columbia*, *supra*, 554 U.S. at 626. Illinois has lots of options for protecting its people from being shot without having to eliminate all possibility of armed self-defense in public.

Remarkably, Illinois is the *only* state that maintains a flat ban on carrying ready-to-use guns outside the home, though many states used to ban carrying concealed guns outside the home, Bishop, *supra*, at 910; David B. Kopel, "The Second Amendment in the Nineteenth Century," 1998 *BYU L. Rev.* 1359, 1432-33 (1998)—a more limited prohibition than Illinois's, however. Not even Massachusetts has so flat a ban as Illinois, though the District of Columbia does, see D.C. Code §§ 22-4504 to -4504.02, and a few states did during the nineteenth century, *Kachalsky v. County of Westchester*, Nos. 11-3642, -3962, 2012 WL 5907502, at \*6 (2d Cir. Nov. 27, 2012)—but no longer.

It is not that all states but Illinois are indifferent to the dangers that widespread public carrying of guns



may pose. Some may be. But others have decided that a proper balance between the interest in self-defense and the dangers created by carrying guns in public is to limit the right to carry a gun to responsible persons rather than to ban public carriage altogether, as Illinois with its meager exceptions comes close to doing. Even jurisdictions like New York State, where officials have broad discretion to deny applications for gun permits, recognize that the interest in self-defense extends outside the home. There is no suggestion that some unique characteristic of criminal activity in Illinois justifies the state's taking a different approach from the other 49 states. If the Illinois approach were demonstrably superior, one would expect at least one or two other states to have emulated it.

Apart from the usual prohibitions of gun ownership by children, felons, illegal aliens, lunatics, and in sensitive places such as public schools, the propriety of which was not questioned in *Heller* ("nothing in this opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," 554 U.S. at 626), some states sensibly require that an applicant for a handgun permit establish his competence in handling firearms. A person who carries a gun in public but is not well trained in the use of firearms is a menace to himself and others. See Massad Ayoob, "The Subtleties of Safe Firearms Handling," *Backwoods Home Magazine*, Jan./Feb. 2007, p.

30; Debra L. Karch, Linda L. Dahlberg & Nimesh Patel, "Surveillance for Violent Deaths—National Violent Death Reporting System, 16 States, 2007," *Morbidity and Mortality Weekly Report*, p. 11, [www.cdc.gov/mmwr/pdf/ss/ss5904.pdf](http://www.cdc.gov/mmwr/pdf/ss/ss5904.pdf) (visited Oct. 29, 2012). States also permit private businesses and other private institutions (such as churches) to ban guns from their premises. If enough private institutions decided to do that, the right to carry a gun in public would have much less value and might rarely be exercised—in which event the invalidation of the Illinois law might have little effect, which opponents of gun rights would welcome.

Recently the Second Circuit upheld a New York state law that requires an applicant for a permit to carry a concealed handgun in public to demonstrate "proper cause" to obtain a license. *Kachalsky v. County of Westchester*, *supra*. This is the inverse of laws that forbid dangerous persons to have handguns; New York places the burden on the applicant to show that he needs a handgun to ward off dangerous persons. As the court explained, 2012 WL 5907502, at \*13, New York "decided not to ban handgun possession, but to limit it to those individuals who have an actual reason ('proper cause') to carry the weapon. In this vein, licensing is oriented to the Second Amendment's protections.... [I]nstead of forbidding anyone from carrying a handgun in public, New York took a more moderate approach to fulfilling its important objective and reasonably concluded that only individuals having a bona fide reason

to possess handguns should be allowed to introduce them into the public sphere.”

The New York gun law upheld in *Kachalsky*, although one of the nation’s most restrictive such laws (under the law’s “proper cause” standard, an applicant for a gun permit must demonstrate a need for self-defense greater than that of the general public, such as being the target of personal threats, *id.* at \*3, \*8), is less restrictive than Illinois’s law. Our principal reservation about the Second Circuit’s analysis (apart from disagreement, unnecessary to bore the reader with, with some of the historical analysis in the opinion—we regard the historical issues as settled by *Heller*) is its suggestion that the Second Amendment should have much greater scope inside the home than outside simply because other provisions of the Constitution have been held to make that distinction. For example, the opinion states that “in *Lawrence v. Texas*, the [Supreme] Court emphasized that the state’s efforts to regulate private sexual conduct between consenting adults is especially suspect when it intrudes into the home.” 2012 WL 5907502, at \*9. Well of course—the interest in having sex inside one’s home is much greater than the interest in having sex on the sidewalk in front of one’s home. But the interest in self-protection is as great outside as inside the home. In any event the court in *Kachalsky* used the distinction between self-protection inside and outside the home mainly to suggest that a standard less demanding than “strict scrutiny” should govern the constitutionality of laws limiting the carrying of guns outside the home; our analysis is not

based on degrees of scrutiny, but on Illinois's failure to justify the most restrictive gun law of any of the 50 states.

Judge Wilkinson expressed concern in *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011), that "there may or may not be a Second Amendment right in some places beyond the home, but we have no idea what those places are, what the criteria for selecting them should be, what sliding scales of scrutiny might apply to them, or any one of a number of other questions. It is not clear in what places public authorities may ban firearms altogether without shouldering the burdens of litigation. The notion that 'self-defense has to take place wherever [a] person happens to be,' appears to us to portend all sorts of litigation over schools, airports, parks, public thoroughfares, and various additional government facilities.... The whole matter strikes us as a vast *terra incognita* that courts should enter only upon necessity and only then by small degree" (citation omitted). Fair enough; but that "*vast terra incognita*" has been opened to judicial exploration by *Heller* and *McDonald*. There is no turning back by the lower federal courts, though we need not speculate on the limits that Illinois may in the interest of public safety constitutionally impose on the carrying of guns in public; it is enough that the limits it *has* imposed go too far.

The usual consequence of reversing the dismissal of a suit (here a pair of suits) is to remand the case for evidentiary proceedings preparatory to the filing of motions for summary judgment and if those motions fail to an

eventual trial. But there are no evidentiary issues in these two cases. The constitutionality of the challenged statutory provisions does not present factual questions for determination in a trial. The evidence marshaled in the *Skoien* case was evidence of “legislative facts,” which is to say facts that bear on the justification for legislation, as distinct from facts concerning the conduct of parties in a particular case (“adjudicative facts”). See Fed. R. Evid. 201(a); Advisory Committee Note to Subdivision (a) of 1972 Proposed Rule [of Evidence] 201. Only adjudicative facts are determined in trials, and only legislative facts are relevant to the constitutionality of the Illinois gun law. The key legislative facts in this case are the effects of the Illinois law; the state has failed to show that those effects are positive.

