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

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT
Fed. R. App. Proc. 26.1, Circuit Rule 26.1

(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:

Gura & Possessky, PLLC
Law Firm of David G. Sigale, P.C.

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

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

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

Alan Gura
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SUMMARY OF ARGUMENT

Buried in Defendant's brief is the following dispositive concession:

> Of course, learning to use, aim, and fire a gun contributes to safe and effective use of a gun in self-defense, as Chicago's own regulations recognize. We agree therefore that the availability of live-fire training has some relation to residents' ability effectively to exercise Second Amendment rights.

Def. Br. 32.[1]

Much of Defendant's brief, and that of its amici, argue with this concession, straining to deny that the right to keep and bear arms necessarily entails the right to practice the use of those arms.

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[1]Defendant errs in suggesting that range use for "sport and recreation—or by those who do not intend to possess weapons for purposes of self-defense—[has] little to do with exercise of Second Amendment rights." Def. Br. 32. The Supreme Court held that individuals enjoy the right to arms for "self-defense, recreation, and other lawful purposes." *District of Columbia* v. *Heller*, 554 U.S. 570, 677 n.38 (2008) (Stevens, J., dissenting); *United States* v. *Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc). As President Obama noted, the Amendment "provide[s] for Americans the right to bear arms for their protection, for their safety, for hunting, *for a wide range of uses*." http://www.white house.gov/the-press-office/2011/03/03/remarks-president-obama-and-president-calder-n-mexico-joint-press-confer (last visited March 5, 2011) (emphasis added).

That the Second Amendment secures—at its core—the right to train with arms is not just a matter of common sense. It is an unassailable historical fact.

And as Defendant further concedes, the link between gun ownership and gun ranges is acknowledged by the City's conditioning the former on use of the latter. The range ban violates the Second Amendment not merely because range use is a core Second Amendment right, but also because the ban is a gratuitous and unjustifiable obstacle to firearm ownership. "The availability of live-fire training" does not merely have "some relation" to the "ability to effectively exercise Second Amendment rights" which Defendant "recognize[s]." The Municipal Code elevates this relationship to a mandatory condition precedent: no training, no guns. Banning all civilian ranges throughout the City's 231 square miles plainly impacts the "availability of live-fire training."

Defendant also definitively concedes Plaintiffs' First Amendment claim, in linking "learning" to "the availability of live-fire training." Def. Br. 32. "Learning," and its counterpart, "teaching," constitute core First Amendment activity.

Defendant not only ignores adversely dispositive First Amendment precedent. Permeating Defendant's brief is a refusal to acknowledge *Heller*, *Skoien*, and *McDonald* v. *City of Chicago*, 130 S. Ct. 3020 (2010). Every argument offered against the Second Amendment claim has already been rejected in one or more of these opinions:

- Defendant claims that there is no right to gun training outside a militia context. *Heller* rejected the idea that individual Second Amendment rights are limited by a militia purpose;
- Defendant and its amici claim that ancient fire-suppression and public disorder laws allow it to ban ranges. *Heller* rejected reliance on such laws to limit Second Amendment rights; in any event, the cited provisions undermine Defendant's claims;[2]
- Defendant incredibly avers as its regulatory interest the reduction in firearms possession. But there can be absolutely no regulatory interest in suppressing a fundamental constitutional right—no matter how vehemently the City disagrees with the Supreme Court;

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[2]There is, of course, no Framing Era precedent for conditioning firearm ownership on training.

- Confronted with this Court's rejection of a "thieves' veto" on the exercise of constitutional rights, Defendant claims that guns are especially dangerous. But *McDonald* rejected Defendant's argument that the inherent dangerousness of firearms justifies relegating the Second Amendment to second-class status;
- Defendant conjures a standard of review for Second Amendment claims under which all gun laws are apparently constitutional. The argument is specious, not only because the Second Amendment secures *fundamental* rights, but considering this exact argument was unsuccessfully raised in *Skoien*. Defendant's alternative application of intermediate scrutiny fails every aspect of that analysis.

Finally, with respect to the balance of harms, no value can be ascribed to Defendant's parade of imagined horribles, where the record fails to disclose *any* problems that Defendant has ever experienced with gun ranges, which it allowed until, this past July, it removed from its ban on firearm discharge an exception for "duly licensed shooting clubs." Chi. Mun. Code § 8-24-010 (2009). Indeed, if ranges posed such

risks to public safety, Defendant might have pointed to even a single American city that entirely bans them today.

ARGUMENT

I. THE RIGHT TO PRACTICE WITH ARMS, UNCONNECTED TO MILITIA SERVICE, IS DEEPLY ROOTED IN THE SECOND AMENDMENT'S HISTORICAL CORE.

An examination of whether the Second Amendment secures the right to use a gun range begins, and should end, with precedent. There is no serious response to *Heller*'s endorsement of the argument that "[n]o 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*, 554 U.S. at 619 (citation omitted).

