Nos. 12-1269 and 12-1788

IN THE

United States Court of Appeals for the Seventh Circuit

MICHAEL MOORE, et al., Plaintiffs-Appellants, v. LISA MADIGAN and HIRAM GRAU Defendants-Appellees.	))))))))	Appeal from the United States District Court for the Central District of Illinois No. 11-3134 The Honorable Susan E. Myerscough, Judge Presiding.
MARY E. SHEPARD and ILLINOIS STATE RIFLE ASSOCIATION, Plaintiffs-Appellants, v. LISA MADIGAN and HIRAM GRAU Defendants-Appellees.	))))))))	Appeal from the United States District Court for the Southern District of Illinois No. 11-405 The Honorable William D. Stiehl, Judge Presiding.

BRIEF *AMICI CURIAE* OF BRADY CENTER TO PREVENT GUN VIOLENCE; TRACY MARTIN AND SYBRINA FULTON, PARENTS OF TRAYVON MARTIN; RON DAVIS AND LUCIA MCBATH, PARENTS OF JORDAN DAVIS; MAJOR CITIES CHIEFS ASSOCIATION; AND INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS IN SUPPORT OF APPELLEES' PETITION FOR REHEARING EN BANC

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: No. 12-1269; No. 12-1788

Short Caption: Michael Moore, et al. v. Lisa Madigan, et al. ; Mary Shepard, et al. v. Lisa Madigan, et al.

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Brady Center To Prevent Gun Violence, Tracy Martin and Sybrina Fulton, Ron Davis and Lucia McBath, Major Cities Chiefs Association, International Brotherhood of Police Officers

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CONSENT TO FILE

Counsel for the *Moore* Appellants, Alan Gura, as well as counsel for Appellees consent to this filing. Counsel for prospective *amici* contacted counsel for the *Shepard* Appellants, but did not receive a response as of the filing of this brief. No party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than *amici*, its members, or its counsel, contributed money intended to fund preparation of this brief.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus Brady Center to Prevent Gun Violence is the nation's largest non-partisan, non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. Through its Legal Action Project, the Brady Center has filed numerous *amicus curiae* briefs in cases involving firearms regulations, including *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), *United States v. Hayes*, 555 U.S. 415, 427 (2009) (citing Brady Center brief), and *District of Columbia v. Heller*, 554 U.S. 570 (2008).

Amicus International Brotherhood of Police Officers is one of the country's largest police unions, representing more than 25,000 members.

Amicus Major Cities Chiefs Association includes chiefs and sheriffs of the 70 largest law enforcement agencies in the United States and Canada.

Amici Tracy Martin and Sybrina Fulton are the parents of Trayvon Martin, a 17 year old who was shot and killed on February 26, 2012 as he walked home from a convenience store with a bag of Skittles and a can of iced tea to watch the NBA All-Star game with his father. The killer was licensed to carry a loaded concealed firearm in public. He followed Trayvon with his gun after being told not to by police.

Amici Ron Davis and Lucia McBath are the parents of Jordan Davis, a 17 year old who was shot and killed on November 23, 2012 as he sat in his car. The killer was licensed by the state of Florida to carry a loaded concealed firearm in public. He allegedly began firing after becoming upset that the music being played in Jordan's car was too loud.

INTRODUCTION

Less than three years ago, the *en banc* review of this Court corrected a panel's errant reading of the Second Amendment, warning "readers not to treat *Heller* as containing broader holdings than the Court set out to establish: that the Second Amendment creates individual

rights, one of which is keeping operable handguns at home for self-defense." *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc). The need for that review arises again today. In *Moore v. Madigan*, --- F.3d ----, 2012 WL 6156062 (7th Cir. Dec. 11, 2012), a divided panel failed to heed *Skoien*'s warning, read *Heller* as a decision with broad, unarticulated holdings, and in so doing, became the first appellate court in the country to invalidate a gun carry law.