We are disinclined to engage in another round of historical analysis to determine whether eighteenth-century America understood the Second Amendment to include a right to bear guns outside the home. The Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside. The theoretical and empirical evidence (which overall is inconclusive) is consistent with concluding that a right to carry firearms in public may promote self-defense. Illinois had to provide us with more than merely a rational basis for believing that its uniquely sweeping ban is justified by an increase in public safety. It has failed to meet this burden. The Supreme Court’s interpretation of the Second Amendment therefore compels us to reverse the decisions in the two cases before us and remand

them to their respective district courts for the entry of declarations of unconstitutionality and permanent injunctions. Nevertheless we order our mandate stayed for 180 days to allow the Illinois legislature to craft a new gun law that will impose reasonable limitations, consistent with the public safety and the Second Amendment as interpreted in this opinion, on the carrying of guns in public.

REVERSED AND REMANDED, WITH DIRECTIONS;  
BUT MANDATE STAYED FOR 180 DAYS.

WILLIAMS, *Circuit Judge*, dissenting. The Supreme Court's decisions in *Heller* and *McDonald* made clear that persons in the state of Illinois (unless otherwise disqualified) must be allowed to have handguns in their homes for self-defense. But those cases did not resolve the question in this case—whether the Second Amendment also requires a state to allow persons to carry ready-to-use firearms in public for potential self-defense. The majority opinion presents one reading of *Heller* and *McDonald* in light of the question presented here, and its reading is not unreasonable. But I think the issue presented is closer than the majority makes it out to be. Whether the Second Amendment

protects a right to carry ready-to-use firearms in public for potential self-defense requires a different analysis from that conducted by the Court in *Heller* and *McDonald*. Ultimately, I would find the result here different as well and would affirm the judgments of the district courts.

*Heller's* approach suggests that judges are to examine the historical evidence and then make a determination as to whether the asserted right, here the right to carry ready-to-use arms in public (in places other than those permitted by the Illinois statute) for potential self-defense, is within the scope of the Second Amendment. (*Heller* has been criticized for reasons including that judges are not historians.) In making this historical inquiry, and in assessing whether the right was a generally recognized one, I agree with the majority that the relevant date is 1791, the date of the Second Amendment's ratification. See Maj. Op. at 3. But I do not agree that the Supreme Court in *Heller* rejected the argument that the State makes here, nor do I think the State's argument effectively asks us to repudiate *Heller's* historical analysis.

The historical inquiry here is a very different one. *Heller* did not assess whether there was a pre-existing right to carry guns in public for self-defense. By asking us to make that assessment, the State is not asking us to reject the Court's historical analysis in *Heller*; rather, it is being true to it. As I see it, the State embraces *Heller's* method of analysis and asks us to conduct it for the different right that is being asserted. I am not the only one to think that *Heller* did not settle the

historical issues. The Second Circuit's recent unanimous decision upholding New York's "proper cause" prerequisite to obtaining a license to carry a handgun in public recognized and discussed the different historical inquiry that occurs when the asserted right is to possess a handgun in public. See *Kachalsky v. County of Westchester*, 2012 WL 5907502, at \*6-7, \*10-11 (2d Cir. Nov. 27, 2012). (Under the New York law that the Second Circuit upheld, "[a] generalized desire to carry a concealed weapon to protect one's person and property does not constitute 'proper cause,'" and "[g]ood moral character plus a simple desire to carry a weapon is not enough." *Id.* at \*3 (internal citations and quotations omitted)).

*Heller* tells us that "the Second Amendment was not intended to lay down a novel principle but rather codified a right inherited from our English ancestors." *Heller*, 554 U.S. at 599 (internal quotations omitted). For our English ancestors a man's home was his castle, and so he had broad powers to defend himself there. See 4 William Blackstone, *Commentaries on the Laws of England* 223 (1769). The focus of *Heller*'s historical examination was on whether the Second Amendment included an individual right to bear arms or whether that right was limited to militia service. Once the *Heller* majority found that the Second Amendment was personal, the conclusion that one could possess ready-to-use firearms in the home for self-defense there makes sense in light of the home-as-castle history.



It is less clear to me, however, that a widely understood right to carry ready-to-use arms in public for potential self-defense existed at the time of the founding. *Cf. Heller*, 554 U.S. at 605 (rejecting argument by dissenters and stating, "That simply does not comport with our longstanding view that the Bill of Rights codified venerable, widely understood liberties."). In contrast to inside the home, where one could largely do what he wished, there was a long history of regulating arms in public. The 1328 Statute of Northampton, quoted by the majority on page 6, provided in relevant part that no man could "go nor ride armed by night nor by day, in Fairs, markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere." 2 Edw. III, c. 3 (1328). If the words of a statute are supreme, the words of the Statute of Northampton expressly prohibit going or riding while "armed," whether at night or in the day, whether the arms are visible or hidden. And the statute contains no intent requirement. So the Statute of Northampton, by its terms, prohibited going armed in public.

This matters because the Statute of Northampton and its principles did not disappear after its enactment in 1328. The leading scholars relied upon at the time of our country's founding also turned to the Statute of Northampton as they discussed criminal offenses. Massachusetts, North Carolina, and Virginia incorporated the Statute of Northampton in the years immediately after the Constitution's adoption. See Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: Historical Versus*

*Ahistorical Standards of Review*, 60 Clev. St. L. Rev. 1, 31-32 (2012). Although the plaintiffs suggest that later generations did not view the Statute of Northampton to mean what its terms said, whether that is true is not obvious. William Blackstone, cited frequently by the *Heller* majority, for example, summarized the Statute of Northampton as he explained public wrongs. He wrote, “[t]he offense 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; and is particularly prohibited by the Statute of Northampton, upon pain of forfeiture of the arms, and imprisonment during the king’s pleasure: in like manner as, by the laws of Solon, every Athenian was finable who walked about the city in armour.” 4 Blackstone, *supra*, 148-49 (internal citation omitted); see also Eugene Volokh, *The First and Second Amendments*, 109 Colum. L. Rev. Sidebar 97, 101 (2009) (recognizing that Blackstone summarized the Statute of Northampton in this passage).