The early cases are in agreement:

> What, then, is involved in this right of keeping arms? It necessarily involves the right to purchase *and use them in such a way as is usual*, or to keep them *for the ordinary purposes* to which they are adapted; and as they are to be kept, evidently with a view that the citizens making up the yeomanry of the land, the body of the militia, shall become familiar with their use in times of peace, that they may the more efficiently use them in times of war; then the right to keep arms for this purpose *involves the right to practice their use, in order to attain to this efficiency*. The right and use are guaranteed to the citizen, to be exercised and enjoyed in time of peace, in subordination

> to the general ends of civil society; but, as a right, to be maintained in all its fullness.

Andrews v. *State*, 50 Tenn. 165, 178 (1871) (emphasis added).

> We suppose that in view of what they deemed a necessity of a free state, to-wit: the existence of a well regulated militia, they guaranteed to the people, not only the right to have and keep arms, but the right so to use them as to become familiar with that use, so that when an exigency of the state arose, they would be ready and capable for its defense.

Hill v. *State*, 53 Ga. 472, 479 (1874).

> The simple right to carry arms . . . would not answer the declared purpose in view. Skill and familiarity in the use of arms was the thing sought for . . . To acquire this skill and this familiarity, the words "bear arms" must include the right to load them and shoot them and *use them as such things are ordinarily used*, so that the "people" will be fitted for defending the state when its needs demand . . .

Id. at 480 (emphasis added).

Defendant and its amici argue that the right to practice with arms was only a "right" to engage in government-directed militia training, but this is merely another attempt to revive the rejected notion that Second Amendment rights are "collective," limited by a militia purpose. "The holder of the right" is "the people," not the militia. *Heller*, 554 U.S. at 580-81.

Moreover, that a militia be "well-regulated" does not mean that it must necessarily be the subject of state control. With respect to troops, "regulated" is defined as "properly disciplined." 7 OXFORD ENGLISH DICTIONARY 380 (1933). In turn, "discipline" in relation to arms is defined as "training in the practice of arms." 3 OXFORD ENGLISH DICTIONARY 416 (1933). Revolutionary Americans forming voluntary associations to resist British rule, including Washington and Mason, employed the term "well-regulated militia" to describe their associations. 1 Kate Mason Rowland, THE LIFE OF GEORGE MASON 428 (1892). These organizations were decidedly not sanctioned by any governmental authority.

This Court cannot overrule *Heller*, and it is pointless to persist in arguing that individual Second Amendment rights are exercised only pursuant to government control.

Defendant's argument is also illogical. As training is valuable regardless of one's purpose in using firearms, it makes no sense that one should enjoy a right to improve her shooting proficiency only with respect to one constitutionally-protected use of arms. The argument is especially difficult considering the right of individual self-defense lies

at the Second Amendment's "core," *Heller*, 554 U.S. at 630, while it is unclear whether there exists any right, as such, to perform state-directed militia duty. *Cf. United States* v. *Barton*, 2011 U.S. App. LEXIS 4111 at *16-17 (3d Cir. March 4, 2011) ("The federal felon gun dispossession statute . . . does not depend on *how* or *for what reason* the right is exercised.") (emphasis original).

In any event, Defendant's argument is ahistorical. As demonstrated in the preceding descriptions of the training right, the militia's effectiveness was grounded not merely upon government-directed militia training, but upon the population's familiarity with the use of firearms stemming from their ordinary use. *Heller* describes a father teaching his sons to shoot a handgun, not a military official drilling conscripts. A "general knowledge of firearms," *Heller*, 554 U.S. at 619 (citation omitted), and teaching "the whole body of the people . . . especially when young, how to use [firearms]," LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 22 (W. Bennett, ed. 1978), does not speak to government-directed training. Government encouragement

of publicly beneficial private activity hardly diminishes the individual interest in such activity.

That early Americans gave constitutional sanction to the connection between arms rights and arms practice is unsurprising given the evolution of the right to arms. As Prof. Joyce Malcolm documented in works which both *Heller* and *McDonald* cited,[3] the right to arms began as a duty to keep and bear arms; when the Stuart kings attempted to disarm the people, what had been accepted as duty became understood to be a right as well. Joyce Malcolm, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 1, 13-15 (1994). American attitudes of 1789-91 were informed by a long common law history associating arms training with the duty/right of arms ownership, and by the people's recent experience in winning their independence by virtue of proficiency in arms.

[3] *See Heller*, 554 U.S. at 592-93; *McDonald*, 130 S.Ct. at 3037.

A. The English Experience.

The fourteenth century saw the longbow's advent as a distinctly English arm, one which had enabled English commoners to prevail over masses of armored knights at Crecy, Agincourt, and Poitiers. Training thus became essential. In 1363, Edward III expressed concern that commoners were neglecting archery in favor of other sports, "so that the kingdom in short, becomes truly destitute of archers." His proclamation informed all sheriffs:

> [T]hat everyone in the shire, on festival days when he has holiday, *shall learn and practice himself* in the art of archery, and use for *his* games bows and arrows, or crossbows and bolts, forbidding all and single, on our orders, to meddle or toy in any way with these games of throwing stones, wood, or iron, playing handball, football, stickball or hockey, or cock-fighting, or any other games of this kind, which are worthless, under pain of imprisonment.