That novel reading of *Heller* raises issues of exceptional and recurring importance. For one, the majority's insistence that *Heller* "decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside," *Moore*, 2012 WL 6156062, at *9, contradicts dozens of courts that have either refused to expand *Heller* beyond the home absent more explicit guidance from the Supreme Court, or upheld carry restrictions under appropriate scrutiny. Moreover, that conclusion scarcely acknowledges *Heller*'s presumptively lawful regulatory measures and explicitly refuses to follow *Heller*'s exhortation to look to history for the scope of the right. In addition, the majority's evaluation (and dismissal) of the data supporting Illinois's law moves the debate on the efficacy of carry laws from legislatures—the very bodies designed to handle such contentious policy issues—into courtrooms.

These issues merit *en banc* consideration. The Court should grant Appellees' petition.

ARGUMENT

I. THE PANEL MAJORITY'S OPINION RAISES QUESTIONS OF EXCEPTIONAL AND RECURRING IMPORTANCE POST-*HELLER*.

1. Contrary to the caution other courts have exercised in defining the Second Amendment's scope, the panel majority's opinion takes broad, unmeasured steps. At times, the majority characterizes the distinction between guns in the home and in the public square as "irrational" and "arbitrary," noting that the "right to bear arms for self-defense" is "as important outside the home as inside." *Moore*, 2012 WL 6156062, at *3, 9. And, at one point, the opinion discounts

Illinois's interest in public safety, suggesting that "the Supreme Court made clear in *Heller* that it wasn't going to make the right to bear arms depend on casualty counts."[1] *Moore*, 2012 WL 6156062, at *6. As such, challengers to other gun regulations have characterized the majority's opinion as "demonstrating" that a court may "take a categorical approach" to "striking down" a reasonable firearm permitting policy "if only because it precludes [a generalized assertion of] self-defense as good cause for permit issuance." Notice of Supplemental Authority 2, *Richards v. Prieto*, No. 11-16255 (9th Cir. Dec. 13, 2012), ECF No. 60.

The vast majority of courts have not gone so far. Many have concluded that "the Court, both in *Heller*, and subsequently in *McDonald*, took pain-staking effort to clearly enumerate that the scope of *Heller* extends only to the right to keep a firearm *in the home* for self-defense purposes." *Richards v. Cnty. of Yolo*, 821 F. Supp. 2d 1169, 1174 n.4 (E.D. Cal. 2011).[2] Among the reasons for refusing to extend *Heller* beyond the home is judicial restraint: "This is serious business." *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011). "We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights." *Id.* Others, recognizing that "extensive state regulation of handguns has never been considered incompatible with the Second Amendment . . . includ[ing] . . . complete prohibitions on carrying the weapon in public," have exercised appropriate deference to the legislature and upheld carry laws under

[1] In Chicago, those casualty counts are "2,364 shooting incidents and 487 homicides, 87 percent of them gun-related." Peter Slevin, *Chicago Is Grappling with Gun Violence*, Wash. Post, Dec. 23, 2012, at A09.

[2] *See also, e.g.*, *Dorr v. Weber*, 741 F. Supp. 2d 993, 1005 (N.D. Iowa 2010) ("[A] right to carry a concealed weapon under the Second Amendment has not been recognized to date."); *United States v. Hart*, 726 F. Supp. 2d 56, 60 (D. Mass. 2010) ("[Defendant] suggests this right extends to the possession of concealed handguns outside one's home. *Heller* does not hold, nor even suggest, that concealed weapons laws are unconstitutional."); *United States v. Tooley*, 717 F. Supp. 2d 580, 596 (S.D.W. Va. 2010) ("[P]ossession of a firearm outside of the home . . . [is] not within the 'core' of the Second Amendment right as defined by *Heller*.").

intermediate scrutiny. *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 100 (2d Cir. 2012).

By contrast, challengers to gun regulations summarize the majority's opinion with a simple syllogism: *Heller* says "self-defense"; self-defense can happen anywhere; therefore, *Heller* extends everywhere. But that supposed simplicity glosses over two important issues.

