In the

United States Court of Appeals

For the Seventh Circuit

No. 17-2998

KEVIN W. CULP, *et al.*,

Plaintiffs-Appellants,

v.

KWAME RAOUL, in his official capacity as Attorney General of the State of Illinois, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois.
No. 3:14-cv-3320 – **Sue E. Myerscough**, *Judge*.

ARGUED SEPTEMBER 20, 2018 – DECIDED APRIL 12, 2019

Before MANION, HAMILTON, and SCUDDER, *Circuit Judges*.

SCUDDER, *Circuit Judge*. Before us is a challenge to the scheme Illinois has enacted to license the concealed carry of firearms. The plaintiffs are out-of-state residents who contend that Illinois law discriminates against them in a way that forecloses their receiving a license in violation of the Second Amendment and the Privileges and Immunities Clause of the U.S.

Constitution. Two years ago we considered and rejected the same challenge from the same parties in an appeal from the denial of their request for a preliminary injunction. The case returns on the same evidentiary record following entry of summary judgment for the State.

Illinois has regulated the public carrying of firearms by enacting the Firearm Concealed Carry Act and seeking to ensure that licenses issue only to individuals – residents and nonresidents alike – without substantial criminal and mental health histories, with the State then undertaking regular and rigorous monitoring to verify ongoing compliance. Illinois monitors the compliance of in-state license holders by accessing the robust, real-time information available about its residents. But monitoring compliance of out-of-state residents is limited in material ways by Illinois's inability to obtain complete and timely information about nonresidents – for example, about a recent arrest for domestic violence or a voluntary commitment for inpatient mental health treatment. Illinois cannot compel this information from other states, nor at this time do national databases otherwise contain the information.

The State has sought to overcome this information deficit not by holding out-of-state residents to different standards than residents for obtaining a concealed-carry license, but by issuing licenses only to nonresidents living in states with licensing standards substantially similar to those of Illinois. In this way, Illinois's "substantially similar" requirement functions as a regulatory proxy, as the State's indirect means of

obtaining adequate assurances that individuals licensed to carry a firearm in public remain fit and qualified to do so.

We conclude that Illinois's substantial-similarity requirement – the centerpiece of its approach to nonresident concealed-carry licensing – respects the Second Amendment without offending the anti-discrimination principle at the heart of Article IV's Privileges and Immunities Clause.

I

A

The path to (and limitations on) the concealed carrying of firearms in Illinois owes much to the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008). There the Court held that the Second Amendment confers "the right of law-abiding, responsible citizens to use arms in the defense of hearth and home." *Id.* at 635. Concluding that "the inherent right of self-defense has been central to the Second Amendment right," the Court invalidated a District of Columbia law banning handgun possession in the home, "where the need for defense of self, family, and property is most acute." *Id.* at 628.

In so holding, the Supreme Court underscored that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited," emphasizing that "the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for

whatever purpose." *Id.* at 626. The Court sounded the extra caution that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms" – all "presumptively lawful measures." *Id.* at 626–27 & n.26.

Two years later, the Court decided *McDonald v. City of Chicago* and held that "the Second Amendment right is fully applicable to the States." 561 U.S. 742, 750 (2010). Echoing what it underscored in *Heller*, the Court "repeat[ed] th[e] assurances" that longstanding "prohibitions on the possession of firearms by felons and the mentally ill" remained unquestioned. *Id.* (quoting *Heller*, 554 U.S. at 626).

In the wake of *Heller* and *McDonald*, we held that the Second Amendment right to "bear arms" extends beyond the home. See *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012), *petition for rehearing en banc denied*, 708 F.3d 901 (7th Cir. 2013). This conclusion resulted in our invalidating an Illinois law that imposed a near-categorical prohibition on the carrying of guns in public. See *id.* at 934. This "sweeping ban," we reasoned, could not be upheld by the State's generalized reliance on "public safety," as Illinois had ample room to "limit the right to carry a gun to responsible persons rather than to ban public carriage altogether" – consistent with *Heller*'s recognition of the propriety of

restricting gun possession by children, felons, the mentally ill, and unlawful aliens. *Id.* at 940, 942.

We ended our opinion in *Moore* with an invitation to the "Illinois legislature to craft a new gun law that will impose reasonable limitations" – in a manner "consistent with the public safety and the Second Amendment" – "on the carrying of guns in public" within the State. *Id.* at 942. Illinois responded by enacting the Firearm Concealed Carry Act, 430 ILCS 66/1 to 66/999, authorizing the issuance of concealed-carry licenses to individuals who meet prescribed eligibility requirements. This new statute set the stage for this litigation.

B

Obtaining a license under the Illinois Concealed Carry Act requires an applicant to show, among other things, that he is not a clear and present danger to himself or a threat to public safety and, within the past five years, has not been a patient in a mental hospital, convicted of a violent misdemeanor or two or more violations of driving under the influence of drugs or alcohol, or participated in a residential or court-ordered drug or alcohol treatment program. See 430 ILCS 66/10(a)(4), 66/25(3), 66/25(5); 430 ILCS 65/4, 65/8.