Some, like the plaintiffs, read Blackstone to mean that the Statute of Northampton was understood to cover only those circumstances where the carrying of arms was unusual and therefore terrifying. But that seems to be a strained reading of Blackstone’s words. The more natural reading is that Blackstone states that riding or going armed with dangerous weapons is an offense and is a crime against the public peace. He then explains why the offense of riding or going armed with dangerous weapons is a crime against the public peace—because doing so makes people terrified or nervous. Notably, Blackstone compares going

armed with dangerous weapons to the mere act of walking around a city in armor, which was prohibited in ancient Greece. The comparison suggests that just as seeing a person walking around a city in armor would cause other citizens to be nervous, regardless of any affirmative action, so would the reaction be to seeing another carrying dangerous weapons in a populated area.

It is true as the majority states that *Sir John Knight's Case*, 87 Eng. Rep. 75 (K.B. 1686), stated that the meaning of the Statute of Northampton "was to punish people who go armed to terrify the King's subjects." But it immediately followed that statement by saying that "[i]t is likewise a great offence at the common law, as if the King were not able or willing to protect his subjects; and therefore this Act is but an affirmance of that law." The case is consistent with the idea that going armed in the public arena with dangerous weapons without government permission, by its nature, terrifies the people, whether the arms can be seen or not. *See Charles, supra*, at 28 (examining background and implications of case and explaining that persons who were the "King's Officers and Ministers in doing their Office" were exempt from punishment under the Statute, which explains Sir Knight's acquittal).

Robert Gardiner's *The Compleat Constable*, written for seventeenth- and eighteenth-century British constables, comports with the understanding that the Statute of Northampton's intent was to prohibit the carrying of any weapon that might "endanger

society among the concourse of the people," Charles, *supra*, at 23, and that it was an affirmation of governmental police authority, as well as that "dangerous weapons" included guns, *id.* at 23-24. *The Compleat Constable* stated, with a specific reference to "guns," that a British constable could arrest upon seeing any person ride or go armed offensively, "in Fairs or Markets or elsewhere, by Day or by Night, in affray of Her Majesties Subjects, and Breach of the Peace; or wear or carry any Daggers, Guns, or Pistols Charged." Robert Gardiner, *The Compleat Constable* 18-19 (3d ed. 1707). The only exceptions were for persons serving Her Majesty, sheriffs and their officers, and those "pursuing Hue and Cry, in Case of Felony, and other Offences against the Peace." *Id.* at 19.

Sir Edward Coke also discussed the Statute of Northampton, and he interpreted it to allow persons to keep weapons inside the home, explaining that a man's home was his castle. As the majority notes, Coke also stated that one could not assemble force to go out in public. But that does not necessarily mean that persons were free to carry arms for potential personal self-defense. Indeed, in Coke's explanation of the Statute, he recounted the case of Sir Thomas Figett, who was arrested after he "went armed under his garments, as well as in the palace, as before the justice of the kings bench." Edward Coke, *Institutes of the Laws of England* 161-62 (1797). In his defense, Figett said there "had been debate" between him and another earlier in the week, "and therefore for doubt of danger, and safeguard of his life, he went so

armed." *Id.* at 162. Nonetheless, he was ordered to forfeit his arms and suffer imprisonment at the king's pleasure. *Id.*

I also note that in examining the contours of the proposed right, the majority looks to the perspective of an Ohio frontiersman. But it seems that when evaluating the rights originally embodied in the Second Amendment, looking to the margins should not be the inquiry. *Cf. Heller*, 554 U.S. at 605. We have already observed that there were a number of laws in our country around the time of the founding that limited the discharge of firearms in public cities. *See Ezell v. City of Chicago*, 651 F.3d 684, 705 (7th Cir. 2011) ("The City points to a number of founding-era, antebellum, and Reconstruction state and local laws that limited discharge of firearms in urban environments."); *id.* at 705-06 & nn.13-14; *id.* at 713-14 (Rovner, J., concurring) (observing that "none of the 18th and 19th century jurisdictions cited by the City . . . were apparently concerned that banning or limiting the discharge of firearms within city limits would seriously impinge the rights of gun owners" and that some of the early laws' concern with fire suppression reflected that "public safety was a paramount value to our ancestors" that sometimes trumped a right to discharge a firearm in a particular place). So while there are a variety of other sources and authorities, the ones I have discussed suggest that there was not a clear historical consensus that persons could carry guns in public for self-defense. *See also Kachalsky*, 2012 WL 5907502, at \*6 (stating that unlike the ban

on handguns in the home at issue in *Heller*, “[h]istory and tradition do not speak with one voice” regarding scope of right to bear arms in public and that “[w]hat history demonstrates is that states often disagreed as to the scope of the right to bear arms [in public]”).

I will pause here to state that I am not convinced that the implication of the *Heller* and *McDonald* decisions is that the Second Amendment right to have ready-to-use firearms for potential self-defense extends beyond the home. That the Second Amendment speaks of the “right of the people to keep *and bear* arms” (emphasis added) does not to me imply a right to carry a loaded gun outside the home. *Heller* itself demonstrates this. The Court interpreted “bear” to mean to “carry” or to “wear, bear, or carry,” upon one’s person, for the purpose of being armed and ready in case of conflict. *Heller*, 554 U.S. at 584. And we know that *Heller* contemplated that a gun might only be carried in the home because it ordered the District of Columbia to permit Heller to do precisely that: it directed that unless Heller was otherwise disqualified, the District must allow him “to register his handgun and must issue him a license *to carry it in the home.*” *Id.* at 635 (emphasis added). Mr. Heller did not want simply “to keep” a gun in his closet. He wanted to be able “to bear” it in case of self-defense, and the Supreme Court said he could.

We have warned against “treat[ing] *Heller* as containing broader holdings than the Court set out to establish:

that the Second Amendment creates individual rights, one of which is keeping operable handguns at home for self-defense. . . . Judicial opinions must not be confused with statutes, and general expressions must be read in light of the subject under consideration." See *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc). The Supreme Court made clear in *Heller* and *McDonald* that its holdings only applied to handguns in the home for self-defense. See, e.g., *id.*; *Heller*, 554 U.S. at 635 ("And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."). The Court's language must be read in that light. The plaintiffs point, for example, to *Heller's* statement that the operative clause of the Second Amendment guarantees "the individual right to possess and carry weapons in case of confrontation." 554 U.S. at 592. But *Heller* makes this statement in the portion of its opinion supporting the conclusion that the Second Amendment included a personal right, as compared to one solely related to the militia. See *id.* at 592-95. The plaintiffs also point out that *Heller* stated that the need for self-defense is "most acute" in the home, which they argue implies that there is a Second Amendment right to possess ready-to-use firearms in places outside the home. See *id.* at 628. But the Court made this comment in the context of its conclusion that the District of Columbia handgun ban applied in the home; the fact that the need was acute in the home emphasized that the fatal flaw in the handgun ban was that it applied in the home. See *id.* at 628-30.

