No. 10-3525

In the United States Court of Appeals for the Seventh Circuit

RHONDA EZELL, WILLIAM HESPEN, JOSEPH BROWN, ACTION TARGET, INC., SECOND AMENDMENT FOUNDATION, INC., AND ILLINOIS STATE RIFLE ASSOCIATION,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO,

Defendant-Appellee.

Appeal from an Order of the United States District Court
for the Northern District of Illinois
The Hon. Virginia M. Kendall, District Judge
District Court No. 10-CV-5135

APPELLANTS' BRIEF AND REQUIRED SHORT APPENDIX

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-3525

Short Caption: Rhonda Ezell, et al. v. City of Chicago

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

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[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

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

Rhonda Michelle Ezell, William Edward Hespen, Joseph Irwin Brown, Action Target, Inc.,

Second Amendment Foundation, Inc., Illinois State Rifle Association

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

Law Firm of David G. Sigale

Gura & Possessky, PLLC

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

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

Action Target, Inc., None; Second Amendent Foundation, Inc., None; Illinois State Rifle Association, None

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

Action Target, Inc. -- BB&T/ATI Investment, LLC

Attorney's Signature: _____ Date: December 7, 2010

Attorney's Printed Name: Alan Gura

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** [ ] **No** [X]

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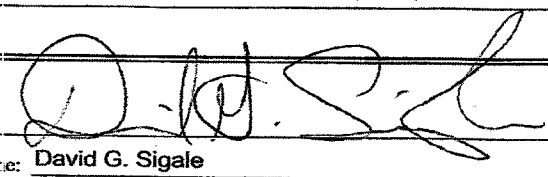
Attorney's Signature:  Date: November 12, 2010

Attorney's Printed Name: David G. Sigale

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes [X] No [ ]

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APPELLANTS' BRIEF

JURISDICTIONAL STATEMENT

Plaintiffs-Appellants ("Plaintiffs") seek declaratory and injunctive relief barring enforcement of several City of Chicago ordinances as unconstitutional under the Second and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983. The District Court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1343.

Plaintiff Second Amendment Foundation, Inc., is a non-profit corporation, organized under the laws of Washington with its principal place of business in Bellevue, Washington. Plaintiff Illinois State Rifle Association is a non-profit corporation, organized under the laws of Illinois with its principal place of business in Chatsworth, Illinois. Plaintiff Action Target, Inc., is a corporation organized under the laws of Delaware with its principal place of business in Provo, Utah.

On October 12, 2010, the District Court denied Plaintiffs' motion for preliminary and permanent injunctive relief. Short Appendix ("SA") 1-19. This Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1292(a)(1), which "is decently plain: all interlocutory orders denying injunctions are appealable." *Holmes* v. *Fisher*, 854 F.2d 229, 231 (7th

Cir. 1988); *see also Centurion Reinsurance Co.* v. *Singer*, 810 F.2d 140, 143 (7th Cir. 1987) ("[o]rders dissolving preliminary injunctions, like orders . . . denying such injunctions, are expressly made appealable by 28 U.S.C. § 1292(a)(1) regardless of finality."); *Elliott* v. *Hinds*, 786 F.2d 298, 300 (7th Cir. 1986) ("[a] definitive denial of permanent injunctive relief is automatically appealable under section 1292(a)(1).") (citation omitted).

Plaintiffs timely filed their notice of appeal October 28, 2010. Separate Appendix ("App.") 15.

STATEMENT OF ISSUES

1. Does the Second Amendment secure a right to use or operate a gun range?
2. Do ordinances prohibiting the operation of gun ranges violate the Second Amendment where gun ownership is conditioned on range training?
3. Does firearm instruction or training at a range constitute speech protected by the First Amendment?

4. Do violations of Second Amendment rights, implicating an individual's ability to exercise the right of self-defense, risk irreparable harm warranting preliminary injunctive relief?
5. If the complete prohibition of an activity is unconstitutional, may a court decline to enjoin that prohibition on the government's assertion that it has not regulated the constitutional right?

STATEMENT OF THE CASE

Defendant-Appellee City of Chicago ("Defendant") continues its argument with that portion of the Constitution commanding it not to infringe the people's right to keep and bear arms. U.S. CONST. amend. II. Choosing to resist, rather than comply with the Supreme Court's judgment on this topic, *McDonald* v. *City of Chicago*, 130 S. Ct. 3020 (2010), the City mandates live-fire range training as a condition of gun ownership—but bans gun ranges, without exception, throughout its 230-plus square mile territory.

Plaintiffs take no position regarding the training requirement. Regardless of whether the government can or should mandate gun training, firearms proficiency is at least a good idea: gun training saves

lives, reduces accidents and increases the likelihood that legitimate defensive gun uses succeed.[1]

But the City's decision to burden gun ownership by banning access to the very training it requires is not merely bad policy. It is plainly unconstitutional. Individuals enjoy a Second Amendment right to engage in target shooting—for its own sake, and as a necessary corollary to the right of self-defense, which requires proficiency to be effective. And as there is a fundamental right to armed self-defense, the city cannot ban the very activity it demands as a prerequisite for exercising that right. Moreover, the First Amendment squarely protects instruction and training, without a gun-exception.

On August 16, 2010, Plaintiffs brought this action in the United States District Court for the Northern District of Illinois, seeking declaratory, preliminary and permanent injunctive relief against the range ban, the application of other specific Chicago ordinances within

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[1]The constitutionality of Chicago's training requirement would depend upon recognition of training's value. *Cf. Parker* v. *District of Columbia*, 478 F.3d 370, 399 (D.C. Cir. 2007), *aff'd sub nom District of Columbia* v. *Heller*, 128 S. Ct. 2783 (2008) ("Reasonable firearm proficiency testing would . . . promote public safety . . .").

the context of a gun range, and the application of any other Chicago ordinances in a manner that would implement a range ban. App. 1-12. The same day, Plaintiffs moved for a preliminary injunction. App. 13.

Defendant indicated that it would seek an indefinite stay of the preliminary injunction motion, pending its motion to re-assign the case as related to an earlier-filed, comprehensive challenge to Chicago's gun ordinance. Not wishing to endure any delays, Plaintiffs responded by moving for a temporary restraining order.

On August 24, 2010, the lower court denied the motion for temporary restraining order on grounds that Plaintiffs had not yet established irreparable harm for two reasons: first, the individual plaintiffs were able to move beyond the city's borders to get training, and in fact Plaintiff Ezell had done so; and Plaintiffs' proposed immediate remedy, a mobile firearms range, "can't get here yet . . . [it] looks like it's coming at the earliest mid-September." SA 24. The motion's denial was without prejudice, the court advising Plaintiffs, "it can be soon enough an irreparable injury . . . This is one that you can bring again." SA 25. The court also advised Defendant,

> if you're requiring everyone to take their weapons outside to the suburbs to fire them in order to get certified to possess them, that doesn't wash. And so I think that you have some thinking to do about how you're going to approach this in the future, in the very, very near future.

SA 27.

The lower court also granted Defendant's request to take discovery, whereupon significant discovery occurred, including thirteen depositions (twelve noticed by Defendant) and multiple comprehensive sets of interrogatories, requests for production, and subpoenas duces tecum.

On September 15, 2010, Plaintiffs again moved for a temporary restraining order, as a firm, near date had been established for the arrival of the mobile range, and the organizational Plaintiffs submitted additional evidence of the range ban's impact on their membership and on the general public. But this motion, too, was denied. SA 32-38.

On October 1, 2010, the lower court commenced a two-day hearing on Plaintiffs' motion for preliminary injunction.

Considering the voluminous and comprehensive discovery conducted prior to that hearing, the hearing's broad scope, the extensive live and written testimony presented to the lower court, the exhibit sets

submitted by the parties, and most significantly, the fact that this case ultimately concerns only questions of law, Plaintiffs moved the lower court to consider the hearing as a trial on the merits under Fed. R. Civ. Proc. 65(a)(2). Plaintiffs had repeatedly indicated they would do so. App. 62, 91; TRO Br., Aug. 22, 2010, pp. 1-2, 5-6; Prelim. Inj. Reply Br., Sept. 27, 2010, pp. 1, 13. The court denied the motion, app. 94, and on October 12, 2010, it denied Plaintiffs' motion for preliminary injunction. SA 1-19.

Plaintiffs timely appealed the denial of their motion for injunctive relief. App. 15. Defendant's motion for reassignment, motion to dismiss, and motion to stay proceedings in the district court pending resolution of this appeal, all remain pending below.

The Court should reverse the decision below, and remand with instructions to grant Plaintiffs' request for a judgment including permanent injunctive relief.

STATEMENT OF FACTS

1. *Gun Ranges in the American Landscape*

Guns are occasionally fired in confrontations among people, or by hunters seeking game. But frequently, guns are fired at gun ranges,

whose societal value is confirmed as a matter of federal government policy. The federal Civilian Marksmanship Program, is designed, inter alia, "(1) to instruct citizens of the United States in marksmanship; (2) to promote practice and safety in the use of firearms; [and] (3) to conduct competitions in the use of firearms . . ." 36 U.S.C. § 40722.

Gun ranges exist in virtually every major American city, in numerous settings: in strip malls, next to restaurants, gyms, and department stores, in the basements of private homes, and even on the seventeenth floor of Chicago's Federal Reserve Bank building. App. 35-36, 86-88.

