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No.
IN THE
SUPREME COURT OF ILLINOIS

MATHEW D. WILSON, TROY	)	Appeal from the Appellate
EDHLUND and JOSEPH MESSINEO	)	Court of Illinois, First
	)	Judicial District
Plaintiff-Petitioners	)	No. 08-1202
	)	
v.	)	There on Appeal from the
	)	Circuit Court of Cook
COOK COUNTY, a public body	)	County, Illinois. County
and corporate, et al.	)	Department, Chancery
	)	Division.
Defendants-Respondents	)	No. 07 CH 04848
	)	
	)	The Honorable
	)	Mary K. Rochford,
	)	Judge Presiding.

PETITION FOR LEAVE TO APPEAL

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PRAYER FOR LEAVE TO APPEAL

Pursuant to Supreme Court Rule 315, the Plaintiffs-Petitioners respectfully petition for leave to appeal from the February 9, 2011, Judgment of the Appellate Court, First District, affirming the lower Chancery Court's judgment in favor of the Defendants dismissing the Plaintiffs Amended Complaint with prejudice (A-1).

McDonald v. City of Chicago, 130 S. Ct. 3020 (2010), held that the Second Amendment protects a "fundamental right" against state and local infringement through incorporation into the Fourteenth Amendment, and invalidated local handgun bans. In response to an earlier petition for review, this Court directed the Illinois Appellate Court to reconsider its decision in light of *McDonald*.

The Court of Appeals applied essentially its same reasoning and again affirmed the dismissal for failure to state a claim. As before, it assumed that legislative findings are irrebuttable, even in a constitutional challenge, and that plaintiffs may not produce evidence to the contrary in an adversary proceeding. In its prior decision of 2/19/09, the Court of Appeals did not apply strict scrutiny because it found no fundamental right was involved, and now holds the same even though *McDonald* established that the right to keep and bear arms is fundamental.

The lower court further opined that a “subgroup” of firearms may be banned, even though they are not the types identified in *Heller* as not constitutionally protected, based solely on legislative findings without any evidence generated in an adversarial judicial proceeding. Finally, even though the ordinance defines the banned firearms by reference to complex, technical nomenclature and generic features, the court held the ordinance not to be vague as a matter of law without the opportunity for any lay and expert evidence to decide if adequate standards existed for ordinary persons and law enforcement.

Statement Regarding Dates of Judgment

On February 21, 2007, Plaintiffs filed suit in the Circuit Court of Cook County, Illinois, against the County of Cook. (R.C. 03). Pursuant to Defendants’ 2-615 Motion to Dismiss, the Honorable Mary K. Rochford entered an Order dismissing Plaintiff’s First Amended Complaint with prejudice on 4/29/08 (A-VI). Plaintiffs promptly appealed the dismissal to the First District Appellate Court, which affirmed the dismissal on 08/19/09 (A-VII). Plaintiffs filed a Petition for rehearing which was denied on 9/25/09. Plaintiff’s promptly filed a Petition for Leave to Appeal with this Honorable Court on 10/20/09 . On September 29, 2010, this Honorable Court, in the exercise of its judicial discretion entered a supervisory order directing the 1st District Appellate Court to vacate its decision of 9/25/09 and to reconsider the matter in light of *McDonald v. City of Chicago*, 130 S. Ct 3020 (2010) (A-II). On February 9, 2011, the First Appellate Court again affirmed the trial court’s dismissal of Plaintiffs’ 1st Amended Complaint (A-1). The Plaintiffs did not file a petition for rehearing, and within 35 days of said decision, filed this Petition for Leave to Appeal.

POINTS RELIED UPON IN SEEKING REVIEW

- I. THE COURT ERRED IN ASSUMING THAT LEGISLATIVE FINDINGS CREATE AN IRREBUTABLE PRESUMPTION OF VALIDITY AND DENYING PLAINTIFFS AN ADVERSARY PROCEEDING TO IMPEACH THOSE FINDINGS**
- II. THE COURT ERRED IN FAILING TO APPLY THE STANDARD OF REVIEW APPLICABLE TO EXERCISE OF A CORE FUNDAMENTAL RIGHT BY LAW ABIDING CITIZENS**
- III. THE COURT ERRED IN HOLDING THAT THE FIREARMS OF THE SAME TYPE *HELLER* HELD TO BE PROTECTED MAY BE BANNED.**
- IV. THE COURT ERRONEOUSLY HELD THAT A CRIMINAL ORDINANCE FILLED WITH TECHNICAL TERMS IS NOT VAGUE WITHOUT ACCORDING ANY OPPORTUNITY TO PRODUCE EVIDENCE.**
- V THE APPELLATE COURT ERRED IN FINDING THAT THE ORDINANCE DOES NOT VIOLATE EQUAL PROTECTION**