Alec Myers, ed., 4 ENGLISH HISTORICAL DOCUMENTS 695 (1969) (citation omitted) (emphasis added).

Henry VIII expanded upon these requirements. A 1511 statute commanded that every healthy commoner under sixty years of age "do use and exercyse shootyng in longbowes, and also have to have a bowe

and arrowes ready contyually in his house *to use by hymself* and do use hymself in shotyng." It further ordered that all boys be provided with a bow at seven years of age "to enduse theym and bryng them up in shotyng." *An Act concerning shooting in Longe Bowes*, 3 Henry VIII c. 3, 3 STATUTES OF THE REALM 25 (1963) (emphasis added).

A 1541 statute laid out a longbow training program. In addition to the earlier requirements, towns were required to build shooting ranges (known as "butts"), and training—albeit, self-directed—was mandated:

> [T]he Inhabitants and Dwellers in everie of them be compelled to make and contynue such butts upon payne to forfeyt, for everie three monethes so lacking, twente shillings; at that *the said Inhabitants shall exercise them selfes* with longe bowes in shoting at the same and els where in holye dayes and other tymes convenient.

An Acte for Maytenance of Artillarie and debarring of unlawful Games, 33 Henry VIII c. IX, 3 STATUTES OF THE REALM 837-38 (1963) (emphasis added). The statute also barred many games, including "bowle" and "tennys."

These efforts succeeded: "The butts at Finsbury, outside London, were so crowded that it was inadvisable to shoot more than one arrow

at a time lest it disappear, and the ground was so scarred with arrows that no turf grew." Charles Trench, A HISTORY OF MARKMANSHIP 66 (1972).

Henry also tried to tightly restrict use of crossbows and handguns (a term then including all firearms), with no notable success. By 1533 he began to give up. A statute of that year allowed noblemen and persons with lands worth over 100 pounds to own these arms and provided for their practice at ranges. *An Acte for shotyng in crowbowes & handgonnes*, 25 Henry VIII c. 17, 3 STATUTES OF THE REALM 457 (1963). Henry eventually repealed, by proclamation, the restrictions on firearms possession. Noel Perrin, GIVING UP THE GUN 62 (1978).

Under Phillip and Mary, persons owning more than 10 pounds value of land were *required* to own a firearm, the harquebutt (commonly spelled harquebus or arquebus), and permitted to "exercise and use shoting" in "their owne proper Games," so long as they stayed off the "Highe Waye." *An Acte for the Keeping of Horse, Armor, and Weapons,* 4&5 Phil. & Mar. ch. 2, 4 STATUTES OF THE REALM 316, 320 (1963).

> Elizabeth's reign saw the final switchover from bow to firearm.
>
> While Parliament was doing its best for the longbow, the Privy Council was applying its mind to the development of firearms. In 1569 they sent a circular to the local authorities throughout the country with comprehensive proposals for "the increase of arquebusiers and asking for comment…." [T]he groundwork for the wider introduction of firearms was prepared with infinite care.

C. G. Cruickshank, ELIZABETH'S ARMY 109 (2d Ed. 1966).

Upon the Stuarts' return following the English Civil Wars, that dynasty attempted, unsuccessfully, to disarm most Britons. The Game Acts long forbade all but the wealthy to hunt or to possess hunting implements. The 1671 Game Act added "guns" to the list of implements forbidden to all but major landowners. 22-23 Car. II ch. 25, 5 STATUTES OF THE REALM 745 (1963).

The revision appears to have been unpopular, and historians can find no evidence it was enforced. *See* MALCOLM at 105. But royal enforcement efforts suggested that the English maintained their firearms skills on the range. In December 1686, the Earl of Sutherland sent orders to local officials:

> The King having received information that a great many persons not qualified by law, under pretence of shooting matches, keep muskets or other guns in their houses, it is His pleasure that you should send orders to your deputy lieutenants to cause strict search to be made...

2 CALENDAR OF STATE PAPERS (DOMESTIC), JAMES II 314 (1964); *see also* MALCOLM at 105.

In short, the Framers acted against a common law background where arms, the practice of them, and ranges upon which to practice, were interlinked.

B. The Framing Generation Accepted Firearms Experience as an Indispensable Component of the Right of Arms.

The Framing generation had grown up in a world where Americans were not only armed, but trained to arms. New Plymouth Colony, for example, ordered in 1640 that "the inhabitants of every towne within the government fitt to bear arms be trained at least six times in the year," and in 1677 that "the military commission officers of this jurisdiction … not only train their soldiers in their postures and motions, but also in shooting at markes." William Brigham, THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW

PLYMOUTH 31, 184 (1836). They were familiar with the writings of the great Whig thinkers, including Andrew Fletcher, who counseled that

> I cannot see, why arms should be denied to any man who is not a slave, since they are the only true badges of liberty; and ought not ever, but in times of utmost necessity, to be put in the hands of mercenaries or slaves; neither can I understand why any man that has arms, should not be taught the use of them.