By all this I do not mean to suggest that historical evidence definitively demonstrates there was not a right to carry arms in public for self-defense at the time of the founding. The plaintiffs point to other authorities that they maintain reveal the opposite. At best, the history might be ambiguous as to whether there is a right to carry loaded firearms for potential self-defense outside the home. But if that is the case, then it does not seem there was “a venerable, widely understood” right to do so. That may well mean that the right the plaintiffs seek here is outside the scope of the Second Amendment. Perhaps under *Heller’s* rationale that the Second Amendment codified a preexisting right, with history not seeming to clearly support a generally recognized right, the analysis ends right here.

## II.

We said in *Ezell* that “if the historical evidence is inconclusive or suggests that the regulated activity is *not* categorically unprotected—then there must be a second inquiry into the strength of the government’s justification for restricting or regulating the exercise of Second Amendment rights.” 651 F.3d at 703. In doing so, we stated that “the rigor of this judicial review will depend on how close the law comes to the core of the Second Amendment right and the severity of the law’s burden on the right.” *Id.* Any right to carry firearms in public for potential self-defense, if there is one, is not at the “core” of the Second Amendment. See *Kachalsky*, 2012 WL 5907502, at \*9; *United States v. Marzzarella*, 614 F.3d 85, 92 (3d Cir. 2010).



The Supreme Court made clear in *Heller* that “nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . . .” 554 U.S. at 626. *McDonald* made sure to “repeat those assurances.” *McDonald*, 130 S. Ct. at 3047. That a legislature can forbid the carrying of firearms in schools and government buildings means that any right to possess a gun for self-defense outside the home is not absolute, and it is not absolute by the Supreme Court’s own terms.

Indeed, the Supreme Court would deem it presumptively permissible to outright forbid the carrying of firearms in certain public places, but that does not mean that a self-defense need never arises in those places. The teacher being stalked by her ex-husband is susceptible at work, and in her school parking lot, and on the school playground, to someone intent on harming her. So why would the Supreme Court reassure us that a legislature can ban guns in certain places? It must be out of a common-sense recognition of the risks that arise when guns are around.

Any right to carry loaded firearms outside the home for self-defense is, under *Heller*’s own terms, susceptible to a legislative determination that firearms should not be allowed in certain public places. The Supreme Court tells us that a state can forbid guns in schools. That probably means it can forbid guns not just inside the school building, but also in the playground and

parking lot and grassy area on its property too. And if a state can ban guns on school property, perhaps it can ban them within a certain distance of a school too. Cf. 18 U.S.C. § 922(q)(2)(A). The Supreme Court also tells us that a state can ban guns in government buildings. The list of such buildings would seem to include post offices, courthouses, libraries, Department of Motor Vehicle facilities, city halls, and more. And the legislature can ban firearms in other “sensitive places” too. So maybe in a place of worship. See *GeorgiaCarry.Org v. Georgia*, 687 F.3d 1244 (11th Cir. 2012) (upholding ban on firearms in places of worship). Maybe too on the grounds of a public university. See *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 704 S.E.2d 365 (Va. 2011) (upholding regulation prohibiting possession of guns in university facilities and at campus events). Or in an airport, or near a polling place, or in a bar. And if the latter is true then perhaps a legislature could ban loaded firearms any place where alcohol is sold, so in restaurants and convenience stores as well. The resulting patchwork of places where loaded guns could and could not be carried is not only odd but also could not guarantee meaningful self-defense, which suggests that the constitutional right to carry ready-to-use firearms in public for self-defense may well not exist.

It is difficult to make sense of what *Heller* means for carrying guns in public for another notable reason. Immediately before the sentence giving a presumption of lawfulness to bans on guns for felons and the like, *Heller* states: “Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through

the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. *For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.*" 554 U.S. at 626 (emphasis added and internal citations omitted). The implication of the Supreme Court's statement would seem to be that concealed carry is not within the scope of the Second Amendment (or at the least that that is the presumption). *See, e.g., Nelson Lund, The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. Rev. 1343, 1359 (2009) ("This appears to be an endorsement of yet another exception to the constitutional right."); *Hightower v. City of Boston*, 693 F.3d 61, 73 (1st Cir. 2012) (interpreting this language to mean that laws prohibiting the carrying of concealed weapons are an example of presumptively lawful restrictions); 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, 1523-24 (2009). That would not be the first time the Supreme Court had made such a statement. *See Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897) (stating in dicta that Second Amendment right "is not infringed by laws prohibiting the carrying of concealed weapons").

If carrying concealed weapons is outside the scope of the Second Amendment, the consequence would be significant. "In the nineteenth century, concealed carry was often considered outside the scope of the

right to bear arms. Today, it is the most common way in which people exercise their right to bear arms.’” Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 *Stan. L. Rev.* 1, 45 (2012) (quoting David B. Kopel, *The Right to Arms in the Living Constitution*, 2010 *Cardozo L. Rev.* 99, 136 (2010)). And, as the *Moore* plaintiffs acknowledge in their brief, “today, openly carrying handguns may alarm individuals unaccustomed to firearms.” The implication, as explained by Nelson Lund (author of the Second Amendment Foundation’s *amicus curiae* brief in *Heller* in support of Mr. Heller): “In some American jurisdictions today, for example, openly carrying a firearm might plausibly be thought to violate the ancient common law prohibition against ‘terrifying the good people of the land’ by going about with dangerous and unusual weapons. If courts were to conclude that open carry violates this common law prohibition (and thus is not within the preexisting right protected by the Second Amendment), after *Heller* has decreed that bans on concealed carry are *per se* valid, the constitutional right to bear arms would effectively cease to exist.” Lund, *supra*, at 1361-62. (To be clear, if there is a Second Amendment right to carry arms outside the home for potential self-defense in Illinois as my colleagues have found, I am not suggesting that Illinois should not implement concealed carry laws.)

If there is any right to carry ready-to-use firearms among the public for potential self-defense, the plaintiffs contend the Illinois statutes must be unconstitutional because their ban is far-reaching. But I see the question as somewhat more nuanced.