STATEMENT OF FACTS

On November 14, 2006, the County Commissioners of the County of Cook, a public body as defined in 5 ILCS 120/1 et seq., enacted an Amendment to the Cook County Deadly Weapons Dealer Control Ordinance (“the Ordinance”). See Appendix hereto, A-III, A-III(a). The Amendment sets forth its own definitions of “Assault Weapons” and makes it a crime for any person who “shall manufacture, sell, offer or display for sale, give, lend, transfer ownership of, acquire or possess any assault weapon or large capacity magazine.” Art. I, Sec. 6-2(a) (R.C-370); A-III, p. 4;A-III(a), pp.2-3. As a penalty, the Ordinance provides that “[a]ny person found in violation of this section shall be sentenced to not more than six months imprisonment, or fined not less than \$500.00 and not more than \$1,000.00, or both.” Art. I, Sec.6-2(C) (R.C. 371); A-III, p. 5.

The Ordinance provides further for the destruction of confiscated firearms upon

direction of the Sheriff if he ascertains that same is not required for evidence (R.C. 370). See amended ordinance with name change and re-numbering at A-III(a), p. 3. Description of the parties is set forth in Plaintiffs Amended Complaint (R.C. 342—345); A-V, pp. 3--6.

Plaintiffs filed suit alleging the unconstitutionality of the Amended Ordinance asking for Declaratory Judgment and Injunctive Relief in the Chancery Division of the Circuit Court of Cook County, Illinois, against the County of Cook, its County Board members and the Sheriff of Cook County, Thomas Dart, in his official capacity. (R.C. 03). The trial court ultimately dismissed the suit with prejudice. The First Appellate Court initially held the ordinance constitutional, in part, because the Second Amendment was not incorporated into the 14th Amendment and thus not applicable to the states. This Honorable Court entered a supervisory order vacating that August 9, 2009 opinion (A-II), and remanded the case for further consideration under the subsequent case of *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). Thereafter, the First Appellate Court again affirmed the trial court's dismissal (A-I).

ARGUMENT IN SUPPORT OF PETITION FOR LEAVE TO APPEAL

I. THE COURT ERRED IN ASSUMING THAT LEGISLATIVE FINDINGS CREATE AN IRREBUTABLE PRESUMPTION OF VALIDITY AND DENYING PLAINTIFFS AN ADVERSARY PROCEEDING TO IMPEACH THOSE FINDINGS

The lower court correctly stated: "A motion to dismiss under section 2-615 of the Code of Civil Procedure challenges the legal sufficiency of a complaint based on facial defects of the complaint. . . . [A]llegations in the complaint are viewed in a light most favorable to the plaintiff" A-I, p.8. But the lower court gave plaintiffs no opportunity to develop any record, and assumed that the legislative findings are

unimpeachable and not subject to judicial scrutiny based on evidence in an adversarial proceeding.

A complaint may not be dismissed for legal insufficiency merely because it alleges facts contrary to legislative findings. “[I]t is [the Court’s] task in the end to decide whether [the legislature] has violated the Constitution,” and thus “whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law” *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989)

The “prefatory clauses” of the 1993 original version of the Cook County ordinance allege two empirical propositions that the lower court presumes are not subject to any factual refutation. A-I, pp. 4-5. First, “assault weapons are 20 times more likely to be used in the commission of a crime than other kinds of weapons.” It matters not that the U.S. Department of Justice study found that “AWs [assault weapons] were used in only a small fraction of gun crimes prior to the [federal] ban: about 2% according to most studies and no more than 8%.”¹ Yet the “20 times more likely” fiction is taken as true because it was alleged by the county board in 1993. Second, the board declared that there was “no legitimate sporting purpose for the military-style assault weapons” The lower court would not allow plaintiffs to show evidence of common sporting and other legitimate use of the banned firearms. Nor does it seem to matter that no military force in