When people cannot come to a gun range, a mobile range, fitted inside a truck trailer or other vehicle, may be brought to the people, and safely operated almost anywhere—in the parking lot of a sporting goods store, for example, or next to the Westin North Chicago Conference Center in Wheeling, Illinois. App. 38, 85.

Gun ranges open to the public have historically been located throughout Chicago. App. 34. Today, Chicago's map is dotted with gun ranges, albeit ones open only to police and private security operators. App. 80-82, 118-120. These gun ranges are located in residential and

commercial neighborhoods, among homes, schools, churches, parks, government buildings, and businesses of every description. *Id.*; App. 106-108. City officials are unaware of complaints about these gun ranges, which they believe have no negative impact on their surroundings. App. 102, 108-09, 121.

2. *Chicago's Training Requirement*

Defendant demands at least one hour of range training as a condition for exercising the right to keep and bear arms. Chicago residents wishing to lawfully possess firearms in the city must first obtain a Chicago Firearms Permit ("CFP"). Chi. Mun. Code § 8-20-110(a). An application for a CFP

> shall include . . . (7) an affidavit signed by a firearm instructor certified by the State of Illinois to provide firearm training courses attesting that the applicant has completed a firearm safety and training course, which, at a minimum, provides one hour of range training . . .

Chi. Mun. Code § 8-20-120(a). CFPs are valid for three years, at which time a new CFP must be obtained to maintain lawful firearm ownership. Chi. Mun. Code § 8-20-130(a).

The requirement is not exclusive to new gun owners. Chicago firearm registrants whose registrations predate the CFP requirement's adoption must obtain a CFP, and the requisite training, in order to renew their firearm registration. Chi. Mun. Code § 8-20-110(d). If a registration is not timely renewed, the subject firearm may become unregisterable to the current owner and must be disposed of. Chi. Mun. Code §§ 8-20-140(d), 8-20-170(c).[2]

Owing to, and as part of Chicago's recent changes to its firearms laws, the city enacted a ninety day grandfathering period during which it purportedly allowed the registration of previously-acquired firearms. Chi. Mun. Code § 8-20-140(d)(2). This ninety-day period expired October 12, 2010. Any individual wishing to take advantage of this opportunity was required to obtain a CFP and thus, to undergo at least one hour of range training within that ninety-day period.

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[2]Registrations under the previous law were valid for one year. Defendant took the position that registrations expiring prior to October 12, 2010, were nonetheless extended through that day. However, apparently, a registration issued October 13, 2009 would have expired exactly one year later in the absence of a CFP and the requisite range training.

3. *Chicago's Ban on the Operation of Gun Ranges.*

Chicago Mun. Code § 8-20-280, "Prohibition on shooting galleries and target ranges," provides, "Shooting galleries, firearm ranges, or any other place where firearms are discharged are prohibited; provided that this provision shall not apply to any governmental agency."

Additionally, a variety of Chicago code provisions, individually and as a whole, operate to bar the temporary lending and borrowing of firearms for purposes of training and familiarization at a gun range. These include: Chi. Mun. Code §§ 8-20-020 (barring possession of handguns outside the home), 8-20-030 (barring possession of long guns outside one's home or fixed place of business), 8-20-080 (barring possession of ammunition without corresponding CFP and registration certificate), 8-20-100(a) (providing that generally, "no firearm may be sold, acquired or otherwise transferred within the city, except through inheritance of the firearm"), 8-20-100(d) (providing that "No person may loan, borrow, give or rent to or from another person, any firearm or ammunition except in accordance with this chapter"), 8-20-110(a) (mandating that each individual must have a valid CFP to possess a

firearm), 8-20-140(a) (firearms may be possessed only with a registration certificate), and 8-24-010 (barring recreational shooting).

Every day in which an individual operates a gun range in violation of Chi. Mun. Code § 8-20-280; or transfers, loans, borrow, gives or rents firearms or ammunition in violation of Chi. Mun. Code § 8-20-100; or possesses an unregistered firearm in violation of Chi. Mun. Code § 8-20-140, is considered a separate and distinct offense. The penalty for a first offense in violation of these provisions is a fine ranging from $1,000 to $5,000 and/or incarceration ranging from 20 to 90 days. A subsequent offense carries a fine ranging from $5,000 to $10,000 and/or incarceration ranging from thirty days to six months. Chi. Mun. Code § 8-20-300(b).

Every day in which an individual possesses guns outside the home or fixed place of business in violation of Chi. Mun. Code §§ 8-20-020 or 8-20-030; possesses ammunition without a corresponding registration under Chi. Mun. Code § 8-20-080; or possesses a firearm without a CFP in violation of Chi. Mun. Code § 8-20-140, is considered a separate and distinct offense. The penalty for a first offense in violation of these provisions is a fine ranging from $1,000 to $5,000 and/or incarceration

ranging from 20 to 90 days. Chi. Mun. Code § 8-20-300(a). Discharging a firearm other than in self-defense or defense of another person, in violation of Chi. Mun. Code § 8-24-010, carries a penalty ranging from $500 to $1000.

4. *Defendant's Asserted Rationales for the Range Ban.*

The legislative record is largely silent with respect to the range ban, enacted as part of the city's comprehensive post-*McDonald* gun control and prohibition ordinance. At the City Council's hearing on the legislation, Alderman Dowell asked Corporation Counsel Mara Georges, "What about shooting range facilities? Could people come into Chicago and construct those types of facilities?" App. 18. Georges replied that the City could

> limit what we allow to operate in our city, however is reasonable as decided by the City Council. And the City Council certainly could decide from . . . a reasonable point of view that those gun dealers should be prohibited and various other gun associated activities prohibited within the city.

Id. Asked again about the prospect of private, for-profit gun ranges, Georges answered, "there are certainly very stringent zoning

requirements that need to be met and things such as that. So, you know, there is regulation that can be done." App. 19.

Georges later explained the city-wide ban on gun stores was enacted, instead of mere zoning and other types of ordinary restrictions, because no Alderman wanted gun stores in his or her ward. Dahleen Glanton & Duaa Eldeib, "Chicago Gun Law May Not Be Bulletproof," *Chicago Tribune*, July 11, 2010, at 2, available at http://articles.chicagotribune.com/2010-07-11/news/ct-met-chicago-gun-law-20100708_1_reasonable-restriction-gun-ordinance/2 (last visited December 6, 2010).

The City Council's Committee on Police and Fire issued findings related to the gun ordinance that included the range ban. The Committee found that "[p]ublic safety requires that firearm owners complete a certified firearms training course that includes both classroom instruction and range training," app. 27, but did not mention the range ban.

Given the lack of any finding by the City Council relating to the range ban, Defendant searched for a number of rationales to justify the law. At first, Defendant alluded to "the serious public safety issues

raised by the wide-spread discharge of firearms at shooting ranges located in a dense urban environment." Br. Opp. TRO, August 23, 2010, pp. 8-9. Defendant identified a concern "with arms being discharged en masse and with great frequency," App. 68-69, 70-71, and with the fact that if ranges exist, people will have guns in their cars as they travel to the range. App. 71; SA 27.

Briefing opposition to the second TRO motion, Defendant's purported rationale for the gun range ban was:

> Firearms ranges pose considerable public safety, health, and environmental concerns, and the Chicago City Council has determined that these risks warrant a ban on the operation of ranges in the City.

Br. Opp. TRO, Sept. 15, 2010, at 15.

Briefing opposition to the preliminary injunction motion, Defendant claimed that the gun range ban served public safety "by prohibiting a concentration of individuals with firearms in one location," Br. Opp. Prelim. Inj., Sept. 22, 2010, at 19. Without explanation, the range ban was to "reduc[e] opportunities for illegal transfer of firearms, theft, and gun trafficking." *Id*.

Finally, Defendant claimed that gun ranges could be banned because they "create complicated and difficult regulatory challenges that the City has not yet addressed and could not address without significant ongoing cost." *Id.* "[T]he ban eliminates the need to integrate the operation of firing ranges into the City's otherwise established regulatory schemes." *Id*. at 21. These interests were re-asserted as sufficient to satisfy intermediate scrutiny. *Id*.

Former Chicago Police Range Master (and current advisor) Sergeant Daniel Bartoli testified mostly regarding the problems he perceived in Plaintiffs' mobile range, and offered his ideas on range safety.[3] But Bartoli also elucidated the alleged governmental interest in banning gun ranges, offering that range patrons might be victimized by criminals seeking to steal guns. App. 113.

Defendant's counsel offered generalized opposition to the concept of gun ownership as a reason for banning gun ranges, speculating that:

---

[3]For example, Bartoli believes gun ranges should have secured parking, be surrounded by opaque fencing, and have a separate area for the loading of firearms apart from the shooting area. App. 110-12. Adoption of such regulations would risk additional litigation, but the point is moot as Chicago lacks such regulations.

> the problems of congregating with weapons are very serious, because . . . there's a strong likelihood that every day interpersonal conflicts will turn violent, if people have guns. Where two people are arguing in a parking lot may just result in some fisticuffs, or maybe not even that, if people have weapons, tensions escalate, fears escalate, and you can have deadly consequences.

App. 128-29. Defendant offered no specific facts or studies relating to range-oriented crime.