Protecting the safety of its citizens is unquestionably a significant state interest. *United States v. Salerno*, 481 U.S. 739, 748 (1987); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976). Illinois chose to enact the statutes here out of concern for the safety of its citizens. See *People v. Marin*, 795 N.E.2d 953, 959-62 (Ill. App. Ct. 2003).

Given the State's obvious interest in regulating the safety of its citizens, the question is who determines the contours of any right to carry ready-to-use firearms for self-defense in public when they are unsettled as a matter of both original history and policy. The *Heller* majority concluded that "enshrinement of constitutional rights necessarily takes certain policy choices off the table . . . includ[ing] the absolute prohibition of handguns held and used for self-defense in the home." 554 U.S. at 636. But "as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense." *United States v. Masciandro*, 638 F.3d 458, 470 (4th Cir. 2011).

The Supreme Court has told us that we must "accord substantial deference to the predictive judgments of [the legislature]." *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 195 (1997). "In the context of firearm regulation, the legislature is 'far better equipped than the judiciary' to make sensitive policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks." *Kachalsky*, 2012 WL 5907502, at \*12. The legislature knows the statis-

tics and is in a far better position than we are to weigh their import. Illinois reasonably wants to try to reduce the incidence of death and injury by firearms, both those which come from affirmative acts of violence and also the many deaths and injuries that occur accidentally, and doing so by taking them off the streets is a legislative judgment substantially related to its important governmental objective of reducing injury and death by firearms.<sup>1</sup>

It is common sense, as the majority recognizes, that a gun is dangerous to more people when carried outside the home. *See* Maj. Op. at 8. When firearms are carried outside of the home, the safety of a broader range of citizens is at issue. The risk of being injured or killed now extends to strangers, law enforcement personnel, and other private citizens who happen to be in the area. *Cf.* David Hemenway & Deborah Azrael, *The Relative Frequency of Offensive and Defensive Gun Uses: Results from a National Survey*, 15 *Violence & Victims* 257, 271 (2000) (finding that guns are used “far more often to kill and wound

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<sup>1</sup>State courts that have addressed a state constitutional right to bear arms have used a “reasonable regulation” standard, a test that is more deferential than intermediate scrutiny but that, unlike the interest-balancing test proposed in Justice Breyer’s *Heller* dissent, does not permit states to prohibit all firearm ownership. *See, e.g., State v. Hamdan*, 665 N.W.2d 785, 798-801 (Wis. 2003); Adam Winkler, *Scrutinizing the Second Amendment*, 105 *Mich. L. Rev.* 683, 686-87 (2007) (discussing “hundreds” of state court opinions using this test).

innocent victims than to kill and wound criminals"). Indeed, the Illinois legislature was not just concerned with "crime rates" and "murder rates" when it passed the law. Cf. Maj. Op. at 8. It also sought to "prevent situations where no criminal intent existed, but criminal conduct resulted despite the lack of intent, e.g., accidents with loaded guns on public streets or the escalation of minor public altercations into gun battles or . . . the danger of a police officer stopping a car with a loaded weapon on the passenger seat." See *Marin*, 795 N.E.2d at 962. The danger of such situations increases if guns may be carried outside the home.

That the percentage of reported accidental gun-related deaths is lower as compared to suicide (which accounts for the majority of firearms-related deaths) and murder, see Robert A. Hahn et al., *Firearms Laws and the Reduction of Violence: A Systematic Review*, 28 Am. J. Preventive Med. 40, 40 (2005), does not make the Illinois law invalid. First, in those statistics, "[u]nintentional firearm-related deaths appear to be substantially undercounted (i.e., misclassified as due to another cause)," *id.* at 47, and in any event the State has a significant interest in reducing the risk of accidental firearms-related deaths as well as accidental injuries. The majority says the law cannot be justified on the ground that it reduces the accidental death rate unless it could be shown that allowing guns to be carried in public causes gun ownership to increase. See Maj. Op. at 13. But whether gun ownership increases is not the question. See *id.* at 10-11. It is not the number of guns owned that matters but where the guns are carried. Illinois already

allows people to own and have guns in their homes; however, they cannot carry them in public. The Illinois legislature reasonably concluded that if people are allowed to carry guns in public, the number of guns carried in public will increase, and the risk of firearms-related injury or death in public will increase as well. *Cf. Marin*, 795 N.E.2d at 959-62.

And it is also common sense that the danger is a great one; firearms are lethal. *Cf. Skoien*, 614 F.3d at 642 (“guns are about five times more deadly than knives, given that an attack with some kind of weapon has occurred”) (citing Franklin E. Zimring, *Firearms, Violence, and the Potential Impact of Firearms Control*, 32 J. L. Med. & Ethics 34 (2004)). For that reason too the focus simply on crime rates misses the mark. As Philip J. Cook, a Duke University professor cited twice by the majority, put it: “My research over 35 years demonstrates that the effect of gun availability is not to increase the crime rate but to intensify the crime that exists and convert assaults into murders.” Ethan Bronner, *Other States, and Other Times, Would Have Posed Obstacles for Gunman*, N.Y. Times, July 25, 2012, at A12.

The majority’s response to the fact that guns are a potential lethal danger to more people when carried in public seems to be to say that knowing potential victims could be armed may have a deterrent effect or make criminals timid. *See Maj. Op.* at 8, 13. Yet even an article relied upon by the majority cautions that the effect on criminals may well be *more* gun use: “Two-thirds of prisoners incarcerated for gun offenses reported



that the chance of running into an armed victim was very or somewhat important in their own choice to use a gun. Currently, criminals use guns in only about 25 percent of noncommercial robberies and 5 percent of assaults. If increased gun carrying among potential victims causes criminals to carry guns more often themselves, or become quicker to use guns to avert armed self-defense, the end result could be that street crime becomes more lethal." Philip J. Cook, Jens Ludwig & Adam M. Samaha, *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 *UCLA L. Rev.* 1041, 1081 (2009).

On the other side of the lethal danger to the State's citizens is the asserted interest in carrying guns for self-defense, yet even the majority does not contend that carrying guns in public has been shown to be an effective form of self-defense. For example, as the majority acknowledges, University of Pennsylvania researchers found that assault victims are more likely to be armed than the rest of the population. *See* Maj. Op. at 12-13 (citing Charles C. Branas et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 *Am. J. of Pub. Health* 2034, 2037 (2009)). The researchers examined shootings in Philadelphia and concluded that "gun possession by urban adults was associated with a significantly increased risk of being shot in an assault," *id.*, which suggests, if anything, that carrying a gun is not effective self-defense. The researchers posited that possible reasons for their findings included that a gun may falsely empower its possessor to overreact, that persons with guns may increase the risk of harm by

entering dangerous environments that they normally would have avoided, and that persons bringing guns to an otherwise gun-free conflict may have those guns wrested away and turned on them. *Id.* at 2037-38.