¹ C. Koper, *An Updated Assessment of the Federal Assault Weapon Ban* (Report to National Institute of Justice, U.S. Sup’t of Justice, 2004), at 2, http://www.sas.upenn.edu/jerry/lee/research/aw_final_2004.pdf. The federal law expired in 2004.

the world uses these pejoratively-termed “assault weapons,”² because they fire only once per trigger pull; real military-style assault weapons are fully-automatic machineguns which fire continuously.³

It is said that the ordinance bans “high capacity, rapid-fire rifles or pistols.” A-I, p. 4. Plaintiffs were not allowed to generate a factual record showing that the banned firearms fire no more rapidly, with no higher capacity, than commonly-possessed firearms which *Heller* held to be protected. No evidence in the record exists that the legislative body did tests or relied on scientific studies to show that the banned guns fire more rapidly than other guns. Moreover, capacity is a function of the magazine, not the firearm, into which can be placed a magazine of low capacity. It is nonsensical to ban a firearm which has no inherent “capacity” because of its “capacity.”

As the lower court acknowledged, *Heller* “held that the second amendment provides the individual right to bear arms typically possessed by law-abiding citizens for lawful purposes,” 128 S. Ct. at 2801-02, 2815-16, but “the ban at issue amounted to a prohibition of an entire class of arms that was ‘overwhelmingly’ accepted and properly utilized for self-defense in the home by the general population.” *Id.* at 2821-22. A-I, p. 10. *Heller* so held without any deference or even mention whatever to the contrary legislative findings.

² ‘Assault weapon’ is a political term, developed by anti-gun publicists to expand the category of ‘assault rifles’ so as to allow an attack on as many additional firearms as possible on the basis of undefined ‘evil’ appearance.” *Sternberg v. Carhart*, 530 U.S. 914, 1001 n. 16 (2000) (Thomas, J., dissenting) (citation omitted).

³ Assault rifles . . . are capable of delivering full automatic fire. . . “Harold Johnson, *Small Arms Identification & Operation Guide—Eurasian Communist Countries* (Defense Intelligence Agency 1980), p. 105.

Justice Breyer, whose “interest-balancing inquiry” the majority rejected, *id.* at 2821, would have relied on a legislative report, similar to the legislative findings here, filled with allegations denouncing the type of firearm it sought to ban. *Id.* at 2854-61 (Breyer, J., dissenting). That is the approach the lower court takes here.

McDonald barely mentioned Chicago’s legislative finding and accorded it no discussion. 130 S.Ct. at 3026 (quoting finding that handgun ban was enacted to protect residents “from the loss of property and injury or death from firearms”). Instead, *McDonald* held that “the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials.” *Id.* at 3049.

Under the *Heller-McDonald* approach, legislative findings are accorded no deference. Even if a lesser standard is applied, such as that applied to adult bookstores under the First Amendment, a municipality cannot “get away with shoddy data or reasoning. The municipality’s evidence must fairly support the municipality’s rationale for its ordinance.” *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438-39 (2002). If plaintiffs “cast direct doubt on this rationale, either by demonstrating that the municipality’s evidence does not support its rationale or by furnishing evidence that disputes the municipality’s factual findings,” then “the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.” *Id.*

The First Amended Complaint alleges that the banned firearms are in common use for sport, defense, and other lawful purposes, and thereby protected. The well-established precedents are clear that Plaintiffs have the opportunity to prove these

allegations with evidence because no irrebuttable presumption based on legislative findings exist in the face of Constitutionally protected rights.

II. THE COURT ERRED IN FAILING TO APPLY THE STANDARD OF REVIEW APPLICABLE TO EXERCISE OF A CORE FUNDAMENTAL RIGHT BY LAW ABIDING CITIZENS

Previously the Court of Appeals “held that the *Heller* Court did not announce that the second amendment provides a fundamental right to bear arms” and rejected its incorporation under the Fourteenth Amendment.⁴ A-I, p. 2. See prior Opinion at A-VII, p. 9. When *McDonald* ruled otherwise,⁵ this Court directed the lower court to reconsider. However, the new opinion by the Court of Appeals applies basically the same reasoning and reaches the same conclusions as it did in its first decision of 8/19/09.

