IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MICHAEL MOORE, CHARLES HOOKS, PEGGY FECHTER, JON MAIER, SECOND AMENDMENT FOUNDATION, INC. and ILLINOIS CARRY,

Plaintiffs-Appellants,

v.

LISA MADIGAN, in her Official Capacity as Attorney General of the State of Illinois, and HIRAM GRAU, in his Official Capacity as Director of the Illinois State Police,

Defendants-Appellees.

MARY SHEPARD and the ILLINOIS STATE RIFLE ASSOCIATION,

Plaintiffs-Appellants,

v.

LISA M. MADIGAN, in her Official Capacity as Attorney General of the State of Illinois, PATRICK L. QUINN, in his official capacity as Governor of the State of Illinois, TYLER R. EDMONDS, in his official capacity as the State's Attorney of Union County, Illinois, and SHERIFF DAVID LIVESAY, in his official capacity as Sheriff of Union County,

Defendants-Appellees.

Appeals from the United States District Court
for the Central District of Illinois
No. 11-CV-3134, the Honorable Sue E. Myerscough, Judge Presiding, and
for the Southern District of Illinois
No. 11-CV-405, the Honorable William D. Stiehl, Judge Presiding.

BRIEF AMICI CURIAE OF THE CITY OF CHICAGO, LAW CENTER TO PREVENT GUN VIOLENCE, BOARD OF EDUCATION OF THE CITY OF CHICAGO, AND CHICAGO TRANSIT AUTHORITY IN SUPPORT OF PETITION FOR REHEARING EN BANC

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 12-1269 & 12-1788

Short Caption: **Moore, et al. v. Madigan, et al./Shepard, et al. v. Madigan, et al.**

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(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):

Law Center to Prevent Gun Violence [name of organization revised from Legal Community Against Violence].

(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:

Katten Muchin Rosenman LLP

(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:

None

Attorney's Signature: **/s Jonathan K. Baum** Date: **January 7, 2013**
Attorney's Printed Name: **Jonathan K. Baum**

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d).
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INTEREST OF AMICI CURIAE

The City of Chicago faces a serious problem of firearms violence. In 2011, 83.4% of Chicago's 433 murder victims were shot, and 82.4% of those murders occurred outside the home. Chicago police officers actively enforce the Illinois provisions at issue here, and a Chicago ordinance that similarly prohibits firearms outside the home. Municipal Code of Chicago, Ill. §§ 8-20-020, 8-20-030 (2012). These restrictions play an important role in removing guns from the streets before they are misused and thus reduce the devastating impact of firearms.

Law Center to Prevent Gun Violence ("Law Center"), formerly known as Legal Community Against Violence, is a national law center dedicated to preventing gun violence. Founded after a 1993 assault weapon massacre at a San Francisco law firm, the Law Center provides legal and technical support for gun violence prevention. The Law Center tracks and analyzes federal, state, and local firearms legislation and cases. The Law Center has provided informed analysis as amicus in Second Amendment cases, including District of Columbia v. Heller, 554 U.S. 570 (2008) and McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).

Board of Education of the City of Chicago educates more than 404,000 children in 675 elementary and high schools. In the first four months of this school year, 13 Chicago public school students have been killed and 102 have been injured by firearms.

Chicago Transit Authority ("CTA") operates the nation's second largest public transportation system, providing over 515 million trips per year, and serving Chicago and 40 suburbs. On an average weekday, 1.6 million rides are taken on CTA. The firearm restrictions at

issue here support the CTA's mission to provide safe transportation to its passengers.[1]

ARGUMENT

This case presents an issue of exceptional importance – whether a statewide prohibition on the carrying of guns in public violates the Second Amendment. Gun violence poses a serious threat to public safety, and most gun violence occurs in public places outside the home. See Chicago Police Department, 2011 Chicago Murder Analysis 4, 7, https://portal.chicagopolice.org.. And the Illinois restrictions on carrying guns in public have long been an important component of policing strategies designed to take guns out of the hands of criminals before they use them to commit crimes. Given the public safety implications of the panel majority's decision that the Second Amendment protects a right to carry guns in public, this court should consider this case en banc.

In addition, the panel majority's opinion conflicts with decisions in this and other circuits in several ways. First, the panel majority reads District of Columbia v. Heller, 554 U.S. 570 (2008), as holding that the Second Amendment protects a right to carry guns in public, while other circuits have rejected that view. Second, the panel majority applied a higher level of scrutiny to regulations of firearms activity outside the home than the intermediate scrutiny routinely applied in this circuit and others. Third, the panel majority's refusal to remand this case on the ground that only legislative facts are relevant is inconsistent with decisions in this circuit.