Andrew Fletcher, *A Discourse of Government with Relations to Militias*, *in* POLITICAL WORKS 23 (John Robertson, ed. 1997); *see* Stephen Halbrook, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 47 (1984).

It is thus not surprising that Revolutionary Americans boasted not merely of being armed, but of being well-trained in marksmanship, and considered this conferred an advantage over British troops. Early in the War, George Washington wrote that, while military muskets were best, "A good fowling piece will do execution in the hands of a Marksman." 9 WRITINGS OF GEORGE WASHINGTON 141 (1936). James Madison in 1775 wrote a friend of his experience among rifleman:

> You would be astonished at the perfection this art is brought to. The most inexpert hands rec[k]on it an indifferent shot to miss the

> bigness of a man's head at the distance of 100 yards. I am far from among the best & should not often miss it on a fair trial at that distance.

1 THE PAPERS OF JAMES MADISON 153 (William T. Hutchinson, *et al.* eds 1962). As historian Robert Shalhope observed,

> Even Charles Lee, a British military man, observed in a widely-circulated pamphlet that "the Yeomenry of American … are accustomed from their infancy in fire arms; they are expert in the use of them–Whereas the lower and middle people of England are, by the tyranny of certain laws almost as ignorant in the use of a musket, as they are of the ancient Catepulta." The Continental Congress echoed this theme in its declaration of July 1775: "On the sword, therefore, we are compelled to rely for protection. Should victory declare in your favor, yet men trained to arms from their infancy, and animated by the love of liberty, will afford neither a cheap nor an easy conquest."

Robert Shalhope, *The Ideological Origins of the Second Amendment*, 69 JOURNAL OF AMERICAN HISTORY 599, 606 (1982) (citations omitted).The Framing period's own historians concurred:

"[T]he traditional view of historians, from the very beginning, emphasized the widespread competence of Colonial militias with guns." Clayton Cramer, ARMED AMERICA 149 (2006). "Europeans, from their being generally unacquainted with fire arms are less easily taught the

use of them than Americans, who are from their youth familiar with these instruments of war." David Ramsay, 1 THE HISTORY OF THE AMERICAN REVOLUTION 252 (1811 ed.). "[T]he habitual use of the fowling-piece made these raw militia superior to veteran troops in aiming the musket." Richard Frothingham, Jr., A HISTORY OF THE SIEGE OF BOSTON 102-03 (2d ed.1851). Advocates of the Constitution's ratification extolled the value of marksmanship gained in the ordinary course of civilian life. "The militia of these free commonwealths, *entitled and accustomed to their arms*, when compared with any possible army, must be tremendous and irresistible." Halbrook, supra, at 68-69 (quoting Tench Coxe, PENNSYLVANIA GAZETTE, Feb. 20, 1788) (emphasis added).

None of this is to say that the Framers did not value the government's organization and direction of militia, or its provision of additional training. Defendant's amici expend much energy proving as much, but the matter is wholly irrelevant. Of course the government added value to the militia by organizing and training it—but a core

assumption underlying codification of the right to keep and bear arms was that the people's general familiarity with firearms would improve the militia's quality.

Moreover, neither amici nor Defendant can answer the fact that the right to keep and bear arms was understood to secure private activities such as self-defense and hunting. It is difficult to suggest that the Framers believed they had the fundamental right to use guns for such purposes, but not the right to practice for those purposes.

The historical basis for recognizing training as inherent in the right to arms is solid. Certainly, it compares favorably with two implicitly-secured constitutional rights Defendant acknowledges: the right to expressive conduct as including nude dancing, Appellants' Br. 54-55, and now, abortion. Accepting fully and without reservation all the arguments for why nude dancing and abortion are constitutionally protected (subjects on which Plaintiffs have no position), Defendant's claim that the "[u]se and operation of gun ranges is not directly protected by the Constitution, as is the right to abortion," Def. Br. 18

n.2, is specious. If the Due Process Clause "directly protect[s]" abortion, one can hardly deny that "the right of the people to keep and bear arms," U.S. Const. amend. II, protects the right to practice and obtain training in the use of arms.

II. ANCIENT FIRE SUPPRESSION AND PUBLIC DISORDER ORDINANCES DO NOT SUPPORT DEFENDANT'S COMPLETE RANGE BAN.

Searching for historical precedent, Defendant mimics the District of Columbia's failed strategy for the defense of its ordinance banning the home possession of functional firearms by invoking ancient fire suppression and public disorder laws.

The approach suffers from two fatal flaws. First, the Supreme Court rejected that tactic in *Heller* as overreading even the colonial interest in fire suppression and gun safety. Perhaps more critically, virtually all of the ancient laws invoked by Defendant are simple regulations—not complete prohibitions. Considering the danger posed by gun training in centuries past, that these ancient laws were more permissive than a total ban hardly advances Defendant's argument.