As acknowledged by the lower court, *McDonald* “followed *Heller* in holding that the right to possess a handgun in the home for the purpose of self-defense is protected by the second amendment as a fundamental right.” A-I, p. 12. When it added that *McDonald* “[left] unclear the appropriate standard of review” (id.), the Appellate Court ignored the long line of cases stating that a “fundamental” right is “explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny.” *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 17, 33 (1973). “[C]lassifications affecting fundamental rights . . . are given the most exacting scrutiny.” *Clark v. Jeter*, 486 U.S. 456, 461 (1988). See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460

⁴ See *Wilson v. Cook County*, 394 Ill. App. 3d 534, 542, 914 N.E. 2d 595 (2009).

⁵ [T]he Second Amendment is incorporated through the Due Process Clause of the Fourteenth Amendment because “the right to keep and bear arms is fundamental to *our* scheme of ordered liberty,” and is “deeply rooted in the Nation’s history and tradition . . .” *McDonald*, 130 S. Ct. at 3036.

(“strict scrutiny [is] applied when government action impinges upon a fundamental right”)⁶.

Just as *Heller* rejected rational-basis standard of review,⁷ *McDonald* rejected the power “to allow state and local governments to enact any gun control law that they deem to be reasonable” 130 S. Ct. at 3046. “In *Heller*, . . . we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing.” *Id.* at 3047, citing *Heller*, 128 S. Ct. at 2820-2821.⁸

The Appellate Court purported to rely on *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010). A-I, pp. 11,12,15. But *Chester*, unlike plaintiffs here, 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 for self-defense – by virtue of Chester's criminal history as a domestic violence misdemeanor.” 628 F.3d at 683 (emphasis in original). Applying analogous First Amendment concepts applying strict scrutiny to core rights, *Chester* held that “intermediate scrutiny is more appropriate than strict scrutiny for” persons with a criminal history. *Id.* at 682-83. Under *Chester*, plaintiffs here should have been afforded strict scrutiny as applicable to the ordinance’s infringement on their core right to possess firearms.

⁶ “Under the strict-scrutiny test,” the government has the burden to prove that a restriction “is (1) narrowly tailored, to serve (2) a compelling state interest.” *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002).

⁷ “Obviously, the same [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.” 128 S.Ct. at 2818 n.27.

⁸ The “interest-balancing inquiry” would allow “arguments for and against gun control” and the upholding of a handgun ban “because handgun violence is a problem” *Id.* at 2821. Interest balancing is a form of intermediate scrutiny. See *id.* at 2852 (Breyer, J., dissenting), citing *Burdick v. Takushi*, 504 U.S. 428 (1992).

Even though applying intermediate scrutiny, *Chester* remanded the case for an evidentiary hearing, reciting that the “government has offered numerous plausible *reasons* why the disarmament of domestic violence misdemeanants is substantially related to an important government goal; however, it has not attempted to offer sufficient *evidence* to establish a substantial relationship between § 922(g)(9) and an important governmental goal to determine whether the Federal Statute in question violated the Second Amendment by application of the intermediate scrutiny test.” *Id.* at 683 (emphasis in original). The Appellate Court here not only applied the wrong test, but denied plaintiffs the same right to an evidentiary hearing to determine if the government could satisfy its burden under the intermediate scrutiny test dictated under *Chester* for non-core rights.

It is noteworthy that, without even mentioning a standard of review, *Heller* applied a categorical test under which a type of firearm is constitutionally protected if it is common use: “It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon . . . Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition on their use is invalid.” *Heller*, 128 S. Ct. at 2818. Application of the categorical test of common-use to the long guns and handguns banned here would render the Ordinance void. But even if such firearms did not pass the categorical test, application of strict scrutiny or even intermediate scrutiny would at least require a remand for adjudication with actual evidence in the record.

Justice Breyer suggested that the *Heller* majority “implicitly” rejected strict scrutiny based on dictum about “presumptively lawful” restrictions on possession by

felons and the mentally ill. *Heller*, 128 S. Ct. at 2851 (Breyer, J., dissenting). Yet a compelling state interest for narrowly tailored restrictions of these types may be easily articulated. The existence of exceptions to a right hardly disqualifies strict scrutiny. See *Heller*, 128 S. Ct. at 2821 (noting First Amendment exceptions and stating that “[t]he Second Amendment is no different.”).⁹

The lower court relied on “intermediate scrutiny” as argued in *Heller v. District of Columbia*, 698 F. Supp.2d 179 (D. D.C. 2010), appeal pending, No. 10-7036 (D.C. Cir., argued Nov. 15, 2010) (*Heller II*). A-I, p. 14. But *Heller II* adopted that standard because it incorrectly concluded that the Second Amendment protected no “fundamental right.” *Id.* at 187 (had *Heller* “wanted to declare the Second Amendment right a fundamental right, it would have done so explicitly.”).