I. THE PANEL MAJORITY'S APPROACH TO SECOND AMENDMENT SCOPE CONFLICTS WITH DECISIONS IN THIS AND OTHER CIRCUITS.

The majority panel regarded itself as "bound by the Supreme Court's historical analysis"

[1] No party's counsel authored this brief in whole or in part, nor did any party or their counsel, or any person other than amici, contribute money intended to fund preparing or submitting the brief.

in Heller, which it believed decided that the Second Amendment protects a right to carry guns outside the home. Slip op. 7. The Second and Fourth Circuits disagree. Kachalsky v. County of Westchester, 701 F.3d 81, 88-89 (2nd Cir. 2012); United States v. Masciandaro, 638 F.3d 458, 466-67 (4th Cir. 2011). Those circuits recognize that, while the Court held that the Second Amendment protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home," Heller, 554 U.S. at 635, the Court left open other questions about Second Amendment scope. And the Court cautioned against reading other broad rights into its decision, warning that it did not intend to "cast doubt" on a non-exhaustive list of "longstanding prohibitions," which are "presumptively lawful," id. at 626-27; id. at 627 n.26. The panel majority's reading of Heller is incorrect, and out of sync with those circuits.

The panel majority's approach is also inconsistent with Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011), which held that review of Second Amendment "text and relevant historical materials" is required to discern "how the Amendment was understood at the time of ratification," id. at 700. And on that issue, even the panel majority here agreed that the evidence, which includes evidence presented by Illinois and its amici "that there was no generally recognized private right to carry arms in public in 1791," slip op. 3, makes the Second Amendment's scope "debatable," id. at 7. Much of that evidence refutes the panel majority's assumption that the Founding-Era public did not distinguish between carrying guns in the home and in public because that "would . . . have been irrational." Id. As the dissent observes, historically, lines were in fact drawn between the right to keep a gun in the home, which was a person's "castle," and carrying in public. Id. at 27 (Williams, J., dissenting) (discussing Sir Edward Coke's writings). Indeed, Heller made clear that the use of arms "in defense of hearth and home" is "elevate[d] above all other interests." 554 U.S. at 635. This court should allow

rehearing en banc to consider this and other historical evidence about the scope of the Second Amendment.

II. THE PANEL MAJORITY'S HEIGHTENED SCRUTINY CONFLICTS WITH DECISIONS IN THIS AND OTHER CIRCUITS.

The panel majority's selection and application of a heightened level of scrutiny conflicts with other decisions, as well. The Second and Fourth Circuits have applied intermediate scrutiny to regulation of firearms outside the home, affording considerable deference to legislative predictive judgments about firearms policy. See Kachalsky, 701 F.3d at 96-98; Masciandaro, 638 F.3d at 471. This circuit, too, has routinely applied intermediate scrutiny, even for restrictions on the right to keep arms for self-defense in the home. See United States v. Yancey, 621 F.3d 681, 683 (7th Cir. 2010); United States v. Williams, 616 F.3d 685, 692-93 (7th Cir. 2010); United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010) (en banc). The only exception is Ezell; but there the court applied "not quite 'strict scrutiny'" based on the severity of the restriction on the right to a handgun for self-defense in the home. 651 F.3d at 708. The no-public-carry provisions do not affect self-defense in the home. So, even under Ezell, intermediate scrutiny is appropriate.

The panel majority required the State to show, not just a substantial relationship to important governmental objectives, but that the public would "benefit on balance from such a curtailment," slip op. 14, and some degree of certainty about the "net effect on crime rates . . . as a matter of theory and empirically," id. at 8. The majority also misrepresents Skoien as requiring a similarly high bar when it required "a 'strong showing' that a gun ban was vital to public safety." Id. at 14. But Skoien actually expressed skepticism that a "categorical limit" on the right to keep and bear arms depended "on proof, satisfactory to a court, that the exclusion was vital to the public safety," and did not insist on evidence that the federal law barring domestic

violence misdemeanants from firearms possession had, in fact, reduced crime, but rather on evidence implying such a benefit in laws designed to keep domestic abusers, who are often recidivists, from having firearms. 614 F.3d at 641. Based on that evidence, "logic and data establish a substantial relation between [the restriction] and this objective." Id. at 642.

Under the Skoien approach, "logic and data" similarly reveal clear risks that guns and public places are a lethal combination. As the panel majority acknowledges, Illinois presented evidence showing a link between gun ownership and gun violence. Slip op. 11. The panel majority discounted the studies because they pertained to ownership, rather than gun-carrying in public. Id. But the studies nevertheless support the general proposition that, where there are more guns, there are more deaths and greater injuries from guns. That, combined with evidence that most gun violence occurs outside the home, provides ample grounding in logic and data to support the Illinois General Assembly's conclusion that a prohibition on carrying guns in public places promotes public safety.