Other studies have found that in states with broad concealed-carry laws there is an increased chance that one will be a victim of violent crime. Yale Law School Professors Ian Ayres and John J. Donohue III concluded that “the evidence is most supportive of the claim that [right-to-carry] laws *increase* aggravated assault.” *More Guns, Less Crime Fails Again: The Latest Evidence from 1977-2006*, 6 *Econ. J. Watch* 218, 220 (May 2009).<sup>2</sup> (Donohue is now at

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<sup>2</sup>The majority cites Moody and Marvell’s 2008 paper suggesting that Ayres and Donohue should have extended their 2003 analysis by one more year. But extending their data is just what Ayres and Donohue did in their May 2009 piece, *More Guns, Less Crime Fails Again: The Latest Evidence from 1977-2006*. And after extending their state panel data by six additional years, they again concluded that “the best evidence to date suggests that [right-to-carry] laws at the very least *increase* aggravated assault.” *Id.* at 231. They also thoroughly responded to Moody and Marvell’s criticism that their initial 2003 analysis evaluated the trend for five years rather than six, explaining in part: “We would have thought, though, that one would want to be very cautious in evaluating trends beyond five years when 14 of the 24 states have no post-passage data beyond *three* years.” *Id.* at 218-19. They also criticized Moody and Marvell’s conclusions and demonstrated that the two had incorrectly graphed the estimates from Donohue’s table and  
(continued...)

Stanford.) Similarly, another study showed that “an increase in gun prevalence causes an *intensification* of criminal violence—a shift toward a greater lethality, and hence greater harm to a community.” Philip J. Cook & Jens Ludwig, *The Social Costs of Gun Ownership*, 90 J. Pub. Econ. 379, 387 (2006). Other researchers have concluded that guns are “used far more often to intimidate and threaten than they are used to thwart crimes.” Hemenway & Azrael, *supra*, at 271.

The ban on firearms in public is also an important mechanism for law enforcement to protect the public. With guns banned in public an officer with reasonable suspicion to stop and frisk a person can, upon finding a gun, take the gun off the street before a shooting occurs. The majority says that a state may be able to require “open carry,” where persons who carry guns in public must carry them in plain view. Maj. Op. at 10. Living with the open carrying of loaded guns on the streets of Chicago and elsewhere would certainly be a big change to the daily lives of Illinois citizens. Even the plaintiffs do not seem to want Illinois to take that drastic a step, recognizing that “openly carrying handguns may alarm individuals unaccustomed to firearms” and that *Heller* “does not force states to allow the carrying of handguns in a manner that may cause needless public alarm.” *Moore Br.* at 35.

The majority also suggests that with open carry the police could still arrest persons who carry

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(...continued)

misinterpreted the estimates. *Id.* at 219.

concealed guns. This is true but seems contradictory to its statement two sentences earlier that in its view, under the current law police will often lack reasonable suspicion to stop a person with a concealed gun since it is concealed. *See* Maj. Op. at 10. To the latter, guns are not allowed now, so theoretically persons are attempting to conceal them. Nonetheless, Chicago's Police Department made over 4,000 arrests on weapons violations in 2009, though some of these arrests could have been made in conjunction with other crimes as well.<sup>3</sup> More importantly, "concealed" does not mean "invisible." An officer who reasonably suspects he sees a gun in a car when he pulls someone over, or notices what he reasonably suspects to be a gun bulging out of someone's clothes, can under the law as it currently stands arrest that person and take the gun off the street.

Allowing open (or concealed) carry does not address the fundamental point about law enforcement's ability to protect the public: if guns are not generally legal to have in public, officers can remove them from the streets before a shooting occurs whenever they come across a gun. Under a law like the Illinois law, an officer with some reasonable belief that a person is carrying a firearm can stop that person and remove the gun from the street because the officer has a

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<sup>3</sup>Chicago Police Dep't Annual Report 2010, at 34, *available at* <https://portal.chicagopolice.org/portal/page/portal/ClearPath/News/Statistical%20Reports/Annual%20Reports/10AR.pdf>.

reasonable belief that a crime is taking place. The ability to use stops and arrests upon reasonably suspecting a gun as a law enforcement tactic to ultimately protect more citizens does not work if guns can be freely carried.

To the extent the majority opinion's studies draw different conclusions, the Supreme Court has made clear that "the possibility of drawing two inconsistent conclusions from the evidence" does not prevent a finding from being supported by substantial evidence. *Turner Broad.*, 520 U.S. at 211; *see also Kachalsky*, 2012 WL 5907502, at \*13 (recognizing different studies concerning relationship between handgun access and violent crime, and handgun access and safety and character of public places, and stating, "It is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments."). Moreover, it is not necessary for "the statute's benefits" to be "first established by admissible evidence" or by "proof, satisfactory to a court." *Skoien*, 614 F.3d at 641. Nor would the State need to make a stronger showing here than in *Skoien*. *Skoien* concerned the prohibition on firearm possession by misdemeanants with domestic violence convictions, a ban that also applies to the core Second Amendment right of gun possession in the home. As such, the "strong showing" the government acknowledged it needed to demonstrate there made sense. *See id.*

I would note too that the 2005 paper "Firearms Laws and the Reduction of Violence: A Systematic Review," quoted by the majority for its statement that based on its review, evidence was insufficient to determine

whether the degree of firearms regulation is associated with decreased or increased violence, Maj. Op. at 9, did not limit that conclusion to the degree of firearms regulation. The paper found the evidence available from identified studies “insufficient to determine” the effectiveness of *any* of the laws it reviewed, even including acquisition restrictions (e.g., felony convictions and personal histories including persons adjudicated as “mental defective”), and firearms registration and licensing—propositions that even the plaintiffs seem to favor. And, the paper cautioned that “[a] finding that evidence is insufficient to determine effectiveness means that we do not yet know what effect, if any, the law has on an outcome—not that the law has no effect on the outcome.” Hahn et al., *supra*, at 40.