A. Obsolete Fire-Suppression Interests, Unasserted by Defendant, Cannot Overcome the Individual Second Amendment Right.

The District of Columbia (and Justice Breyer's *Heller* dissent) relied heavily on

> [a] 1783 Massachusetts law [that] forbade the residents of Boston to "take into" or "receive into" "any Dwelling House, Stable, Barn, Out-house, Ware-house, Store, Shop or other Building" loaded firearms, and permitted the seizure of any loaded firearms that "shall be found" there.

Heller, 554 U.S. at 631 (quoting Act of Mar. 1, 1783, ch. 13, 1783 Mass. Acts p. 218).

On its face, Boston's 1783 ordinance accomplished nothing more or less than Washington's modern functional firearms ban. But the Supreme Court was unimpressed.

> That statute's text and its prologue, which makes clear that the purpose of the prohibition was to eliminate the danger to firefighters posed by the "depositing of loaded Arms" in buildings, give reason to doubt that colonial Boston authorities would have enforced that general prohibition against someone who temporarily loaded a firearm to confront an intruder (despite the law's application in that case).

Heller, 554 U.S. at 631-32.

In other words, the government's interest in fire suppression—in 1783 Boston, as compelling a governmental interest as could be imagined—would yield to the individual Second Amendment interest in self-defense. *Heller* thus rejected the notion that safety rules for a world in which cities were tinderboxes, firearms sparked unstable powder, and Mrs. O'Leary's cow could seriously be accused of burning down Chicago, might today swallow the Second Amendment guarantee nearly in its entirety. *Cf. Lawrence* v. *Texas*, 539 U.S. 558, 568-71 (2003) (historic prohibitions against sodomy may not have targeted consensual same-sex adult relationships).

Defendant concedes—indeed, relies upon the fact—that modern developments can alter the balance of interests. "[G]iven modern transportation, it is likely that the range ban imposes less of a burden on the Second Amendment rights than historic prohibitions." Def. Br. 26. But the equation here works in the other direction. Given modern firearms and the advent of indoor ranges, the firing of guns today does

not, without more, set buildings ablaze, any more than does "modern transportation" depend upon a ready supply of hay.

Indeed—glaringly absent from Defendant's argument is any assertion of a fire suppression interest. For a City famously destroyed by fire, to invoke fire-safety ordinances as justification for a practice without offering fire safety as its rationale speaks volumes. Amici's statement that the "basic rationale" of these laws "strongly supports the validity" of a complete ban on modern gun ranges, Finkleman Br. 8, is plainly false—neither amici nor Defendant invoke that rationale, far removed from modern reality.[4]

B. Defendant's Citations Prove Only That the Right May Be Regulated, Not Abolished.

Plaintiffs do not doubt that gun ranges may be regulated in the interest of public safety. But the question before the Court is whether

[4]Chicago doubtless may ban celebratory gunfire in its streets, an application of the firing ban not challenged by Plaintiffs.

they may be entirely banned. Where not entirely irrelevant, Defendant's alleged historical precedent supports Plaintiffs.[5]

Philadelphia's ordinances include "An Act For preventing accidents that may happen by fire," and forbids setting chimneys on fire along with the firing of guns. Def. App. 2; *id.* at 4 ("preventing accidents which may happen by fire"); *id.* at 5 (same). This ordinance was specifically rejected by *Heller* as informing any limitation on Second Amendment rights. *See Heller*, 554 U.S. at 632-33 (rejecting Act of Aug. 26, 1721, ch. CCXLV, §IV, in 3 Stat. at Large of Pa. 253-254 (1896)). Defendant also invokes New York's "Act for the more effectual prevention of fires," targeting New Year's revelry. Def. App. 29. *Heller* dismissed such provisions as well. *Heller*, 554 U.S. at 632.

[5]Of course, not every ancient law was constitutional, then or now. Defendant's appendix of allegedly model laws contains enactments punishing those who sing "profane" songs, utter "profane" words, create "lascivious figure[s]," Def. App. 25, "profanely curse or damn, or profanely swear by the name of God, Jesus Christ, or the Holy Ghost," or charge money for exhibiting a "puppet show, wire dancing, or tumbling, juggling or slight of hand." Def. App. 11.

Defendant's citation to Boston's 1746 shooting prohibition fares no better. *Heller* specifically rejected this ordinance, too, as informing Second Amendment limitations, "particularly given its preambulatory reference to 'the *indiscreet* firing of Guns.'" *Heller*, 554 U.S. at 633 (quoting with emphasis preamble in Act of May 28, 1746, ch. X, Acts and Laws of Mass. Bay p. 208).

That law is also vastly more permissive than Defendant's in that it allowed shooting guns on the islands within Boston Harbor, and with proper leave, also allowed "firing at a Mark or Target for the Exercise of their Skill and Judgment, provided it be done at the lower End of the Common; [and] firing at a Mark from the several Batteries in the Town of Boston." Def. App. 7, 30.