Instead of applying *Heller*’s categorical approach or strict scrutiny test applicable to law-abiding persons, the lower court advances “intermediate scrutiny” which applies to persons convicted of violent felonies,¹⁰ misdemeanor crimes of domestic violence,¹¹ persons subject to domestic violence protective orders,¹² and drug addicts.¹³ A-I, pp. 13, 14. Intermediate scrutiny was also adopted in a case upholding the ban on firearms with obliterated serial numbers because it did not ban any subgroup of firearms: “Because

⁹ “No fundamental right – not even the First Amendment – is absolute. The traditional restrictions go to show the scope of the right, not its lack of fundamental character.” *McDonald*, 130 S. Ct. at 3056 (Scalia, J., concurring). Recognition of the right still allows “limited, narrowly tailored specific exceptions . . . not inconsistent with the right of Americans generally to individually keep and bear their private arms” *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001), cert. denied, 536 U.S. 907 (2002).

¹⁰ *United States v. Williams*, 616 F.3d 685 (7th Cir. 2010).

¹¹ *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010); *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010).

¹² *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010).

¹³ *United States v. Yancey*, 621 F.3d 681 (7th Cir., 2010).

unmarked weapons are functionally no different from marked weapons, [the prohibition] does not limit the possession of any class of firearms.” *United States v. Marzzarella*, 614 F.3d 85, 98-99 (3rd Cir. 2010).

In sum, the lower Appellate Court should have reviewed whether the Cook County Ordinance infringed on the right to have arms both under the categorical approach set forth in *Heller* and under the strict scrutiny test applicable to core rights of law-abiding persons. Even intermediate scrutiny would allow plaintiffs to present evidence. Instead the court failed to apply any meaningful test at all.

III. THE COURT ERRED IN HOLDING THAT THE FIREARMS OF THE SAME TYPE *HELLER* HELD TO BE PROTECTED MAY BE BANNED

Heller recognized that “handguns” and “long guns”— i.e., rifles and shotguns — are protected by the Second Amendment, 128 S. Ct. at 2818, but questioned whether machineguns like the M-16 or “short-barreled shotguns” were. *Id.* at 2817. The lower court upheld the ban on various handguns and long guns on the basis: “Unlike the blanket prohibitions of handguns in *Heller* and *McDonald*, the Ordinance bans a smaller subgroup of firearms and attachments.” A-I, p 15. But *Heller* did not allow that a “subgroup” of constitutionally-protected arms may be banned, any more than a subgroup of publications such as pamphlets may be banned. Handguns may not be banned under the Second Amendment just because long guns are allowed or vice versa, just as radios may not be banned under the First Amendment as long as television is allowed. *Heller*, 128 S. Ct at 2818. *Heller* “read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes,” like sawed-off shotguns. *Heller*, 128 S. Ct. at 2815-16, citing *United States v. Miller*, 307 U.S. 174, 179 (1939). A-I, p.16. The most *Heller* can be said to question as

not protected by the Second Amendment are machineguns, sawed-off shotguns, and “sophisticated arms that are highly unusual in society at large.” *Heller*, 128 S. Ct. at 2817. Indeed, *Heller* drew the line between machineguns such as the M-16, which shoot multiple rounds fully automatic with a single pull of the trigger,¹⁴ and firearms which shoot only once for each pull of the trigger, such as typical handguns and the guns banned here.¹⁵

In sharp contrast are ordinary firearms such as the Colt AR-15, which the ordinance here bans. “The AR-15 is the civilian version of the military’s M-16 rifle, and is, unless modified, a semiautomatic weapon. The M-16, in contrast, is a selective fire rifle that allows the operator, by rotating a selector switch, to choose semiautomatic or automatic fire.” *Staples v. United States*, 511 U.S. 600, 603 (1994). Rifles such as the AR-15 have “traditionally have been widely accepted as lawful possessions” *Id.* at 612.