In addition to rationalizing the gun ordinance's range ban, Defendant asserted that even if the court were to enjoin the range ban, ranges would nonetheless be banned by operation of the city's zoning and business licensing codes. The zoning code allegedly bans all that is not permitted, and it does not provide for gun ranges. Likewise, no business could exist in the city without a comprehensive set of regulations which, for gun ranges, do not exist (owing to the range ban). *See, e.g.* Br. Opp. TRO, August 23, 2010, at 7-8; App. 67-68, 79, 130. Patricia Scudiero, a Commissioner of Defendant's Zoning and Land Use Department who also serves as Defendant's Zoning Administrator, explained:

> Q. Does the Chicago zoning ordinance currently provide in any way for a gun range?
>
> A. No.

Q. Does the fact that the Chicago zoning ordinance omits gun ranges mean anything?

A. It means it's prohibited.

App. 95; *see also* App. 104-05.

This "zoning ban" may be more a product of happenstance, or a litigation position, rather than the fruit of any conscience choice. Prior to its amendment this past July, Chi. Mun. Code § 8-24-010 allowed the discharging of guns at "duly licensed shooting clubs."

Scudiero testified that she has never been to a gun range, has never read or studied any literature about gun ranges, has no experience or education with either the structure or operation of gun ranges, and has never investigated gun ranges for zoning purposes. App. 95, 104.

As Zoning Administrator, Scudiero would be tasked with initiating zoning review of any proposed use. App. 103-04. However, she did not participate in any manner in the crafting or adoption of Defendant's gun ordinance, nor did she discuss the ordinance with anyone from or on behalf of the zoning commission, nor did she discuss the ordinance with the Mayor or anyone acting on his behalf. App. 103. No City Council Member ever asked Scudiero how other cities zone for gun

ranges, and Scudiero is unaware of any other city in America banning gun ranges. App. 105.

Nonetheless, the lower court allowed Scudiero to testify as to what she "imagine[s]" happens at a gun range. App. 96-97. Based on this imagination, Scudiero opined that gun ranges should be zoned as an "intense" use, similar to taverns, rock crushing facilities, salvage yards, incinerators, drive-through facilities, and adult establishments. Specifically, Scudiero opined gun ranges belong in manufacturing districts, but even then, only on a case-by-case special use basis. App. 98-101. However, Scudiero had no knowledge of whether gun ranges emit noise or emissions of any kind. App. 105-06.

5. *The Range Ban's Impact on Plaintiffs and the Public*

On June 29, 2010, the day following the Supreme Court's decision in *McDonald*, Chicago Police Superintendent Jodie Weis testified that 95,700 guns were registered in Chicago. App. 20.[4] Weis estimated that

[4]Handguns, "the most popular weapon chosen by Americans for self-defense in the home," *Heller*, 128 S. Ct. at 2818, could not have been added to this tally by civilians since 1982.

perhaps 10% of the city's population, or approximately 300,000 people, would be interested in registering firearms post-*McDonald*. App. 25.

Weis also testified that "[s]hooting is a very perishable skill." App. 22. Defendant's former Range Master agrees, App. 117, and believes training is necessary to adequately practice self-defense. App. 116.

Plaintiff Second Amendment Foundation, Inc. ("SAF") has approximately 1,700 members in Chicago. App. 46. Plaintiff Illinois State Rifle Association ("ISRA") has 1,144 members in Chicago. App. 50. By definition, these individuals are interested in advancing the exercise of Second Amendment rights. Most of them own guns. App. 46,50. Assuming a complete overlap in these organization's memberships, Plaintiffs have approximately 1,700 members whose ability to register or re-register possessed guns expired October 12 absent range-training, and whose currently registered guns will become unregistrable absent range-training by July 11, 2011 (one year from the ordinance's effective date)—a daily average of almost five people. Of course, not all members of the public impacted by the range ban are motivated to join Plaintiff organizations.

Lack of range-training in Chicago has inhibited price competition, reduced access to trainers, and discouraged Chicagoans from obtaining the training necessary to possess guns in compliance with Chicago law. Andre Queen, Executive Director of a state-licensed investigative and security academy in Chicago that offers the CFP course testified that his company's ability to provide range training is limited because the suburban ranges are locking out Chicago-based instructors, so that they can keep the CFP training market for themselves. App. 53.

What ranges are available to Chicago-based instructors are beginning to charge high fees and compete with their business, offer limited facilities, and are a significant distance from the city. App. 53-54. The lack of adequate range facilities costs customers, both because there is simply not enough range time to take on the students that can otherwise be served, and because the cost and time associated with using the ranges that are available discourages customers. App. 54. The lack of gun ranges in Chicago is significantly impeding individuals' ability to maintain and obtain lawful gun ownership. App. 51-54.

Plaintiff Rhonda Ezell, whose Chicago home has been repeatedly burglarized, suffers from various serious medical conditions burdening

her ability to travel. With significant difficulty, Ezell completed her training outside Chicago, but would like to continue training closer to home. App. 29. Hespen lawfully owns various registered firearms, and was facing the loss of their registration but for obtaining training outside the city. App. 31. Nonetheless, the lack of lack of ranges in Chicago impedes Hespen's ability to maintain marksmanship. App. 32.

Brown lawfully possessed a firearm outside the city, but could not bring it to Chicago for lack of training outside the city. Brown frequented ranges in Chicago when they were available. He regularly promotes the shooting sports and provides shooting instruction, and he would do so among his Chicago neighbors, but the lack of a local range impedes his ability to engage in this activity. App. 33-34.

Hespen and Brown are better able than Ezell to travel to gun ranges, but all three would exercise their right to do so in Chicago. App. 29-30, 32, 34.

Action Target designs, builds, and furnishes gun ranges throughout the United States, including in Chicago. Action Target recently built gun ranges for the Federal Reserve Bank, 230 S. LaSalle Street; the Postal Service, 743 S. Canal Street; and Brinks, 919 S. California

Avenue. It is bidding to retrofit Chicago gun ranges operated by the Customs and Border Protection Service, and Federal Air Marshals. App. 35-36, 80. Action Target also sells commercial ranges in the Chicago area, and would construct ranges in Chicago but for the ban. App. 36, 83-84.

Plaintiffs are greatly concerned that owing to the recent highly-publicized demise of Chicago's handgun ban, many individuals seeking to become first-time gun owners might purchase guns that are less-than-optimally suitable for their needs. Plaintiffs believe it is better for potential gun owners, and in the interest of public safety, that prospective gun buyers experience a variety of guns, or at least, those guns they are considering, *before* actually making their purchases. And many people are introduced to shooting and gun ownership by visiting a range prior to deciding to purchase a gun. App. 42, 44.

SAF and ISRA are in the business of promoting firearms education and ownership, including by the securing of Second Amendment rights. App. 41, 43. ISRA has long operated a gun range near Kankakee, Illinois, for the benefit of its members, and to promote marksmanship and the shooting sports. App. 44. Among ISRA's members and officers

are various firearms trainers certified by the State of Illinois who are qualified to provide the training mandated by the City of Chicago as a prerequisite to obtaining a CFP. *Id.*

To address the training crisis facing current and prospective Chicago gun owners, SAF and ISRA contracted for the operation of a mobile range training facility in the city. SAF placed a deposit guaranteeing the availability, for immediate delivery, of a mobile range facility, fully compliant with all federal environmental and safety standards, which contains three positions within a forty-eight foot truck trailer. App. 42. SAF had also secured a commercial space for the location of this range within Chicago, and planned to secure additional parking locations so that convenient range training may be provided to gun owners throughout the city. *Id.* This range would be operated by SAF in conjunction with ISRA's state-registered firearms trainers. App. 42, 45.

Defendant's discovery of Plaintiffs' initial landlord, a steel perforating factory with an empty parking lot, focused on Defendant's theory that the landlord's business might be violating various laws by renting space to Plaintiffs. App. 47-48, 57. The landlord testified that

he canceled Plaintiffs' lease because he wished to avoid "[a]ny problems of any kind with the City with regard to this lease. They could be extra judicial." App. 56. Advised that the city could not lawfully harass him, the landlord's attorney replied that was "legally" correct, but perhaps not in "the real world." *Id.*

Plaintiffs leased an alternative space for the mobile range. App. 48.

But for the range ban, SAF and ISRA would begin operating the mobile range within the City of Chicago, but refrain from doing so for fear of arrest, prosecution, fine and incarceration of their principals and employees. App. 42, 45. For the same reason, ISRA refrains from opening a more permanent range facility within the City of Chicago. App. 45, and Action Target is refraining from soliciting and conducting business in Chicago. App. 36.

6. *The District Court's Decision*

The lower court began its analysis by rejecting application of intermediate (and, by implication, strict) scrutiny. Reasoning that intermediate scrutiny has only been employed by this Court in cases involving categorical possession bans, the lower court apparently

adopted rational basis as a means of evaluating the Second Amendment claim, although it noted the result would be no different under intermediate scrutiny. SA 11.

The court then found the individual Plaintiffs failed to establish irreparable harm, because they were not unable to leave the city for training purposes. Action Target, whose private range business is illegal by virtue of the ban, was held not to be suffering harm because it had no "current plans to construct a range, has not searched for a location to construct a range, and would not be able to construct a range in less than nine months." SA 12.

The court then reasoned that for some individuals, a range outside city limits might be closer than a location inside city limits, and that anyone who sustained additional travel expense to engage in gun training, or who lost a firearm to the non-registrability penalty owing to lack of training, could simply recover money damages later. SA 13.