The 1790 Ohio and Northwestern Territory ordinance required only that target practice take place a quarter-mile from any building, and exempted "shooting at or killing any of the larger kind of game or wild animals, such as buffaloes, bears, deer, hares, rabbits, turkeys, swans, [and] geese that may happen at any time to come into view," with

proper care. Def. App. 9. The early 19th-century prohibitions on gun firing in various sections of Philadelphia (alongside fire-conscious bans on "illuminated" houses and the making of bonfires), allowed individuals to obtain the city's permission. Def. App. 13, 14, 17. So did the cited New Haven ordinance, a "By-Law" of the "Fire Department." *Id.*, at 23.

Defendant's cited 1817 New Orleans provision was "An ordinance for preventing and extinguishing fires." Def. App. 19. Far from Chicago's total ban, New Orleans only restricted firing in dangerous places (e.g., "in any street, court-yard, lot, walk or public way"), and required a setback from "any house or other inhabited part of the said city or suburbs." Def. App. 20. New Orleans specifically targeted reckless conduct: "particularly on the occasion of festivals or public rejoicings." *Id.; compare Heller*, 554 U.S. at 632 (discussing New York prohibition on celebratory gunfire). Baltimore's 1827 firing prohibition targeted "the practice of Firing at Fowl on the Water in the Harbour and Bason of the City," and advised "the persons who are in the habit of amusing

themselves in that way" that the "ordinance will be rigidly enforced, and an example made of" violators. Def. App. 32.

Manchester only barred shooting in "the compact part of the city," without permission, alongside its prohibitions on bonfires, careless use of matches, and falsely crying fire. Def. App. 25. St. Joseph, Missouri, allowed shooting with a permit. *Id.*, at 27.

Finally, Chicago's historic laws hardly aid Defendant. The 1861 enactment, a fire department regulation, allowed shooting with government permission. Def. App. 34. The 1881 variation contained no such exception, Def. App. 36, but the City apparently never banned modern gun ranges. Until last July, Defendant allowed shooting at "duly licensed shooting clubs." Chi. Mun. Code § 8-24-010 (2009). Plaintiff Brown testified that he used seven Chicago ranges prior to the ban. Brown Decl. ¶6.

In contrast to virtually all of the provisions amici and Defendant cite, Defendant's law contains no exceptions for portions of the city, or sets range distances from other uses, nor does it permit target practice

with a license or other form of permission. These laws stand for nothing more than the unremarkable proposition that cities may regulate the operation and location of gun ranges. Were that all Chicago had done, this case might well never have been brought.

III. IF APPLICABLE, INTERMEDIATE SCRUTINY IMPOSES NO BURDEN ON PLAINTIFFS, BUT RATHER REQUIRES DEFENDANT TO DEMONSTRATE A "STRONG SHOWING" THAT ITS REGULATION IS "SUBSTANTIALLY RELATED TO AN IMPORTANT GOVERNMENTAL OBJECTIVE."

Defendant claims that "even if [gun range training and use] fell somewhere within the ambit of Second Amendment protection, it would be governed by an intermediate level of scrutiny that requires plaintiffs to show the gun-range ban unduly burdens their [right]." Def. Br. 12-13. In the alternative, Defendant claims "[t]he prohibition survives more rigorous intermediate scrutiny . . . because it is substantially related to the important public-safety objectives of reducing gun violence in Chicago." *Id.* 13.

Both claims fail—even if intermediate scrutiny were the applicable standard.

A. Intermediate Scrutiny Is Inapplicable On Plaintiffs' Facts.

This Court's precedent is clear: at least in cases challenging gun laws that come within *Heller*'s list of "presumptively lawful" regulations reflecting "longstanding" practices, the standard of review is intermediate scrutiny. *Skoien*, *supra*.[6]

It is far from certain that this relaxed standard applies here, as a stronger standard might be applied in different contexts. *United States* v. *Williams*, 616 F.3d 685, 693 (7th Cir. 2010). That observation finds support in the Supreme Court's explanation that an intermediate standard of review may apply to an enumerated right under circumstances where the right's exercise is "of less constitutional

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[6] *Heller* demonstrates that Second Amendment violations may be enjoined without resort to a means-ends standard of review. Washington, D.C.'s handgun ban failed the common use test for protected arms, while that city's functional firearms ban was in literal conflict with a core guarantee of the right. Plaintiffs agree that a means-ends standard of review should resolve their Second Amendment claim to the extent that the range ban frustrates the possession of guns, and would be applicable to any Second Amendment challenge to range *regulation*, but is inapplicable to the claim that Defendant's absolute range ban infringes the right to train with guns.

moment." *Cent. Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 563 n.5 (1980).