The lower court relied on *People v. James*, 94 Cal. Rptr.3d 576, 585-86 (Cal. App. 2009), which relied solely on a legislative declaration that the banned guns are not “typically possessed by law-abiding citizens for lawful purposes such as sport hunting or self-defense” A-I, pp. 17, 18. The lower court noted that, like here, plaintiffs in *Heller II* argued that the banned guns “are not made or designed for offensive military use,” “are not disproportionately used in crime,” “and in fact are commonly used for

¹⁴ See 26 U.S.C. § 5845(b) (“machinegun”); *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 804 (1988) (describing the M-16 selective fire (full automatic) rifle as the “standard assault rifle”).

¹⁵ Accord, *United States v. Fincher*, 538 F.3d 868 (8th Cir.2008) (machine gun and sawed-off shotgun).

lawful purposes, such as target shooting, hunting and personal protection.” *Heller II*, 698 F. Supp.2d at 194. That court rejected any such evidence because doing so would “overrule the council’s findings.” *Id.* The council’s findings are not irrebuttably true, and overruling them is required if the evidence warrants such.

After again reciting “the stated purpose of the Ordinance as laid out in its prefatory statements,” the lower court correctly summarizes what plaintiffs wish to prove with evidence, but deny them the opportunity to do so:

“Plaintiffs contend that the Ordinance is not narrowly tailored or substantially related to the stated goal. They cite to studies that note the minimal use of assault weapons in gun crimes as well as how many of the defined guns and gun attributes that are banned under the ordinance are not the type of advanced weaponry utilized by the military. Plaintiffs conclude that many of the banned guns are commonly owned and utilized in homes as part of the deeply rooted history of our country for the fundamental right of self-defense that is fundamental to our scheme of ordered liberty.” A-I, p. 21.

The lower court notes that *Heller* “made clear that the second amendment in no way provides protections from restrictions on uncommon or unusually dangerous weapons” (A-I, pp. 22, 23), but it assumes that legislative allegations, such as here and in *Heller II* and *James*, are true per se, and plaintiffs may not show otherwise no matter what the facts are in the real world.¹⁶

Without allowing a shred of evidence, the lower court asserts that “the Ordinance is not a blanket prohibition on common handguns as that before the *Heller* and *McDonald*

¹⁶ The court incorrectly cited *Fincher* as holding that “the second amendment right does not extend to assault weapons” (A-I, p. 16), yet *Fincher* involved machineguns – true “assault weapons” – and not the ordinary firearms banned here, which require a separate pull of the trigger for each shot. 538 F. 3d at 873,74.

courts.” A-I, p. 23. Such matters are not known by judicial intuition, but are subject to production of evidence in an adversary proceeding. Moreover, *Heller* and *McDonald* invalidated bans on handguns,¹⁷ and never used the term “common handguns” or said that “a subcategory” of protected firearms—“handguns” and long guns” – could be banned.¹⁸

Parker v. District of Columbia, 478 F.3d 370, 397 (D.C. Cir. 2007), which *Heller* affirmed, held: “The modern handgun – and for that matter the rifle and long-barreled shotgun – is undoubtedly quite improved over its colonial-era predecessor, but it is, after all, a lineal descendant of that founding-era weapon, and it passes *Miller’s* standards.” *Parker*, 478 F.3d at 398.¹⁹

The lower court said that “common firearms” are protected by the Second Amendment (A-I, p. 23), but it erroneously decided that a legislative assertion that handguns and rifles, or subcategories thereof, are not common takes the question off the table no matter how common they are in reality.

The lower court recites the mantra: “The *James* and *Heller II* courts reviewed bans on nearly identical weapons as in the Ordinance, and the legislative findings in *James* and *Heller II* mirror those cited in the Ordinance.” A-I, p. 23. The legislative

¹⁷ The handgun ban amounts to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for that lawful purpose [self-defense].” *Heller*, 128 S.Ct. at 2817.

¹⁸ “It is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed.” *Heller*, 128 S.Ct. at 2818.

¹⁹ A Beretta 9mm semiautomatic pistol was found to meet the *Miller* test in *Emerson*, 270 F.3d at 216, 227 n.22 (5th Cir. 2001). Semiautomatic rifles, pistols, and shotguns “are commonly kept and used by law-abiding people for hunting purposes or for the protection of their persons and property” *Rinzler v. Carson*, 262 So. 2d 661, 666 (Fla. 1972).

finding is apparently the Holy Grail which no citizen who asserts a constitutional violation may question with evidence in court. This unquestioned deference to the legislature and denial of judicial review of a constitutional violation has been rejected in American jurisprudence at least since *Marbury v. Madison*, 5 U.S. 137 (1803).