Finding that *Heller* and *McDonald* addressed an individual right, "and did not address an organization's right," *id.*, the court held that SAF and ISRA (party plaintiffs in *McDonald*) could not assert Second

Amendment rights. The court also stated that SAF and ISRA did not demonstrate that their members were unable to train outside the city.

The court then asserted that Defendant had "presented evidence that firing ranges would fall within the intensive use category and be zoned for manufacturing districts . . . and that firing ranges must be highly regulated . . ." SA 15. The fact that no zoning and other regulations were in place, reasoned the court, would cause great harm to Defendant were an injunction issued, relative to what the court termed would be "the minimal inconvenience of traveling outside of the City for a one-hour course." *Id.*

The lower court then declined to offer its assessment of Plaintiffs' likelihood of success on the merits, because the constitutional issues are allegedly novel. SA 16. After recounting that it believed monetary damages would be an adequate remedy, and its decision on the balancing of interests, the court separately found no First Amendment violation had been established because Plaintiffs were still free to discuss firearms, and offer classroom instruction in Chicago. SA 17.

One point on which Plaintiffs prevailed below related to the balance of harm. Although the court did not perceive the range ban as harmful,

and credited the regulatory void as a potential problem tipping the balance in Defendant's favor, the court's opinion reveals no acceptance of Defendant's strenuous attacks on the safety of Plaintiffs' proposed remedy (apart from the court's generalized concerns regarding gun ranges). Considering the court's summation of the evidence during closing arguments, this is not surprising:

> [T]he testimony was that these mobile ranges are next to Sam's Clubs and residences and shopping malls and in parking lots, and there's not been any difficulties with them in those places. That was not challenged in any effective way, right? That -- that's the way it stands right now from the first witness we heard from.

App. 132. "[T]here's not been a conclusion from anyone that a mobile range next to a shopping mall is dangerous. I haven't heard that testimony." App. 133.

> What we have on the facts is a man who stood here and told this Court that those mobile ranges are placed in places where there's high-traffic area, and it goes against your argument that it's so dangerous to place one of these here, and that they don't have any problems with it. Then we have two locations proposed where they can go and conjecture as to whether it's going to be placed in one angle or another angle, near the railroad tracks, near the residences, et cetera, but not one bullet has left those other ranges and caused harm to anyone. Those are the facts.

Id.

SUMMARY OF ARGUMENT

The Second Amendment guarantees a right to use and operate gun ranges. Obtaining and maintaining firearm proficiency is necessary to effectively exercise the right of self-defense (in the home and elsewhere) central to the Second Amendment, but shooting at a range is also in and of itself a traditional lawful use of firearms secured by that amendment. Thus, while Defendant may regulate ranges in the interest of public health and safety, it cannot completely ban them, whatever its purported reasons.

Regardless of whether gun ranges are independently protected by the Second Amendment, the possession of guns in the home for self-defense is so secured. In electing to make regular range training a prerequisite for home gun possession, the City deprives itself of any theoretical ability to ban ranges needed for that training. Chicago cannot ban something it mandates as a condition of exercising a fundamental right.

At best, the requirement that gun training, both mandatory and elective, be obtained outside the city, fails any applicable standard of review because Defendant has utterly failed to identify *any* legitimate

governmental interests for the regulation, let alone a relationship between those interests and the law.

And as the Fourth Circuit holds, gun training at a range for purposes of obtaining a gun license is protected First Amendment speech. *Edwards* v. *City of Goldsboro*, 178 F.3d 231 (4th Cir. 1999). Obviously, Defendant believes that gun classes express something valuable enough to be made mandatory. Banning such communication violates the First Amendment.

For all the effort expended in this case, the only governmental interests asserted in defense of the range ban were: (1) people transport guns to ranges, to fire them, (2) range patrons might be victimized by crime, (3) gun ownership and possession is inherently dangerous, (4) regulating ranges is too costly, and (5) vague zoning concerns justify banning gun ranges. These are not serious arguments.

Within the context of a preliminary injunction analysis, the irreparable harm is plain enough. The deprivation of constitutional rights is frequently considered irreparable; the deprivation of First Amendment rights is irreparable harm *per se*. Likewise with the

Second Amendment, which secures the interest in personal self-defense. Even the temporary deprivation of Second Amendment rights to train with firearms, be it the harm from lack of proficiency with firearms or, as in Chicago, the harm in the consequential legal disability on keeping arms at all, can have a profound effect. Such deprivation may leave individuals defenseless, accident-prone, or diminished in the ability to respond to an emergency. Money cannot compensate for the resulting injuries.

The government cannot justify prohibiting constitutionally-protected activities by asserting that it cannot enact less far-reaching regulations. Given the strong public interest in gun safety, the harm that may befall a population where people are hampered in their ability to receive and train with basic means of self-defense, and the complete lack of any justification for the ban, the balance of interests calls for injunctive relief.

ARGUMENT

A plaintiff seeking a preliminary injunction must prove three threshold elements: "[f]irst, that absent a preliminary injunction, it will suffer irreparable harm in the interim period prior to final resolution of

its claims. Second, that traditional legal remedies would be inadequate. And third, that its claim has some likelihood of succeeding on the merits." *Girl Scouts of Manitou Council, Inc.* v. *Girl Scouts of U.S., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008) (citations omitted).

Upon satisfying these threshold requirements, the Court "must somehow balance the nature and degree of the plaintiff's injury, the likelihood of prevailing at trial, the possible injury to the defendant if the injunction is granted, and the wild card that is the 'public interest.'" *Id.* (citations omitted). In so doing, the court employs a sliding scale approach: "[t]he more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh in his favor." *Id.* (citations omitted).

Plaintiffs easily satisfy all three threshold requirements for obtaining preliminary injunctive relief, and the balance of interests weigh heavily in their favor. Yet the Court can, and should, dispense with the preliminary injunction framework's required showing of irreparable harm. "[I]rreparable injury is not an independent requirement for obtaining a permanent injunction; it is only one basis

for showing the inadequacy of the legal remedy." *Crane by Crane* v. *Indiana High Sch. Athletic Ass'n*, 975 F.2d 1315, 1325 (7th Cir. 1992) (citation omitted).

Plaintiffs first signaled their desire to consolidate the hearing for a trial on the merits on August 22, with the filing of their first TRO brief, over a full month before the preliminary injunction hearing. TRO Br., Aug. 22, 2010, pp. 1-2, 5-6. Defendant's discovery would be considered heavy in most cases.

And the case turns entirely on fully-briefed, extensively argued questions of law. A trial will not prove anything more about the central constitutional questions that has not already been fully explored, a topic about which the parties likely have nothing more to add.

"Only if the final outcome will depend on facts presented at trial, so that there is genuine uncertainty at the preliminary-injunction stage concerning what that outcome will be, should the judge go through the balancing process . . ." *Curtis 1000* v. *Suess*, 24 F.3d 941, 945 (7th Cir. 1994). Notice of intent to consider a hearing as a trial on the merits is

not strictly required if lack of notice causes no prejudice. *Atlantic Richfield Co.* v. *Federal Trade Com.*, 546 F.2d 646, 651 (5th Cir. 1977).

The lower court should have granted the Rule 65(a)(2) motion. In the interest of judicial economy, this Court should simply decide the constitutional questions, and issue a judgment accordingly.

I. THE STANDARD OF REVIEW.

"On a review of the district court's denial of a preliminary injunction, legal conclusions are reviewed de novo, findings of historical or evidentiary fact for clear error, and the balancing of the injunction factors for an abuse of discretion." *Christian Legal Soc'y* v. *Walker*, 453 F.3d 853, 859 (7th Cir. 2006) (citation omitted). "No deference is due to a 'decision to deny a preliminary injunction that is premised on an error of law.'" *Burlington N. & Santa Fe Ry. Co.* v. *Bhd. of Locomotive Eng'rs*, 367 F.3d 675, 678 (7th Cir. 2004) (citation omitted).

II. THE USE AND OPERATION OF GUN RANGES LIE AT THE SECOND AMENDMENT'S CORE.

"[T]he Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees . . . fundamental rights, even though not expressly guaranteed, have been recognized by the Court as

indispensable to the enjoyment of rights explicitly defined." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 579-80 (1980). Unsurprisingly, the Supreme Court has noted that the rights to use and operate a gun range are inherent in the Second Amendment:

> The Constitution secures the right of the people to keep and bear arms. No doubt, a citizen who keeps a gun or pistol under judicious precautions, *practises in safe places the use of it*, *and in due time teaches his sons to do the same*, exercises his individual right.

Heller, 128 S. Ct. at 2812 (citation omitted) (emphasis added).

"[T]o bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms . . ." *Heller*, 128 S. Ct. at 2811-12 (citation omitted). Indeed, to the extent the availability of "[a] well-regulated militia" supplies a reason for the right's codification, U.S. CONST. amend. II, "the adjective 'well-regulated' implies nothing more than the imposition of proper discipline and training." *Heller*, 128 S. Ct. at 2800. "The militia consisted of the people bearing their own arms when called to active service, arms which they kept and hence knew how to use." *United States* v. *Emerson*, 270 F.3d 203, 235 (5th Cir.