The Illinois statutes safeguard the core right to bear arms for self-defense in the home, as well as the carry of ready-to-use firearms on other private property when permitted by the owner, along with the corollary right to transport weapons from place to place. See 720 Ill. Comp. Stat. 5/24-2; 720 Ill. Comp. Stat. 5/24-1.6(a)(1). Guns in public expose all nearby to risk, and the risk of accidental discharge or bad aim has lethal consequences. Allowing public carry of ready-to-use guns means that risk is borne by all in Illinois, including the vast majority of its citizens who choose not to have guns. The State of Illinois has a significant interest in maintaining the safety of its citizens and police officers. The legislature acted within its authority when it concluded that its interest in reducing gun-related deaths and injuries would not be as effectively

served through a licensing system. For one, every criminal was once a law-abiding citizen, so strategies for preventing gun violence that bar prior criminals from having firearms do not do enough. *See* Philip J. Cook, et al., *Criminal Records of Homicide Offenders*, 294 J. Am. Med. Ass'n 598, 600 (2005) (homicide prevention strategies targeted toward prior offenders "leave a large portion of the problem untouched"). Nor could the State ensure that guns in public are discharged only, accurately, and reasonably in instances of self-defense. *See People v. Mimes*, 953 N.E.2d 55, 77 (Ill. App. Ct. 2011) ("The extensive training law enforcement officers undergo concerning the use of firearms attests to the degree of difficulty and level of skill necessary to competently assess potential threats in public situations and moderate the use of force.").

The Supreme Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems," and courts "should not diminish that role absent impelling reason to do so." *Oregon v. Ice*, 555 U.S. 160, 171 (2009). Indeed, "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). (And to the extent it matters, Illinois is not the only place that has and enforces strict gun laws. New York City, for example, has gun laws that are in effect like those of Illinois; while technically a "may issue" location where the city may issue permits

for handgun carry outside the home, New York City rarely does so and so has been characterized as maintaining a virtual ban on handguns. *See* Lawrence Rosenthal, *Second Amendment Plumbing after Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 *Urb. Lawyer* 1, 39 (2009)). Reasonable people can differ on how guns should be regulated. Illinois has chosen to prohibit most forms of public carry of ready-to-use guns. It reaffirmed that just last year, when its legislature considered and rejected a measure to permit persons to carry concealed weapons in Illinois. *See* Dave McKinney, *Concealed-Carry Measure: Shot Down in Springfield*, *Chicago Sun-Times*, 2011 WLNR 9215695 (May 6, 2011). In the absence of clearer indication that the Second Amendment codified a generally recognized right to carry arms in public for self-defense, I would leave this judgment in the hands of the State of Illinois.





# United States Court of Appeals

For the Seventh Circuit  
Chicago, Illinois 60604

February 22, 2013

## Before

FRANK H. EASTERBROOK, *Chief Judge*  
RICHARD A. POSNER, *Circuit Judge*  
JOEL M. FLAUM, *Circuit Judge*  
MICHAEL S. KANNE, *Circuit Judge*  
ILANA DIAMOND ROVNER, *Circuit Judge*  
DIANE P. WOOD, *Circuit Judge*  
ANN CLAIRE WILLIAMS, *Circuit Judge*  
DIANE S. SYKES, *Circuit Judge*  
JOHN DANIEL TINDER, *Circuit Judge*  
DAVID F. HAMILTON, *Circuit Judge*

Nos. 12-1269, 12-1788

MICHAEL MOORE, *et al.*, and  
MARY E. SHEPARD, *et al.*,

*Plaintiffs-Appellants,*

*v.*

LISA MADIGAN, ATTORNEY GENERAL  
OF ILLINOIS, *et al.*,

*Defendants-Appellees.*

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Appeals from the United States District Courts  
for the Central District of Illinois and  
the Southern District of Illinois.  
Nos. 3:11-cv-3134-SEM-BGC and  
3:11-cv-405-WDS-PMF—**Sue E. Myerscough** and  
**William D. Stiehl**, *Judges*.

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### ORDER

On January 8, 2013, defendants-appellees filed a petition for rehearing *en banc*, and on January 23, 2013, plaintiffs-appellants filed answers to the petition. A vote of the active members of the court on whether to grant rehearing *en banc* was requested and a majority of the judges have voted to deny the petition.\* The petition is therefore DENIED.

Judge David F. Hamilton's dissent from the denial of rehearing *en banc*, joined by Judges Rovner, Wood and Williams, is appended.

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\* Judge Michael S. Kanne did not participate in the consideration of the petition for rehearing *en banc*.

HAMILTON, *Circuit Judge*, joined by ROVNER, WOOD, and WILLIAMS, *Circuit Judges*, dissenting. I respectfully dissent from the denial of rehearing en banc in these cases. The Supreme Court has not yet decided whether the post-*Heller* individual right to keep and bear arms at home under the Second Amendment extends beyond the home. The panel's split decision in these cases goes farther than the Supreme Court has gone and is the first decision by a federal court of appeals striking down legislation restricting the carrying of arms in public. Until the Supreme Court faces the issue, the state of the law affecting people in Illinois, Wisconsin, and Indiana is an important question worthy of en banc consideration to decide whether to affirm, reverse, or remand for further factual development. Without undue repetition of Judge Williams' persuasive panel dissent, three points deserve emphasis at this en banc stage of the proceedings.

First, extending the right to bear arms outside the home and into the public sphere presents issues very different from those involved in the home itself, which is all that the Supreme Court decided in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). I will not repeat the debate in the panel opinions reviewing the historical and empirical evidence, for that debate was, in the majority's view, essentially dicta. The core of the panel majority's reasoning is that because there is a need for self-defense outside the home as well as in, *Heller* and *McDonald* should extend to public carrying of loaded firearms. *Moore v. Madigan*, 702 F.3d 933, 935-38 (7th Cir. 2012). The logic has some appeal, but its

simplicity overlooks qualitative differences between a private home and public streets and buildings that must be considered as we try to interpret *Heller* and *McDonald*. See *Kachalsky v. County of Westchester*, 701 F.3d 81, 94 (2d Cir. 2012).

In so many public settings, carrying and using firearms present lethal risks to innocent bystanders. Yet when people go about their daily lives in public places, they have no choice about whether to consent to the dangers posed by firearms in public. We can all choose whether to visit homes where firearms are present.