First, it fails to acknowledge adequately *Heller*'s list of presumptively lawful firearms regulations—"the sort of message that, whether or not technically dictum, a court of appeals must respect, given the Supreme Court's entitlement to speak through its opinions as well as through its technical holdings." *Skoien*, 614 F.3d at 641. That list creates a "patchwork of places where loaded guns could and could not be carried[, which] is not only odd but also could not guarantee meaningful self-defense, which suggests that the constitutional right to carry ready-to-use firearms in public for self-defense may well not exist." *Moore*, 2012 WL 6156062, at *14 (Williams, J., dissenting).

And second, the Supreme Court has implied strongly, on multiple occasions, the need for historical analysis when attempting to define the scope of Second Amendment rights beyond the home-based right articulated in *Heller*. *See Heller*, 554 U.S. at 592-95, 600-03, 605-19, 626-28 (tracing the right to bear arms through Anglo-American origins and state analogues); *McDonald*, 130 S. Ct. at 3056 ("[T]raditional restrictions" on the Second Amendment "show the scope of the right," just as they do "for *other* rights.") (Scalia, J., concurring); *see also Robertson v. Baldwin*, 165 U.S. 275, 281 (1897) (noting that the right is "inherited from our English ancestors . . . subject to certain well-recognized exceptions . . . which continue[] to be recognized as if they had been formally expressed"). Indeed, *Heller* stated specifically that it was not "to cast doubt on longstanding prohibitions" in the history of Anglo-American jurisprudence. 554 U.S. at 626.

The *Moore* majority, however, was "disinclined to engage in another round of historical

analysis to determine whether eighteenth-century America understood the Second Amendment to include a right to bear guns outside the home." *Moore*, 2012 WL 6156062, at *9. Thus, it refused even to entertain any of Illinois's historical arguments regarding the scope of the right, viewing *Heller* as having settled the matter.

But as Judge Williams aptly noted, "*Heller* did not assess whether there was a pre-existing right to carry guns in public for self-defense." *Id.* at *10 (Williams, J., dissenting). "By asking us to make that assessment, the State is not asking us to reject the Court's historical analysis in *Heller*; rather, it is being true to it." *Id.* The panel majority cannot sidestep the requisite historical analysis by "treat[ing] *Heller* as containing broader holdings than the Court set out to establish," *Skoien*, 614 F.3d at 640, and this Court should exercise *en banc* review to give full and adequate consideration to the issue.

2. En route to its broad interpretation of *Heller*, the majority brusquely disregarded the empirical data and policy rationales supporting Illinois's firearm policy, assuming that it—as opposed to the legislature—was best suited for this inquiry. Putting on its policymaking hat, the majority disregarded the amplified danger of guns in public on its view that an armed citizenry "may make criminals timid." *Moore*, 2012 WL 6156062, at *4. It dismissed the law-enforcement benefit to Illinois's policy as "weak." *Id.* And the majority crafted methodological and interpretive criticisms of empirical studies showing that increased gun ownership caused more homicides, that loose gun-carry laws are associated with higher assault rates, that assault victims are more likely to be armed than the general population, and that a gun carrier is more likely to use the gun to commit a crime than to defend himself. *Id.* As such, the majority concluded that "the empirical literature on the effects of allowing the carriage of guns in public fails to establish a pragmatic defense of the Illinois law." *Id.* at *6.

But the majority's rule for evaluating the data is puzzling. Notwithstanding this Court's admonition that a "categorical limit" on firearm possession is not "conditioned" on "proof, satisfactory to a court, that the exclusion was vital to the public safety," *Skoien*, 614 F.3d at 641, the majority required at least a "strong showing" that "a gun ban was vital to public safety," which apparently includes not only a showing "that the public *might* benefit on balance from such a curtailment" but "proof it would." *Moore*, 2012 WL 6156062, at *6, 7.