In sum, what are maligned as “assault weapons” are “widely owned by private citizens today for legitimate purposes,” including “for self-defense, hunting, and target shooting” Michael P. O’Shea, “The Right to Defensive Arms after *District of Columbia v. Heller*,” 111 W.Va. L. Rev. 349, 388 (Winter 2009). It was error to hold as a matter of law that the banned firearms are not constitutionally protected based on nothing more than disputed legislative assertions.

IV. THE COURT ERRONEOUSLY HELD THAT A CRIMINAL ORDINANCE FILLED WITH TECHNICAL TERMS IS NOT VAGUE WITHOUT ACCORDING ANY OPPORTUNITY TO PRODUCE EVIDENCE.

The lower court closed the door on any opportunity to show with evidence that the ordinance is vague. The ordinance is filled with technical jargon regarding firearms banned by model names and generic features, and includes “copies” and “duplicates” thereof. The First Amended Complaint alleges in considerable detail that these definitions are vague as applied to specific models of firearms. Without any evidence based on an adversary proceeding, the lower court opines that “the terms ‘copies’ and ‘duplicates’ in the Ordinance are not vague, but have plain and ordinary meanings. A-I, p. 23. The court then concluded on the vagueness issue: “The trial court properly found that plaintiffs did not state a cause of action based on the plain meaning and adequate detail provided in the Ordinance.” A-I, pp. 24, 25. How could complex questions of firearm nomenclature and design be resolved regarding an ordinance using numerous

technical names and generic features without testimony from ordinary persons, firearm experts, and law enforcement officers required to enforce such ordinance?

Springfield Armory v. Columbus, 29 F.3d 250, 251 (6th Cir. 1994), considered such evidence and declared as “unconstitutionally vague on its face” an assault weapon ban with similar nomenclature as here: “The ordinance is fundamentally irrational and impossible to apply consistently by the buying public, the sportsman, the law enforcement officer, the prosecutor or the judge.”

Robertson v. Denver, 874 P.2d 325, 334 (Colo. 1994) found that language similar to the “copies or duplicates” language here “cannot be readily [ascertained] by a person of common intelligence,” rendering it unconstitutionally vague.

Peoples Rights Organization, Inc. v. Columbus, 152 F.3d 522, 536 (6th Cir. 1998), invalidated as vague generic definitions of “assault weapon” similar to those here, noting: “When criminal penalties are at stake . . . a relatively strict test is warranted.” *Id.* at 533. “Indeed, “[i]n the absence of a scienter requirement . . . [a] statute is little more than a trap for those who act in good faith.”” *Id.* at 534, quoting *Colautti v. Franklin*, 439 U.S. 379, 395 (1979).

While “a scienter requirement may mitigate a law’s vagueness,” *Village of Hoffman Estates v. Flipside Hoffman Estate, Inc.*, 455 U.S. 489, 499 (1982), the Ordinance here has none. Plaintiffs are subject to criminal prosecution without proof of their knowledge that the firearms they possess have characteristics which restrict them under the Ordinance. *Mens rea* may not be required regarding an inherently dangerous weapon like a hand-grenade, which can be easily recognized as such. *United States v. Freed*, 401 U.S. 601 (1971). Yet *Staples v. United States*, 511 U.S. 600, 602 (1993),

required proof of knowledge of the characteristics of a firearm that made it subject to strict regulation, given that it appeared to be an ordinary commonly- possessed rifle. The Ordinance here restricts ordinary rifles of the same type, but has no such knowledge requirement.

Similar to here, in *City of Chicago v. Morales*, 527 U.S. 41, 46 (1999), “the council made a series of findings,” including that “. . . criminal street gang activity was largely responsible for the city’s rising murder rate” That finding did not prevent the Illinois Court of Appeals or this Court from conducting a searching analysis and declaring the ordinance void for vagueness. *Id.* at 50 (citations omitted). The U.S. Supreme Court affirmed, applying the familiar test: “Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.” *Id.* at 56. See also *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

Here, the Court of Appeals erred in finding the complaint, which set forth in great detail reasons why the ordinance is vague, insufficient to state a claim, without allowing the generation of evidence to support the claims. See Amended Complaint, Counts I, IV, V, pp. 7–17; 20–23 (R.C. 340); exhibits B through F (R.C. 372–402); A–V–7–17;20–23.