The Fourth Circuit accurately summed up the situation, applying intermediate rather than strict scrutiny in a challenge to the same law at issue in *Skoien* only because the defendant's claim was "not within the core right identified in *Heller*—the right of a *law-abiding*, responsible citizen to possess and carry a weapon for self-defense." *United States* v. *Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (emphasis original). Plaintiffs, however, are law abiding and responsible. This Court should follow *Chester* and clarify that intermediate scrutiny in Second Amendment cases applies only to unlawful, irresponsible people standing outside the right's core protection.

B. "Undue Burden" Cannot Be A Second Amendment Standard of Review.

If Defendant's proposal of a new "undue burden" test sounds familiar, that is because the identical argument was just presented to this Court, sitting *en banc*. *See* Brief of Brady Center, as *Amicus Curiae*, *United States* v. *Skoien*, No. 08-3770. Brady, and the standard's

chief academic proponent, term their theory "reasonable regulation," "but it could just as easily be termed 'undue burden,'" Def. Br. 36, Defendant's preferred terminology.

Whatever the label, this Court sitting *en banc* has traversed this territory, and instead adopted the "more rigorous" intermediate scrutiny test which places upon the *government*, not the Plaintiffs, the burden to make a "strong showing" that the regulation is "substantially related to an important governmental objective." *Skoien*, 614 F.3d at 641 (citations omitted). Even were this Court to re-visit *Skoien*, the "undue burden" argument merits little consideration. The test is so deferential as to permit *any* regulation that does not render the right "illusory," "nugatory," or "effectively destroyed." Def. Br. 37 (citations omitted); *cf.* Brady Br. 20. Defendant asserts even its late handgun ban would survive this test.[7] This is hardly an appropriate level of review for a fundamental right.

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[7]Claiming *McDonald* Plaintiffs did not "prevail," Defendant still insists its handgun ban was not foreclosed by the Supreme Court's decision. Defendant's theory will be tested. *McDonald* v. *City of Chicago*, No. 11-1016.

Defendant's proposed test is based on the manner in which state courts have allegedly applied analogous state right to arms provisions. Plaintiffs disagree with this assessment of how state courts evaluate right to arms provisions, *see, e.g.* David Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1 (2010), but having federal courts defer to state authorities on the question of how to best secure a federal constitutional right contradicts the very logic of the Fourteenth Amendment, which was ratified precisely because state courts were not upholding basic civil rights, including particularly the right to arms. And as the Supreme Court recognized in the First Amendment context, "[t]he distinction between laws burdening and laws banning speech is but a matter of degree." *United States* v. *Playboy Entm't Group*, 529 U.S. 803, 812 (2000).

Even were "undue burden" the governing standard (and it is not), Defendant would still lose. Defendant's arguments rely heavily on the work of Professor Adam Winkler—who dismissed the notion that

Chicago's range ban is constitutional in under 140 characters. "Reasonable gun control is one thing, this another. Chicago requires 1 hour on range for handgun permit but bars ranges." www.twitter.com/adamwinkler, Aug. 16, 2010, 3:18 p.m. (citation omitted) (last visited March 5, 2011).

Reviewing the "undue burden" standard in the one context where it unquestionably applies confirms Professor Winkler's analysis. "Undue burdens"

> plac[e] a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the . . . state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.

Planned Parenthood v. *Casey*, 505 U.S. 833, 877 (1992) (O'Connor, Kennedy & Souter, JJ.)

Here, Defendant's averred purpose has nothing to do with informing or advancing the Second Amendment right. The acknowledged purpose is to suppress the possession of guns. And the effect of the range ban

undeniably places a "substantial obstacle" in the path of individuals wishing to exercise Second Amendment rights. Queen, a licensed trainer, testified that prospective registrants quit the process because of the difficulty of obtaining training. The argument that banning all gun ranges in a city of nearly three million people, covering over 230 square miles, does not "unduly burden" access to range training is as frivolous as the argument for the undue burden standard itself.

C. The Range Ban Fails Intermediate Scrutiny.

Defendant struggles to alter the intermediate standard of review, because it has utterly failed to make any "showing," let alone a "strong showing," that banning all gun ranges is "substantially" related to reducing gun violence. Defendant demonstrates that the legislative record contains the familiar refrains proclaiming gun ownership a social evil. But it does not reflect analysis of ranges.

Defendant now resorts to post-hoc rationalization, wildly hypothesizing accidents and criminal attacks on gun ranges, because

the City Council had no evidence before it—as none exists—linking gun ranges to violence—let alone a "substantial" proportion of violence.[8]

Defendant's attempt to extract some support for its position from *Miller* v. *Civil Constructors*, 651 N.E.2d 239 (Ill. Ct. App. 1995), is disingenuous. *Miller* held that ranges are *not* ultrahazardous, that any risk from ranges "can be virtually eliminated by the exercise of reasonable or even 'utmost' care," and that "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." *Id.*, at 245.