2001). "An effective militia requires not only that people have guns, but that they be able to shoot them with more danger to their adversaries than themselves." *Silveira* v. *Lockyer*, 328 F.3d 567, 587 (9th Cir. 2003) (Kleinfeld, J., dissenting).

In *Heller*, neither the D.C. Circuit nor the Supreme Court bothered to engage in any balancing test or other extended analysis before striking down Washington, D.C.'s ban on the possession of functional firearms for self-defense, as that law literally contradicted a "core" aspect of Second Amendment rights. *Heller*, 128 S. Ct. at 2818. A complete ban on gun ranges and traditional gun range activity must meet the same fate.

This Court has already rejected Defendant's argument that the Second Amendment limits its protection to the home: "[T]he Second Amendment creates individual rights, *one of which* is keeping operable handguns at home for self-defense. What other entitlements the Second Amendment creates, and what regulations legislatures may establish, were left open [in *Heller*]." *United States* v. *Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (emphasis added).

Although Plaintiffs maintain that the Second Amendment preserves pre-existing rights rather than "creates" them, the basic idea—that the Second Amendment is not limited to the home—is incontrovertible. Although *Heller* does not require invalidating all laws regulating guns in public, "*Heller* does not preclude Second Amendment challenges to laws regulating firearm possession outside of home." *Peruta* v. *County of San Diego*, 678 F. Supp. 2d 1046, 1051 (S.D. Cal. 2010).

The Second Amendment applies "*most notably* for self-defense within the home," *McDonald*, 130 S. Ct. at 3044 (plurality opinion) (emphasis added), "where the need for defense of self, family, and property is most acute," *Heller*, 128 S. Ct. at 2717, but not exclusively so. For example, "Americans valued the ancient right [to keep and bear arms] . . . for self-defense *and hunting*." *Id.* at 2801 (emphasis added). "The settlers' dependence on game for food and economic livelihood, moreover, undoubtedly undergirded . . . state constitutional guarantees [of the right to arms]." *McDonald*, 130 S. Ct. at 3042 n.27. Hunting does not occur inside the home.

Describing Second Amendment rights, the Supreme Court invoked Senator Sumner's famous "Bleeding Kansas" speech: "The rifle has ever been the companion of the pioneer and, under God, his tutelary protector against the red man and the beast of the forest." *Heller*, 128 S. Ct. at 2807 (citation omitted). And in setting out the common-use test for protected arms, the Supreme Court has made clear that the Second Amendment secures arms possessed "for lawful purposes like self defense." *Id.* at 2815.

Indeed, the Supreme Court was all but forced to declare the Second Amendment applies outside the home, given the way in which the District of Columbia litigated its case. The District offered that the term "bear arms" had an exclusive idiomatic meaning, effectively, to soldier or go into battle, and that "keep and bear arms" was a unitary concept referring only to a right to possess weapons in the context of military duty.

The Supreme Court was required to address this argument to reach its judgment, and rejected it. "At the time of the founding, as now, to 'bear' meant to 'carry.'" *Heller*, 128 S. Ct. at 2793 (citations omitted). To

"bear arms," as used in the Second Amendment, is to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Id.* (quoting *Muscarello* v. *United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)); BLACK'S LAW DICTIONARY 214 (6th Ed. 1998)); *see also Heller*, 128 S. Ct. at 2804 ("the Second Amendment right, protecting only individuals' liberty to keep *and carry* arms . . ."), at 2817 ("the right to keep *and carry* arms") (emphasis added). "[B]ear arms means . . . simply the carrying of arms . . ." *Heller*, at 2796.

Having defined the Second Amendment's language as including a right to "carry" guns for self-defense, the Supreme Court helpfully noted several exceptions that prove the rule. Explaining that this right is "not unlimited," in that there is no right to "carry any weapon whatsoever in any manner whatsoever and for whatever purpose," *Id.* at 2816 (citations omitted), the Court confirmed that there is a right to carry at least some weapons, in some manner, for some purpose. The Court then listed as "presumptively lawful," *id.*, at 2817 n.26, "laws

forbidding the carrying of firearms in sensitive places," *id.*, at 2817, confirming both that such "presumptions" may be overcome in appropriate circumstances, and that carrying bans are *not* presumptively lawful in non-sensitive places.

All of this activity takes place outside the home. And if any places fall outside the "sensitive places" exclusion zone, those places would be gun ranges, the "safe places [where] the use of [a handgun]" may be "practice[d]." *Heller*, 128 S. Ct. at 2812 (citation omitted). It is difficult to imagine that practicing the use of guns at a range is not among the "other entitlements" of the Second Amendment outside the home. *Skoien*, 614 F.3d at 640. Even the dissenters in *Heller* recognized the majority to have secured a right to arms for "self-defense, *recreation, and other lawful purposes*." *Heller*, 128 S. Ct. at 2845 n.38 (Stevens, J., dissenting) (emphasis added); *id.* at 2869 (Breyer, J., dissenting).

Leaving recreation aside, practicing with one's gun at a range tends to increase proficiency and effectiveness. A homeowner wishing to exercise the right of self defense with a firearm would be at a severe disadvantage in doing so absent access to a gun range for practice.

Rather than confront the issue before it, and provide its required assessment of Plaintiffs' likelihood of success on the merits, the court below invoked two out-of-circuit district court opinions, one unpublished, for the notion that district courts should avoid alleged issues of first impression on motions for preliminary injunction. SA 16 (citing *I.P. Lund Trading ApS* v. *Kohler Co.*, 11 F. Supp. 2d 112, 115 (D. Mass. 1998) and *Vega* v. *Lantz*, 03 C 2248, 2007 WL 3025285 (D. Conn. Oct. 16, 2007)).

This was plain error. Novelty is not part of this Court's preliminary injunction framework—likelihood of success on the merits is. Of course, a full evidentiary record is always preferable in resolving matters on which there is little direct precedent, but the sentiment is overstated. Applied strictly, fundamental rights would never be secured under the lower court's approach to preliminary injunctions so long as the government could claim that its conduct was not *quite* covered by precedent. Every motion for preliminary injunctive relief would turn into a contest not merely as to which side would be more likely to succeed, but whether the issues in the case were truly novel.

The parties here might well dispute whether this case raises issues of first impression. For example, Plaintiffs note that *Heller* specifically described the use of gun ranges as an aspect of the Second Amendment right, 128 S. Ct. at 2812; that this Court held "keeping operable handguns at home for self-defense" is only "one" of the rights secured by the Second Amendment, *Skoien*, 614 F.3d at 640, with firing at a range an obvious strong candidate for being another; that the Supreme Court just confirmed that training is First Amendment activity, *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705 (2010); and that the Fourth Circuit squarely upheld their First Amendment claim over a decade ago. *Edwards, supra*, 178 F.3d 231. Defendant, having discovered a novel way to violate the Second Amendment, would leverage the novelty of its conduct by asserting that this Court has never passed on a statutory scheme mandating range training but banning ranges. If accepted, the argument would be self-perpetuating, the issue remaining unresolved because it has not previously arisen.

In any event, the lower court overread the cases upon which it relied. In *Lund*, the district court merely called for additional briefing

on the constitutional question, and addressed it two months later. *I. P. Lund Trading ApS* v. *Kohler Co.*, 11 F. Supp. 2d 127 (D. Mass. 1998). In *Vega*, the court noted it was "especially" influenced to avoid a likelihood analysis considering the pendency of the parties' cross-motions for summary judgment, "which provide more appropriate opportunities for the Court to consider a matter of first impression in this circuit." *Vega*, at p. 5. Considering the volume of the record on appeal, it is difficult to imagine what might be missing. The lower court did not indicate what else the parties could have submitted.

A more useful precedent holds,

> The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given . . . All we can do is, to exercise our best judgment, and conscientiously to perform our duty.

Cohens v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

Consistent with this understanding, federal courts routinely decide important constitutional questions of first impression in the context of temporary restraining order or preliminary injunction motions. *See,*

e.g., Carhart v. *Stenberg*, 972 F. Supp. 507 (D. Neb. 1997) (preliminary injunction against "partial birth abortion" law), *aff'd*, 192 F.3d 1142 (8th Cir. 1999), *aff'd*, 530 U.S. 914 (2000); *ACLU* v. *Reno*, 1996 U.S. Dist. LEXIS 1617 at *1 (E.D. Pa. Feb 16, 1996) (temporary restraining order against Communications Decency Act); *ACLU* v. *Reno*, 929 F. Supp. 824 (E.D. Pa. 1996) (three judge court) (preliminary injunction issued), *aff'd*, 521 U.S. 844 (1997).

As questions relating to the likelihood of success on the merits are purely legal, the briefing on these issues would not look much different on dispositive motions. Indeed, Defendant has moved for a stay of the proceedings below precisely because it anticipates this Court's guidance. The lower court itself lamented that "[t]he body of law involving various firearms' ordinances is evolving on an almost weekly basis." SA 16.

On appeal, the lower court's refusal to fully engage the constitutional issues is an academic point. This Court should not merely opine on the likelihood of success. Given the record, the case is ready for an actual decision on the merits of the constitutional claim.

III. REGARDLESS OF WHICH, IF ANY, STANDARD OF REVIEW IS UTILIZED, THE RANGE BAN IS PRESUMPTIVELY UNCONSTITUTIONAL.

Because the challenged laws forbid the exercise of protected activity, without more, they must be struck down. *See Heller*, 128 S. Ct. at 2818 (Functional firearm ban "makes it impossible for citizens to use [firearms] for the core lawful purpose of self-defense and is hence unconstitutional."). But even if the case is governed by some standard of review— any standard of review—the outcome is the same.