Moreover, the panel majority sells short the practical utility of the public-carry prohibition for policing purposes. When a police officer receives information about someone with a gun from a 9-1-1 call, or observes someone with a gun-shaped bulge in the pocket, that officer has reasonable suspicion to believe a law is being violated – which the officer would not have if concealed carry were allowed – and may stop and frisk, arrest, and remove the gun from the street. The panel majority doubts the value of that policing strategy, reasoning that guns will usually be concealed anyway, so police officers will not usually have reasonable suspicion. Slip op. 10. The panel majority also suggests that allowing open, but not concealed, carry would be just as effective. Id. It is hard to see how this approach equally enables police officers to remove guns from the streets. For one thing, the panel majority's speculation that there are limited

opportunities to detect concealed guns ignores evidence that, in fact, aggressive enforcement of restrictive gun laws drives down firearms-related activity in the streets. See, e.g., Lawrence Rosenthal, Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs, 41 Urb. Lawyer 1, 25-44 (2009) (discussing effectiveness of New York City police strategies targeting gun carrying). The majority's proposed alternative – to allow only open carrying – is no substitute. Open carrying might not give rise to reasonable suspicion or probable cause. See Gonzalez v. Village of West Milwaukee, 671 F.3d 649, 656 (7th Cir. 2012). Thus, the ability of police officers to stop, frisk, and arrest gang members they see with guns before crimes are committed could be just as severely hampered if open carrying were allowed.

Most importantly, even if the "net effect on crime rates . . . is uncertain," slip op. 8, the Illinois prohibition on public carry should survive intermediate scrutiny. Where there is room for debate about whether laws reduce crime such that one can "draw[] two inconsistent conclusions from the evidence," that is enough to survive intermediate scrutiny. Turner Broadcasting Systems, Inc. v. FCC, 520 U.S. 180, 211 (1997). As the dissent observed, "substantial deference" should be accorded "the predictive judgments of [the legislature]," which is better equipped to define policy "concerning the dangers in carrying firearms and the manner to combat those risks." Slip op. 36 (Williams, J., dissenting) (citation omitted).

III. THE PANEL MAJORITY'S CONCLUSION THAT ADJUDICATIVE FACTS ARE IRRELEVANT CONFLICTS WITH DECISIONS IN THIS CIRCUIT.

The panel majority held that the usual remand that follows when the dismissal of a complaint is reversed was not warranted here because the case involves only "legislative facts" and not "factual questions for determination at trial." Slip op. 20. This ruling cannot be squared

with this circuit's decisions. Adjudicative facts are those that are "germane to the specific dispute, which often are best developed through testimony and cross-examination," while legislative facts are "reported in books and other documents not prepared specially for litigation or refined in its fires." Indiana Harbor Belt Railroad Co. v. American Cyanamid Co., 916 F.2d 1174, 1182 (7th Cir. 1990). While the constitutionality of a statute is often decided by reference to "legislative facts," Metzl v. Leinenger, 57 F.3d 618, 622 (7th Cir. 1995), the line between legislative and adjudicative facts "should not be viewed as hard and fast," Indiana Harbor Belt Railroad, 916 F.3d at 1182. When facts critical to a constitutional challenge "cannot be determined with reasonable accuracy without an evidentiary hearing, such a hearing can and should be held." Id. A State's justifications may well depend on adjudicative facts, such as when a "possible justification concerns the internal operations of a branch of state government." Metzl, 57 F.3d at 622.

Here, adjudicatory facts would shed light on the validity of government justifications. A factual record could explain policing strategies designed to combat unique criminal problems in Illinois. Experienced police officials could testify about how the Illinois statutes are enforced. Social scientists and criminologists may be able to analyze location-specific data and provide expert analysis of Illinois gun violence, policies, and policing strategies. Indeed, in a similar case, Illinois Association of Firearms Retailers v. City of Chicago, No. 10 CV 4184 (N.D. Ill.), just this sort of discovery has been undertaken, and summary judgment briefs filed. There, the City adduced evidence about the role of Chicago's firearms regulations in policing strategies, and their relation to reducing gun violence. See id. Dkt. Nos. 157-70.

The panel majority compared this case to Skoien, slip op. 20, where the court found publicly available data sufficient to justify the statute, and that it was unnecessary to also

consider "admissible evidence," 614 F.3d at 641. But nothing in Skoien suggests that only publicly available information may be relied upon to justify firearms regulations. And Ezell assumes the opposite. There, this court had little trouble with the idea that adjudicative facts were relevant to the constitutionality of a gun-range ban. This court closely examined the evidence the City offered and, although it found that evidence insufficient to avoid a preliminary injunction, the court remanded to give the City an opportunity to "muster sufficient evidence to justify" the gun-range ban. Ezell, 651 F.3d at 710. The panel majority's approach conflicts with Ezell, and en banc review is warranted for this reason as well.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the Brief of Amici Curiae the City of Chicago, Law Center to Prevent Gun Violence, Board of Education of the City of Chicago, and Chicago Transit Authority complies with the page limitation set forth in Fed. R. App. P. 29(d) and Fed. R. app. P. 35(b)(1)(B)(2) because it is seven and one-half pages, one-half the length authorized for the petition it supports.

/s/ Suzanne M. Loose
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CERTIFICATE OF SERVICE

I certify that on January 8, 2013, I electronically filed the attached Brief of Amici Curiae with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Participants in this appeal who are registered CM/ECF users will be served by the CM/ECF system.

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