Of course, no actual evidence of harm is necessary where the regulatory interest is "limiting the number of handguns in circulation," Def. Br. 4, and eliminating "the possession and discharge of firearms" or the "collection of guns." Def. Br. 45. The relationship between gun ownership and the ability to practice shooting is self-evidently quite

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[8]Were Defendant truly concerned about lead residue, it could mandate hand-washing or the use of lead-free ammunition. The latter regulation would raise questions under *Heller*'s common-use test, but fully serve any interest in lead-elimination without banning all gun training.

strong—and that is the relationship that Defendant admits to targeting with its range ban. It is not so much anything about gun ranges, qua ranges, that informs the ban, merely the fact that gun ranges facilitate and contain the possession and use of guns—the activities Defendant targets for elimination.

Thus, the problem is not merely the lack of a "substantial relationship" between ranges and violence; it is the illegitimacy of Defendant's real interest—elimination of the Second Amendment right.

Undaunted by *McDonald*, Defendant still argues that guns "more directly cause injury and death than the subject matter of other rights," Def. Br. 38, and that hypothetical criminals might still impose a "thieves' veto" over the fundamental right to arms because the theft of "deadly weapons . . . create[s] danger well beyond the immediate harm to the victim of the theft." Def. Br. 45.[9]

But the Supreme Court emphatically rejected Defendant's argument that "the Second Amendment differs from all of the other provisions of

[9]Considering the hazards of stolen cars, by this logic Defendant should ban parking lots.

the Bill of Rights because it concerns the right to possess a deadly implement and thus has implications for public safety." *McDonald*, 130 S. Ct. at 3045. The idea that the nature of firearms entitles Defendant to treat the Second Amendment as a lesser relation of the Bill of Rights is not viable—even if Defendant fervently believes that "limiting the number of handguns in circulation" would substantially reduce gun violence. Defendant may not legislate with the express aim of reducing exercise of fundamental rights.

IV. DEFENDANT CONCEDES THE FIRST AMENDMENT ARGUMENT.

That there is little for Plaintiffs to say here about their First Amendment claim is inherent in the nature of reply. Defendant concedes that "learning" is inextricably linked to range availability, and does not bother contesting that physical demonstration and hands-on instruction are expressive First Amendment speech.

Defendant does, however, misstate the holding of *Edwards* v. *City of Goldsboro*, 178 F.3d 231 (4th Cir. 1999). The Fourth Circuit indeed "presum[ed]" that "the form of the [officer's] speech" included "physical

demonstrations . . .entitled to protection." *Edwards*, 178 F.3d at 247. The presumption was correct: North Carolina's law, like Defendant's, required live-fire training.

Of course Plaintiffs do not claim a First Amendment right to discharge firearms. A law restricting range use to instruction and training, though perhaps difficult to enforce, would not pose First Amendment problems. But this is not a case of wishing to speak about conduct. Were there not something unique—and of unique public importance—imparted in live-fire training, Defendant would not require it.

V. THE BALANCE OF HARMS COMPELS INJUNCTIVE RELIEF.

The harm from not having sufficient gun training available is not money damages for longer-distance travel, to be recovered by people filing Section 1983 actions for bus fare. The harm is being shot, stabbed, beaten, raped, or maimed because one cannot timely register a gun or learn how to use it effectively for self-defense.

And even in "money damages" cases, irreparable harm is often presumed. *See, e.g, Computer Assocs. Int'l* v. *Quest Software, Inc.*, 333 F. Supp. 2d 688, 700 (N.D. Ill. 2004) (trade secret misappropriation and copyright infringement). Of course, considering Plaintiffs prevail on their First Amendment claim, irreparable harm is established as a matter of law.

In any event, it is difficult to accept that irreparable harm can be presumed where a person might be frustrated in reading a book or securing a copyright, but not where the interest frustrated is personal self-defense against criminal violence. Self-defense is practically the interest in life itself. The law secures no higher value.

The public interest in respecting constitutional rights is amplified here by the public interest in ensuring the "safe and effective" use of guns—which Defendant admits is advanced by range use. Def. Br. 32. Plaintiffs have contracted for a range operated by a highly-experienced police contractor, with an impeccable safety record, and would have the range staffed by state-licensed police trainers as required by City

ordinance. The District Court correctly found no hazard emanating from this or any other particular range.

As for Defendant's current lack of regulation, Defendant needed only three days to craft the Nation's most Byzantine gun ordinance. It will take Defendant less effort to conform to normal American practices—and limit further complex litigation in the process.

CONCLUSION

The order below should be reversed.

Dated: March 11, 2011

Respectfully submitted,

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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 7,000 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(b), and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionately spaced typeface using WordPerfect X4 in 14 point Century Schoolbook font.

/s/ Alan Gura
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Attorney for Plaintiffs-Appellants
Dated: March 11, 2011

CERTIFICATE OF SERVICE

On this, the 11th day of March, 2011, I served two true and correct copies of the foregoing Reply Brief on the following by Federal Express:

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I further certify that on this, the 11th day of March, I served the electronic copy of the foregoing Reply Brief 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 11th day of March, 2011.

/s/ Alan Gura
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