A. The District Court Erred In Applying the Rational Basis Test to a Fundamental Right.

The Supreme Court emphatically rejected the notion that rational basis has any place in Second Amendment analysis. "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . ." *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, n. 4 (1938). Quoting this famous footnote, the Supreme Court recently added, "[T]he [rational basis] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the

freedom of speech, the guarantee against double jeopardy, the right to counsel, *or the right to keep and bear arms*." *Heller*, 128 S. Ct. at 2818 n.27 (citing *Carolene Prods*.) (emphasis added). "If a rational basis were enough, the Second Amendment would not do anything." *Skoien*, 614 F.3d at 641.

Removing all doubt as to the presumptive invalidity of nontraditional gun laws, the Supreme Court confirmed that the Second Amendment secures a fundamental right. *McDonald*, 130 S. Ct. at 3042 (plurality opinion); *id.* at 3059 (Thomas, J., concurring). "[C]lassifications affecting fundamental rights are given the most exacting scrutiny." *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988) (citation omitted). Under this analysis, the government carries the burden of proving the law "furthers a compelling interest and is narrowly tailored to achieve that interest," *Citizens United* v. *FEC*, 130 S. Ct. 876, 898 (2010) (citation omitted), a burden that cannot be met where less restrictive alternatives are available to achieve the same purpose. *Ashcroft* v. *ACLU*, 542 U.S. 656, 666 (2004); *see also United States* v.

Engstrum, 609 F. Supp. 2d 1227, 1331-32 (D. Utah 2009) (applying strict scrutiny in Second Amendment analysis).

This Court applies intermediate scrutiny in Second Amendment challenges to laws arguably falling within *Heller*'s list of longstanding prohibitions that may be presumptively lawful. But it has not reserved for peaceful, law-abiding people a *lower* level of review than is employed for violent felons, drug abusers, and other dangerous individuals arguably covered by a presumptive exception. To the contrary, this Court has suggested overbreadth is a possible alternative mode of analysis. *United States* v. *Williams*, 616 F.3d 685, 693 (7th Cir. 2010); *cf. United States* v. *Yancey*, 621 F.3d 681, __ (7th Cir. 2010) ("felon-in-possession laws could be criticized as 'wildly overinclusive'"). Overbreadth is a strict scrutiny doctrine, requiring that laws be narrowly tailored. The lower court's invocation of rational basis review flatly contradicts the Supreme Court's instructions, and turns circuit precedent on its head.

B. Defendant's Failure To Assert Any Valid Governmental Interest Dooms a Standard of Review Defense.

The end result in this case would be the same under either strict or intermediate scrutiny, which requires that there be a "strong showing" that the regulation is "substantially related to an important governmental objective." *Skoien*, 614 F.3d at 641 (citations omitted). Often times, as in *Skoien*, *Yancey*, or *Williams*, the governmental objective in gun regulation is not elusive, leaving courts to struggle with difficult questions of balancing and breadth. What makes this an unusually clear Second Amendment case is the government's total failure to even identify a valid objective. Defendant's attorney advised the City Council that it could do whatever it believed to be "reasonable" regarding gun ranges, and so the City Council simply banned ranges.

Defendant's post-hoc rationalizations for the law are unavailing.

Concerns relating to "arms being discharged en masse and with great frequency," App. 68-69, the congregation in one place of people with guns, and the fact that people would travel to gun ranges with firearms, is simply circular reasoning. Defendant wants to ban gun ranges because it does not want them to operate. The city has "taken

the *effect* of the statute and posited that effect as [its] interest. If accepted, this sort of circular defense can sidestep judicial review of almost any statute, because it makes all statutes look narrowly tailored." *Simon & Schuster, Inc.* v. *N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120 (1991).[5] In any event, as gun ranges are protected by the Constitution, general opposition to their existence is unavailing. "[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 128 S. Ct. at 2822.

The idea that gun ranges may be banned because they are unusually attractive to criminals defies common sense and experience. Defendant might stand on safer ground banning banks, access to which is not enumerated as a constitutional right. The lower court found this claim, unsubstantiated by any evidence, to be "on shaky ground." App. 127. This Court has gone further, repeatedly rejecting the idea that the government may ban constitutionally protected activity because that

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[5]Additionally, as the court below observed, the "transportation of weapons [justification] doesn't make any sense, because you'd have to transport your weapon to get out of the City borders to go to the other firing ranges." App. 27. Defendant "can't really argue just the transportation [of guns should be discouraged], because [people] have to leave the city with their guns as it is." App. 126.

activity might attract crime. "The theft argument is paternalistic. Why can't customers make their own assessments of risk? . . . there is no 'thieves' veto'" of constitutionally-protected activity. *New Albany DVD, LLC* v. *City of New Albany*, 581 F.3d 556, 560 (7th Cir. 2009). "[R]eaders may decide for themselves what risks to run . . . cities must protect readers from robbers rather than reduce risks by closing bookstores." *Annex Books, Inc.* v. *City of Indianapolis*, 624 F.3d 368, __ (7th Cir. 2010) (per curiam).

Also unavailing is the claim that ranges can be banned because regulating them would overburden Defendant. Perhaps the people should be thankful Chicago does not find the "need" to regulate bookstores and churches too burdensome. The court below did not quite rely upon this argument, ruling only that the absence of regulation rendered it unsafe to enjoin the ban. It nonetheless merits mention that a "right" entitles individuals to do something, and is not dependent on the graces of the government. The notion that the government may ban outright whatever it finds too difficult to regulate is not a constitutional doctrine. If gun ranges are constitutionally protected, Defendant's

wholly optional regulatory costs are irrelevant. People do not lose their rights because the government decides it is too expensive to regulate or otherwise accommodate them. *Cf. Forsyth County* v. *Nationalist Mvm't*, 505 U.S. 123 (1992). Notably, Defendant's opinion about the hazard of gun ranges is not shared by Illinois courts:

> [T]he risk of harm to persons or property, even though great, can be virtually eliminated by the exercise of reasonable or even "utmost" care under the circumstances . . . the use of firearms is a matter of common usage and the harm posed comes from their misuse rather than from their inherent nature alone . . . the location [of a range is assumed] appropriate for such activity in the absence of further factual allegations . . . particularly describing the area as inappropriate for the target practice [and] target practice is of some social utility to the community . . .

Miller v. *Civil Constructors*, 651 N.E.2d 239, 245 (Ill. Ct. App. 1995).

In any event, the City's social cost argument was expressly rejected in *McDonald*, wherein the Supreme Court held Defendant bound to respect Second Amendment rights notwithstanding the alleged costs:

> The right to keep and bear arms . . . is not the only constitutional right that has controversial public safety implications . . . Municipal respondents cite no case in which we have refrained from holding that a provision of the Bill of Rights is binding on the States on the ground that the right at issue has disputed public safety implications.

McDonald, 130 S. Ct. at 3045 (citations omitted).

Plaintiffs do not claim that gun ranges are beyond regulation. Churches and bookstores, too, must be built to code, and comply with constitutionally-adequate zoning requirements. If Defendant wishes to regulate gun ranges, it is free to do so within normal constitutional boundaries. Chicago was built on, and remains famous for, a bevy of heavy industrial operations—slaughter-houses, rail yards, factories, steel mills, and a major hub airport—all obviously posing vastly greater environmental challenges than a simple gun range.

Finally, Defendant's claim that it can achieve a range ban under a zoning guise cannot stand. The Supreme Court squarely rejected the zoning rationale in overturning an animal sacrifice ban. "[T]his asserted governmental interest is a mere restatement of the prohibition itself, not a justification for it." *Church of Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 539 n.* (1993).[6]

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[6]Contrary to Defendant's belief, its zoning theory does not moot the dispute over the range ban. Plaintiffs anticipated the possibility of a slippery defense based on laws unrelated to firearms, and accordingly, sought an injunction encompassing "*any other law*, as against the ordinary operation and use of gun ranges open to the public and the loan or rental of functional firearms within gun ranges open to the public." App. 12, 13 (emphasis added).

Moreover, zoning laws cannot extinguish constitutional rights. *City of Renton* v. *Playtime Theaters, Inc.*, 475 U.S. 41 (1986). Restrictive zoning of adult establishments passes First Amendment scrutiny to the extent such businesses are regulated for their secondary effects. Yet recognizing that these establishments engage in protected expression, the Court forbids officials "from effectively denying [individuals] a reasonable opportunity to open and operate an adult theater within the city." *Renton*, 475 U.S. at 53. Ever since, adult zoning ordinances are measured largely by whether they effectively prohibit adult establishments, or merely limit their location pursuant to constitutional standards.

Of course gun ranges are not pornographic establishments. Lawful gun owners who would obtain CFPs must undergo multiple background checks, and all instructors are state-certified police trainers. Even in the adult bookstore context, regulators must come up with actual evidence justifying the regulation, not merely "the conjecture of their attorneys." *Palmetto Properties, Inc.* v. *County of DuPage*, 160 F. Supp. 2d 876, 882 (N.D. Ill. 2001). "[T]here must be *evidence*; lawyers' talk is

insufficient." *Annex Books, Inc.* v. *City of Indianapolis*, 581 F.3d 460, 463 (7th Cir. 2009).