To illustrate the dangers posed by lawful use of firearms in public, consider a deadly confrontation on the streets of New York City in August 2012, when police confronted an armed man who had just shot and killed another man. The police officers were well trained in both *how* to shoot and *when* to shoot and not shoot. The officers fatally shot the gunman, but the officers' many shots also wounded nine bystanders.<sup>1</sup> I intend no criticism of the officers, who confronted an urgent, dan-

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<sup>1</sup> See Michael Wilson, *After Bullets Hit Bystanders, Protocol Questions*, N.Y. Times, Aug. 25, 2012, available at <http://www.nytimes.com/2012/08/26/nyregion/bystanders-shooting-wounds-caused-by-the-police.html?> (last visited Feb. 19, 2013); Chris Francescani, *All Nine Bystanders Wounded in Empire State Shooting Hit by Police*, Reuters, Aug. 27, 2012, available at <http://reuters.com/article/2012/08/27/us-usa-shooting-empirestate-police-idUSBRE87Q04X20120827> (last visited Feb. 19, 2013). One could go on indefinitely collecting examples of lawful firearms in public being used both to cause harm and to prevent harm.

gerous situation that few have experienced first-hand. We will always need armed police officers, and some harm will be unavoidable despite their training, skill, and experience. But consider how much worse the situation on the crowded streets of New York might have been if several civilians, without the officers' training but carrying firearms lawfully, had tried to help with their own firearms. Unless the Supreme Court is prepared to embrace the view attributed to it by the panel majority, that the Second Amendment right to bear arms does not depend on "casualty counts," 702 F.3d at 939, we should not assume that the logic of *Heller* extends naturally and without qualification to firearms in public.

Moreover, the panel majority makes its constitutional point about self-defense outside the home by relying on the need for weapons on the early American frontier. The reliance misses the point. See *Moore*, 702 F.3d at 936. It would have been foolish for any frontier government to prohibit carrying weapons from homestead to trading post. But we do not usually test constitutional doctrine by asking whether all foolish laws would be banned. The real constitutional question is whether there is a right to bear arms in public so rigid that it must strike down duly enacted laws that apply in the downtown streets of modern Chicago, Washington, or New York. It need not be.

Second, despite my disagreement with the panel majority, it's important to keep in mind what the panel did not decide. The panel majority opinion is now the

law of the circuit, and Illinois has 180 days to decide how to amend its laws. Those of us in the lower federal courts are understandably reluctant to commit to a particular standard of constitutional scrutiny that should be applied to Second Amendment issues after *Heller* and *McDonald*, or even to the idea that the standard should be the same for all issues. Nevertheless, it's reasonably clear at this point that the standard is more demanding than rational-basis review and less demanding than strict scrutiny. The panel majority leaves the State a good deal of constitutional room for reasonable public safety measures concerning public carrying of firearms:

(a) Illinois will still be able to establish reasonable limits on *who* may carry a loaded firearm in public. *Heller* itself made clear that the right to keep and bear arms may be denied based on a felony conviction or mental illness. 554 U.S. at 626; see also *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc) (upholding conviction for possession of firearm by person convicted of domestic violence misdemeanor). Reasonable requirements for firearms training and proficiency, including safe and responsible handling and use, should withstand constitutional scrutiny. The Second Circuit recently upheld New York's state law requiring "proper cause" for issuance of a permit to carry a gun. *Kachalsky*, 701 F.3d 81.

(b) Illinois will still be able to set reasonable limits on *where* qualified persons may legally carry firearms in public. *Heller* itself endorsed restrictions in "sensitive" places, such as schools and government buildings. 554 U.S. at 626. It should not be difficult to make reasonable

arguments to support extending that reasoning to areas around schools, courthouses, other government buildings, public universities,<sup>2</sup> public libraries, hospitals, medical offices, public parks and forests, churches and other places of worship, banks, shopping centers, public transportation facilities and vehicles, and venues for sporting events, concerts, and other entertainment, among many possible examples.

(c) Privately owned bars, nightclubs, and restaurants also could fit into that reasoning, and surely the federal Constitution would not prevent a private owner of a business from imposing a ban on carrying firearms in or around the business. See *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1264-66 (11th Cir. 2012) (upholding state law giving private property owners right to exclude firearms). Places of employment could pose similar issues, and again, it's hard to see how the federal Constitution would prohibit a private employer from banning firearms on its premises.

(d) The panel opinion also does not prevent Illinois from setting reasonable limits on *how* qualified persons may carry firearms in public places where they are not prohibited. Should loaded firearms in public be carried openly? Should they be concealed? Should the answer differ depending on place and circumstance? *Heller* noted that a majority of nineteenth-century courts upheld

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<sup>2</sup> See *DiGiacinto v. Rector and Visitors of George Mason Univ.*, 704 S.E.2d 365 (Va. 2011) (upholding regulation prohibiting possession of firearms on campus of public university).



prohibitions on carrying concealed weapons in favor of carrying weapons openly, 554 U.S. at 626, but open carrying of firearms in our modern society can be intimidating and even disruptive.

(e) Finally, the panel opinion, *Heller*, and *McDonald* do not prevent Illinois from imposing reasonable limits on *which* arms may be carried in public. See *Heller*, 554 U.S. at 627. We can be reasonably confident that the Second Amendment rights are not limited to arms known to the Framers of the amendment, but also confident that the rights do not extend to all the arms that a modern militia might need.

In other words, the panel's holding that the current Illinois laws are too restrictive leaves room for many reasonable steps to protect public safety. That takes me to my third point, which concerns how future Second Amendment litigation should proceed. The panel decided to reverse dismissals under Rule 12(b)(6) and to order entry of permanent injunctions against enforcement of the state laws. That step prevented Illinois and the plaintiffs from presenting relevant evidence, both empirical and historical, in a genuinely adversarial setting subject to cross-examination.

The panel majority views the current Illinois restrictions as simply too broad to survive no matter what the empirical or historical evidence might show. The panel's reasoning on that point does not extend, as I read it, to future challenges to narrower, better-tailored restrictions such as those described above. Under some form of intermediate constitutional scrutiny, where courts

will need to weigh both Second Amendment rights and state interests justifying some restrictions on those rights, actual evidence on the burdens, consequences, and governmental interests will be vital for sound judgment. Courts considering even legislative facts, as distinct from adjudicative facts, can benefit from truly adversarial presentation of relevant evidence. See *Ezell v. City of Chicago*, 651 F.3d 684, 709 (7th Cir. 2011) (emphasizing need for evidence in applying intermediate scrutiny in Second Amendment challenge).

Where the law is genuinely in doubt, as it is likely to remain for some time under the Second Amendment, a trial court can do a great service by ensuring the development of a thorough and complete record that provides a reliable, accurate factual foundation for constitutional adjudication. The federal courts are likely to do a better job of constitutional adjudication if our considerations are based on reliable facts rather than hypothesized and assumed facts.