V THE APPELLATE COURT ERRED IN FINDING THAT THE ORDINANCE DOES NOT VIOLATE EQUAL PROTECTION.

The Appellate Court ruled that Plaintiffs failed to allege any facts that two owners of similar firearms would be treated differently. But in fact, Plaintiffs have alleged exactly that in count VI of the Amended Complaint, saying that the Cook County Ordinance: “violates the equal protection clause of the U.S. Constitution, as applied by

the States by the 14th Amendment, by arbitrarily differentiating between identical situated persons by banning specifically listed assault weapons but not banning ownership of other identical firearms, to wit,” and thereafter listing of over a page of specific firearms and categories of firearms not banned. (R.C. 362--364) with photo attachments E and F at R.C.394-402. See also, A-V, pp. 23—26; A-V, Ex. E—F.

Plaintiffs have alleged ownership of numerous firearms banned under the Cook County Ordinance. Plaintiffs have alleged there are numerous firearms that are not banned but are identical to banned firearms. Plaintiffs have alleged exactly the arbitrary differences that have been held to be a violation of Equal Protection in other jurisdictions.

The Appellate Court also ignored Plaintiffs case law from other jurisdictions where regulatory schemes similar to the Ordinance at bar have been struck down. The Cook County’s style of banning ownership of specific listed assault weapons but not banning other identical firearms was found to violate equal protection in *Citizens for a Safer Community v. City of Rochester*, 627 N.Y.S.2d 193, 203 (Supp. 1994),

“ For example, the Ordinance specifically names the Colt AR-15A2 carbine, AR-15A2-Delta HB ar; and AR-15A2H-Bar. It does not list the identical Eagle Arms EA-15, Olympic Arms AR-15 Service Match; Olympic Arms AR-15 Heavy Match, Olympic Arms CA-15, Quality Arms E-2, or the Stoner SR-25. [footnote 5].”

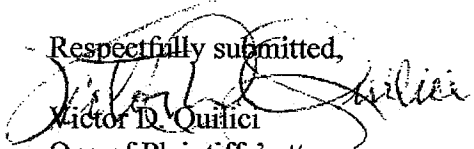
Peoples Rights Organization v. City of Columbus, 152 F.3d 522 (6th Cir. 1998), a pre-*Heller* decision, the catch-all section that prohibited “a modification of a rifle described” and “a modification of an automatic firearm” was ruled to be unconstitutionally vague, *Id.* at 536-37. In *Robertson v. Denver* 874 P.2d 325, 334-335 (1994) the catch-all section that prohibited “[a]ll semiautomatic pistols that are

modifications of rifles having the same make, caliber and action design..." was ruled unconstitutionally vague.

A third case, *Springfield Amory, Inc. v. City of Columbus*, 29 F.3d 250 (1994) found that the catch-all section "[o]ther models by the same manufacturer with the same action design that have slight modifications or enhancements...." was unconstitutionally vague on its face. Without a valid catch-all section, the Cook County Ordinance unconstitutionally violates equal protection.

WHEREFORE, Plaintiffs pray, for the reasons stated herein, this honorable court will grant them leave to appeal from the judgment of the First District Appellate Court in this matter, entered on February 9, 2011, which affirmed the lower court's dismissal of the Plaintiffs' 1st Amended Complaint with prejudice.

Respectfully submitted,


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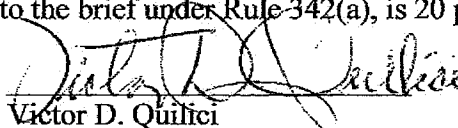
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CERTIFICATE OF COMPLIANCE

I, Victor D. Quilici, certify that this brief conforms to the requirements of Rules 341(a) and (b), that the length of this brief, excluding the appendix pages, excluding the Rule 341(d) cover, excluding the Rule 315/ 341(h)(1) statement of points relied upon, excluding the Rule 341(c) certificate of compliance, excluding the certificate of service, and excluding those matters to be appended to the brief under Rule 342(a), is 20 pages.


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