Of course, the majority had before it studies associating gun prevalence with higher crime rates and discounting the efficacy of public gun carrying for self-defense, sufficient to show the benefit of Illinois's policy. It simply determined not to credit that evidence.[3]

In any event, the majority's rule presents at least two problems. One is with precedent: *Skoien* required only that "logic and data establish a substantial relation between [the statute] and th[e] objective" of public safety. *Skoien*, 614 F.3d at 642. And even with "less deferential review" than that owed the legislature, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." *Turner Broad. Sys., Inc. v. FCC* ("*Turner II*"), 520 U.S. 180, 211 (1997) (internal quotation marks and citation omitted). The panel's opinion, however, regarded that possibility as "fail[ing] to establish a pragmatic defense of the Illinois law." *Moore*, 2012 WL 6156062, at *6.

The second is institutional: The rule compels a court to resolve a quintessentially policy-oriented—indeed, political—inquiry. The empirical data the majority demanded of the State comes not from an endless fount of objective research, or even a civil discovery process supervised by a magistrate judge, but is the product of a complex process sometimes tinged with

[3] For example, the majority discounted "evidence that going armed is not effective self-defense" because the study "d[id] not illuminate the deterrent effect of knowing that potential victims may be armed." *Moore*, 2012 WL 6156062, at *6. But the majority offered only its *ipse dixit* that any such "deterrent effect" actually exists. *See id.* at *4, 6.

the strong *a priori* policy viewpoints of researchers.[4] As such, "[i]n the context of firearm regulation, the legislature is 'far better equipped than the judiciary' to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks." *Kachalsky*, 701 F.3d at 97 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994)). Legislatures customarily weigh and debate public safety policies, considering studies and seeking further data. Courts do not. Indeed, the Supreme Court has instructed that "courts must accord substantial deference to the predictive judgments of [the legislature]." *Turner II*, 520 U.S. at 195 (internal quotation marks and citation omitted). Otherwise, "we circumscribe the scope of popular governance, move the action into court, and encourage litigation in contexts we cannot foresee." *Masciandaro*, 638 F.3d at 475.

The majority's lack of attention to political factors also shows in its assumption that Illinois's being "the *only* state that maintains a flat ban on carrying ready-to-use guns outside the home," suggests that if doing so "were demonstrably superior, one would expect at least one or two other states to have emulated it." *Moore*, 2012 WL 6156062, at *7. Of course, "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). More importantly, though, a far more natural (if unacknowledged by the majority) explanation than a lack of "demonstrable superiority" for the relative paucity of laws comparable

[4] Indeed, the very availability of data may be subject to manipulation. "As U.S. lawmakers prepare once again to take up the contested issue [of gun control] in the wake of the Newtown school massacre, they will find that all data on guns are surprisingly scarce." Joe Palazzolo & Carl Bialik, *Lack of Data Foils Studies of Gun Control and Crime*, Wall St. J., Dec. 21, 2012, at A11. Some years ago, Congress defunded gun-related research at the Centers for Disease Control in response to political pressure, which, in turn, "intimidated scientists across the nation" from conducting public-safety research on firearms. Craig Schneider & Ernie Suggs, *Gun Violence Research Slim*, Atlanta Journal-Constitution, Dec. 19, 2012, at A1.

to Illinois's is a simple lack of political will. That does not bear on whether Illinois's laws are substantially related to public safety—but it does beg the question of why a court, and not the legislature, ought to be the entity that closes the laboratory of the states.

Amici know first-hand the detrimental effects of freely allowing guns in public. The state gave licenses to the alleged killers of *amici*'s children, young Trayvon Martin and Jordan Davis, to carry concealed guns in public. And every day, *amici* law enforcement deal with the public safety consequences of more guns on the streets. These justifications for Illinois's law demand a more thorough look than the majority afforded them. This Court should rehear this case *en banc*.

CONCLUSION

For all of the foregoing reasons, as well as those contained in the brief of Appellees, this Court should rehear this case *en banc*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 35(b)

1. This brief complies with the length limitation of Fed. R. App. P. 35(b)(2) because it is fewer than 7.5 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32 as modified by Circuit Rule 32(b) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in Times New Roman 12-point font.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of January 2013, the foregoing Brief *Amici Curiae* In Support Of Appellees' Petition For Rehearing En Banc was filed with the Court's ECF system, and accordingly was served electronically on all parties.

/s/ Alexander D. Marks
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