Yet here, the alleged "zone ban" is based upon nothing but a desire to ban gun ranges. Defendant's Zoning Administrator testified that neither she nor, apparently, anyone else, had ever consciously tried to zone gun ranges out of existence. The ban is merely Defendant's convenient—but unconstitutional—construction of its law. It plainly fails *Renton* analysis, as would the Zoning Administrator's suggestion, based only on what she "imagine[s]," that gun ranges be relegated to special use status in manufacturing districts.

Indeed, Defendant's zoning theory holds that the use of gun ranges, and gun training enjoy less protection under the Second Amendment than nude dancing enjoys under the First Amendment.[7] Defendant argued precisely that much below:

> Plaintiff would like you to assume that operating ranges is an integral part of the Second Amendment. No Court has held that . . . First Amendment cases that talk about adult use are really quite far afield, because it's very well established that adult use is an integral part [of the First Amendment], although albeit on the infringe [sic] . . . So their banning adult uses is completely different than banning

[7]Gun training is also protected by the First Amendment.

> of the firearms [ranges]. . . in [*Renton*], there's no question. It's uncontroverted that the First Amendment is at the heart of the adult use club. So, of course, it can't be banned.

App. 74-76.

Plaintiffs do not question the First Amendment's protection of adult establishments. But those who framed and ratified the Bill of Rights would be surprised by Defendant's argument of which establishments enjoy relative constitutional security.

IV. THE FIRST AMENDMENT GUARANTEES A RIGHT TO PROVIDE AND RECEIVE INSTRUCTION IN THE USE OF FIREARMS AT A GUN RANGE.

The Supreme Court has long recognized that teaching and learning are protected by the First Amendment. *See*, *e.g.*, *Keyishian* v. *Bd. of Regents*, 385 U.S. 589, 603 (1967) (First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom"); *Sweezy* v. *New Hampshire*, 354 U.S. 234, 249-50 (1957) (plurality) ("right to lecture . . . could not be seriously debated," and noting that "teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding").

One week before the Supreme Court decided *McDonald*, the high court decided *Holder*, *supra*, 130 S. Ct. 2705. *Holder* considered the

question of whether Congress could ban, as material support for terrorist organizations, "plaintiffs' speech to [terrorist] groups [that] imparts a 'specific skill' or communicates advice derived from 'specialized knowledge.'" *Id.* at 2724. Rejecting the government's arguments that such training and educational efforts were merely conduct with some communicative aspects, *id.*, the Court nonetheless upheld, under strict scrutiny, a prohibition on the provision of material support "in the form of speech" to designated terrorist organizations, *id.*: "direct training" in "specific skills" of advocacy, and "teach[ing]" how to "present claims" for relief. *Id.* at 2729.

Of course, teaching and learning, the conveyance and receipt of knowledge, are not limited to advocacy or expression. "Even dry information, devoid of advocacy, political relevance, or artistic expression, has been accorded First Amendment protection." *Universal City Studios, Inc.* v. *Corley*, 273 F.3d 429, 446 (2d Cir. 2001) (citations omitted). And protected teaching includes demonstrative and experiential conduct, not strictly oral conversation. For example, "instructing children on the topics of geography and fiber arts is a form

of speech protected under the First Amendment." *Goulart* v. *Meadows*, 345 F.3d 239, 248 (4th Cir. 2003).

As is the provision of hands-on gun training. *Edwards* v. *City of Goldsboro*, 178 F.3d 231 (4th Cir. 1999). In *Edwards*, a police officer asserted a valid First Amendment claim challenging his punishment for teaching a handgun safety class, completion of which was required for individuals wishing to obtain state permits to carry guns. "[T]he form of the [officer's] speech, presumably verbal as well as some written instruction accompanied by physical demonstrations . . . was entitled to protection." *Edwards*, 178 F.3d at 247. Indeed, because the speech concerned "a categorically public issue, the proper method of safely carrying a concealed handgun, knowledge of which is a prerequisite to obtaining a state permit . . . it occupies the highest rung of the hierarchy of First Amendment values." *Id.* (citation omitted). The class at issue, like Defendant's, involved firing at a gun range. N.C. Gen. Stat. § 14-415.12(a)(4).

Even if the gun training and range use were merely conduct, the range ban's impact on gun education would nonetheless constitute a

First Amendment violation. Because the range ban and associated laws undeniably burden expression, the laws can only survive if they are

> within the constitutional power of the Government; if [they] further[] an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. *O'Brien*, 391 U.S. 367, 377 (1968). The laws fail all four factors. It is not within the city's constitutional power to ban all gun ranges— doing so violates the Second Amendment. The city has no interest, let alone an important or substantial one, in banning all gun ranges. It maintains its own ranges, has historically had ranges open to the public, and initiated the ban only as a form of resisting *McDonald*. Indeed, the governmental interest here is precisely the suppression of gun education. And even if the city's actions were merely a form of regulating gun range activity in furtherance of some legitimate interest, a total ban is plainly overbroad.

The lower court's assertion that Plaintiffs presented their First Amendment argument "however peripherally . . . with little support in the briefs and [the argument] was not elucidated at the hearing," SA

17, is demonstrably wrong. The issue was repeatedly briefed, and discussed at the hearings. *See* Prelim. Inj. Br., August 16, 2010, at 9-10, 13-15; Second TRO Br., Sept. 13, 2010, at 7, 9-10; Prelim. Inj. Reply Br., Sept. 27, 2010, at 1-2, 9-12; App. 65-66, 92-93, 122-25. The court surmised that the First Amendment argument was not pressed "because Plaintiffs remain entitled to discuss the possession and use of firearms," SA 17, but the arguments, then as now, clearly related to live-fire gun training. Indeed, at one point, the district court acknowledged Plaintiffs' First Amendment argument. "[T]hey're saying . . . It's . . . also our First Amendment right to be trained, the training itself." App. 69. Yet the lower court did not address the issue.

This Court should follow *Edwards*, and acknowledge the First Amendment's protection extends to training in the use of firearms for self-defense.

V. BANNING GUN RANGES CAUSES IRREPARABLE HARM.

Considering that the Second Amendment exists to secure the right of self-defense, the inability to access constitutionally-protected arms or to maintain proficiency in the use of those arms profoundly impact's one's

sense of security—to say nothing of the irreparable harm resulting from a successful criminal attack, or tragic accident that could have been averted with access to a firearm and proficiency in its use. There is no way to quantify, in terms of money damages, the inability to shoot back at a home invader, or to receive valuable instruction in doing so. The infringement of constitutional rights is frequently considered to be beyond quantfication with money damages, *see, e.g., Christian Legal Soc'y*, 453 F.3d at 859, but no other constitutional right is so directly linked to one's immediate physical well-being. The court would likely not have held money damages are a sufficient remedy for individuals forced to dispose of books, or to travel outside city limits to attend their church, bookstore, adult nightclub, or abortion clinic. These are all places of significant constitutional protection, to be sure, but few patrons of such establishments visit them with the hope of increasing their personal security.

The lower court completely ignored these aspects of irreparable harm, giving no credit to the fact that training is a perishable skill, and that impeding someone's ability to act in self-defense can have deadly

consequences. The court also placed no inherent value on the exercise of a constitutional right. And because it did not consider Plaintiffs' First Amendment claim, the court did not consider that irreparable harm should be presumed as a matter of law. *National People's Action* v. *Wilmette*, 914 F.2d 1008, 1013 (7th Cir. 1990). But the court did stake out a number of legally erroneous positions with respect to the irreparable harm issue.

A. Vendors Need Not Violate the Law to Access Federal Courts.

The notion that Action Target does not suffer harm because it has no plans to violate the law is simply wrong. Refraining from constitutionally-protected behavior for fear of prosecution constitutes an injury-in-fact for Article III purposes. *Medimmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 129 (2007); *Virginia* v. *Am. Booksellers Ass'n*, 484 U.S. 383 (1988). Of course Action Target will not solicit, and its customers would not invest large sums in, construction projects that would never be approved by the city and would instead, most likely land them in jail. That does not mean Action Target is not injured by the prohibition of its business.

Moreover, "vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." *Craig* v. *Boren*, 429 U.S. 190, 195 (1976) (citations omitted); *see, e.g. Annex Books*, 624 F.3d 368; *Planned Parenthood* v. *Casey*, 505 U.S. 833, 845 (1992) (plaintiffs asserting abortion rights: "five abortion clinics and one physician representing himself as well as a class of physicians who provide abortion services"); *Carey* v. *Pop. Svcs. Int'l*, 431 U.S. 678, 682 (1977) ("a corporation primarily engaged in the mail-order retail sale of nomedical contraceptive devices").

B. SAF, ISRA, and Their Members Suffer Cognizable Injury.

The lower court plainly erred in deciding that SAF and ISRA lacked "standing to demonstrate their irreparable harm" because *Heller* and *McDonald* addressed an individual right, "and did not address an organization's right." SA 13. The reporters are replete with civil rights precedents litigated by organizations asserting the rights of their members, or their own injuries resulting from the deprivation of constitutional rights. SAF and ISRA were plaintiffs in *McDonald*.

SAF and ISRA meet every qualification to assert harm. "There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Warth* v. *Seldin*, 422 U.S. 490, 511 (1975). When a group is forced to spend resources, devoting its time and energy to dealing with certain conduct, it has standing to challenge that conduct. *Havens Realty Corp*. v. *Coleman*, 455 U.S. 363 (1982).

SAF and ISRA educate, research, and publish about gun control and its consequences. They have to educate their members, and the public, about the government's enforcement of gun laws. When people have questions about the government's firearms policies, they turn to SAF and ISRA. The government's enforcement of the challenged provisions thus directly impacts the organizations. *Bellwood* v. *Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990). Accordingly, SAF and ISRA have organizational standing in this case, and assert claims, on their on their own behalf.

Even more plainly, an association may bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *United Food & Commercial Workers Union Local 751* v. *Brown Group*, Inc., 517 U.S. 544, 553 (1996) (citation omitted).

The first prong is easily met: the individual plaintiffs are members and supporters of SAF and ISRA. As they have standing, so do the organizations. *See, e.g., Springfield Branch, NAACP* v. *City of Springfield*, 139 F. Supp. 2d 990, 993 (C.D. Ill. 2001) (concluding that NAACP clearly had standing with respect to racial discrimination claims, where two African-American members were plaintiffs). Indeed, since many SAF and ISRA members are impacted by the challenged laws, representational standing is apparent. The second prong of the representational standing test, that the interests at issue in the litigation are "germane to the organization's purpose," is plainly met.

The third and final prong of the associational standing test holds that neither the claim asserted nor the relief requested requires the participation of all individual members in the lawsuit. "[S]o long as the nature of the claim and the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction." *Warth*, 422 U.S. at 511. That each individual member's claim for relief may differ based on unique facts does not prevent an association from seeking injunctive and declaratory relief relating to the standards to be applied in such cases. *Int'l Union* v. *Brock*, 477 U.S. 274, 288 (1986); *see also Retired Chicago Police Ass'n* v. *City of Chicago*, 7 F.3d 584, 601 (7th Cir. 1994). This case involves no individualized determinations whatsoever, addressing only straightforward legal questions.

C. Individuals Are Harmed When Their Access to Protected Goods and Services Is Burdened, Including By Travel Requirements.

The lower court's criticism of Plaintiffs for failing to identify "any one resident who has been unable to travel to such a range and has [accordingly] been unable to obtain range training," SA 14, seeks an

impossible answer, but misses the point. The question is not whether any *one* individual can leave the city to obtain range training; any one individual, unless physically incapacitated, can. Even Rhonda Ezell, who suffers an assortment of ailments and is awaiting a kidney transplant, was sufficiently motivated by her circumstances to travel for range training at great hardship. The Constitution protects not only people who are physically incapable of leaving the city limits.

The correct questions are whether every Chicagoan interested in exercising Second Amendment rights—estimated by Defendant's police superintendent at 300,000 people—can access range training; whether the registrants of all 95,700 pre-*McDonald* guns can train within a year; and whether the additional costs in time, money and aggravation occasioned by the artificial range shortage discourage consumers of CFP training and others wishing to access gun ranges.

Common sense answers at least this last question, as did Queen's declaration describing the range shortage's impact on the market for training. Indeed, this Court has understood that because "laws requiring the closure of bookstores at night and on Sunday are likely to

curtail sales, the public benefits of the restrictions must be established by evidence, and not just asserted." *Annex Books*, 581 F.3d at 463. It did not demand proof that the constitutional rights at stake in *Annex Books* could not be exercised at other times. Here, of course, the law does not merely require the closure of gun ranges at night and on Sundays. It shutters all gun ranges in the City of Chicago twenty-four hours a day, every day, forever.

Annex Books is also consistent with Supreme Court precedent recognizing that any restriction on the availability of constitutionally-protected articles implicates the rights of consumers. *See, e.g. Carey*, 431 U.S. at 689 ("the restriction of distribution channels to a small fraction of the total number of possible retail outlets renders contraceptive devices considerably less accessible to the public, reduces the opportunity for privacy of selection and purchase, and lessens the possibility of price competition"); *Grosjean* v. *Am. Press Co., Inc.*, 297 U.S. 233 (1936) (tax discouraging newspaper advertisement and circulation).

Of course, localities cannot justify constitutional violations by telling their residents to take their rights elsewhere. The Constitution, with its Bill of Rights, is in full effect in the City of Chicago. *See McDonald*. The idea that individuals should simply go to the suburbs to exercise their rights (and hope that the suburbs do not mimic Chicago's law) is nothing more than what the Supreme Court has rejected, yet again, in *McDonald*—the idea that constitutional rights may be abandoned because "conditions and problems differ from locality to locality." *McDonald*, 130 S. Ct. at 3046.

The only condition that matters is one that applies uniformly in Chicago as well as in its suburbs: the operative, functioning condition of the Constitution.

In the First Amendment context, "[i]t is not sufficient to say that neighboring communities permit the type of speech that the challenged ordinance bans . . . . the government may not simply point to neighboring communities that permit the speech as a defense to their ordinance that bans that type of speech from its jurisdiction." *Palmetto Properties*, 160 F. Supp. 2d at 883(citing *Schad* v. *Mt. Ephraim*, 452

U.S. 61, 76-77 (1981) ("[One] is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place") (quoting *Schneider* v. *State*, 308 U.S. 147, 163 (1939)). The concept applies equally for all constitutional rights. Chicago could not, for example, ban abortion clinics or intimate relations on the grounds that they are tolerated in the suburbs. Likewise, Chicago cannot demand its three million residents leave the city to exercise their fundamental right to practice and train with firearms.

VI. THE BALANCE OF HARM, AND THE PUBLIC INTEREST, WEIGH DECISIVELY IN FAVOR OF INJUNCTIVE RELIEF

The court seriously erred in accepting the absence of regulation, apart from the range ban, as a form of harm that would be suffered by Defendant were the injunction to issue. This alleged "harm" is entirely self-inflicted. If accepted, it would sanction the wholesale violation of any constitutional right.

Defendant extolled as absolutely necessary a pervasive state of regulation. *See*, *e.g.* App. 134-35. It could not conceive of a condition wherein people are free to exercise fundamental constitutional rights,

without awaiting approval from government officials. Defendant also correctly advised the court that it was powerless to command the City Council to enact any regulations. App. 68. And Defendant claimed it could take over a year to enact proper gun range regulations. App. 131.[8] Thus, according to Defendant, its lack of regulation justified maintaining a complete prohibition on constitutionally-protected activity. Defendant claimed the court could not enjoin the ban, for that would mean leaving nothing in the ban's place—an allegedly unacceptable outcome that the court was powerless to address.

The lower court should not have accepted this circular, essentially political argument. This case is not about abstract concepts of what makes for good government; it is about the operation of the federal constitution. The Bill of Rights and Fourteenth Amendment stood ratified and in full effect some 166 and 97 years, respectively, before Chicago even had a zoning code. These constitutional provisions remain in effect regardless of whether Defendant *chooses*—and it is very much

[8]No guarantee could be offered that Defendant's new regulations would be any more constitutional.

Defendant's choice—to regulate Plaintiffs' fundamental rights.[9]

Plaintiffs do not seek to enjoin all regulation. Plaintiffs oppose only the law that has actually been enacted—a total ban on gun ranges. If the City feels strongly about regulating gun ranges, it is free to do so anytime within constitutional limitations. Defendant's voluntary failure or refusal to regulate the exercise of fundamental rights hardly sanctions its complete abrogation of those rights.

The public interest strongly favors firearms proficiency and education, to say nothing of respecting fundamental rights. *Cf. Christian Legal Soc'y*, 453 F.3d at 859 ("injunctions protecting First Amendment freedoms are always in the public interest"). Given the severe harm that may befall Plaintiffs and the public in the absence of adequate range training, and the complete lack of harm suffered by enjoining a law for which there is no legitimate rationale, the balance of interests tilts strongly in favor of immediate injunctive relief.

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[9]Defendant has never acknowledged that it may be the only city in America with a gun range ban, and that somehow, gun ranges have never been enjoined for months and years on end while regulators wrestled with the alleged problems they pose. Gun ranges are as old as gunpowder. They are only difficult to regulate when the object of the regulation is to impose difficulty.

CONCLUSION

The order below should be reversed, and the case remanded with instructions to enter a permanent injunction consistent with Plaintiffs' prayer for relief.

Dated: December 7, 2010

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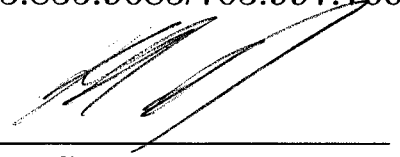
By: 

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,514 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii).

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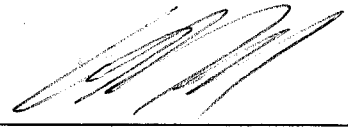

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Dated: December 7, 2010

CERTIFICATE OF SERVICE

On this, the 7th day of December, 2010, I served two true and correct copies of the foregoing Appellants' Brief and Required Short Appendix on the following by Federal Express:

Suzanne M. Loose
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I further certify that on this, the 7th day of December, 2010, I served the electronic copy of the foregoing Appellants' Brief and Required Short Appendix on above-listed counsel by email to sloose@cityofchicago.org.

The brief was also filed this day by dispatch to the Clerk via Federal Express.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 7th day of December, 2010.

Alan Gura