These standards are identical for residents and nonresidents alike, and no provision of the Illinois statute imposes any additional requirement on nonresidents. Furthermore, no aspect of this case entails a Second Amendment (or any other) challenge to any

substantive-eligibility requirements in the Illinois statute. To the contrary, this case is only about how the substantial-similarity requirement applies to out-of-state residents. Resolving the question requires an examination of the statutory scheme, most especially the State's initial evaluation of applicants and its ongoing monitoring of a licensee's continued eligibility.

The issuance of a license requires the State Police to conduct an extensive background check of each applicant. See 430 ILCS 66/35. This check includes a search of multiple national databases, including the FBI's National Instant Criminal Background Check System and, for Illinois residents, of "all available state and local criminal history record information files," records pertaining to domestic violence restraining orders, and mental health files of the Illinois Department of Human Services. *Id.*

To enable the prompt identification of any disqualifying circumstances that may arise during the five-year licensing period, the Illinois statute requires ongoing monitoring. See 430 ILCS 66/70; 430 ILCS 65/8.1. The monitoring is substantial, with the State Police Firearms Services Bureau conducting a *daily* check of all resident licensees against the Illinois Criminal History Record Inquiry and Department of Human Services's mental health system for any development that might disqualify a licensee from holding a concealed-carry license. To ensure that certain intervening and disqualifying events are reported, Illinois obligates the clerks of its circuit courts as well as state law enforcement agencies to notify the State Police of

certain criminal arrests, charges, and disposition information. See 430 ILCS 65/8.1(a); 20 ILCS 2630/2.1 to 2630/2.2. Illinois law also mandates that physicians, law enforcement officials, and school administrators report persons suspected of posing a clear and present danger to themselves or others within 24 hours of that determination. See 430 ILCS 65/8.1(d)(1)–(2).

This monitoring regime positions Illinois to revoke the license of an individual who poses a danger of misusing firearms. The State Police learning, for example, that a license holder had been arrested for domestic violence or committed involuntarily to inpatient mental health treatment results in a revocation of the license. See 430 ILCS 66/70(a); 430 ILCS 66/25(2) (incorporating 430 ILCS 65/4(2)(iv)), 66/25(4).

The upshot of all of this is that eligibility for a concealed-carry license in Illinois turns on the continuing and verifiable absence of a substantial criminal record and mental health history for all applicants, regardless of residency. See 430 ILCS 66/25(2) (incorporating 430 ILCS 65/4(2)(ii)–(xvii)), 66/25(3). While this observation is simple, implementing it is not. The State's ability to determine eligibility depends on access to information. And it is on this point that Illinois faces a substantial practical barrier – an information shortfall – when it comes to the mental health and criminal histories of out-of-state residents wishing to obtain a license.

Illinois does not have access to other states' criminal history databases or mental health repositories.

Nor are other states required to provide this information to Illinois or, more generally, to include the information in a national database to which the Illinois State Police have access. This is today's information reality, and it is uncontested. At no point in this litigation – not in the district court, during the first appeal, or now in this second appeal – have the plaintiffs presented evidence refuting Illinois's showing of this information deficit.

Despite this information gap, the Illinois legislature still authorized concealed carry by out-of-state residents in circumstances where the State can obtain enough confidence about an applicant's background and continued fitness to carry a firearm in public. The confidence comes, the legislature determined, from a regulatory proxy – an indirect indicator that provides adequate assurance that a nonresident is fit and qualified to engage in concealed carry in Illinois. The proxy took the form of the legislature authorizing the issuance of concealed-carry licenses to residents of states "with laws related to firearm ownership, possession, and carrying, that are substantially similar to the requirements to obtain" an Illinois concealed-carry license. 430 ILCS 66/40(b).

The law of another state is deemed "substantially similar" if the state, like Illinois, (1) regulates who may carry firearms in public; (2) prohibits those with involuntary mental health admissions, and those with voluntary admissions within the past five years, from carrying firearms in public; (3) reports denied persons to the FBI's National Instant Criminal Background

System; and (4) participates in reporting persons authorized to carry firearms in public through the National Law Enforcement Telecommunications System. See 20 Ill. Admin. Code § 1231.10.

The rationale is plain: because states that meet these criteria monitor the same criminal and mental health qualifications Illinois requires under its own law and report this information to national databases, Illinois can access the information to assess whether nonresidents from these states are qualified to carry a concealed gun in Illinois. And, even more critically, the criminal history and mental health reporting practices of these substantially similar states enable Illinois to learn about any disqualifying event that warrants revoking an individual's license.

The State Police implement this monitoring of nonresident licensees by running a check of national databases every 90-days. By doing so, Illinois positions itself to learn of new arrests, convictions, and mental health commitments and thus ongoing fitness for concealed carry within the State.

To determine which states have substantially similar regulatory schemes, Illinois undertakes a survey process. The State Police send a survey to all other states seeking information regarding their regulation of firearm possession and related criminal history and mental health reporting. Since 2013, Illinois has conducted two surveys and most recently, in 2015, determined that four states meet the criteria: Arkansas, Mississippi, Texas, and Virginia. Residents of these

states, therefore, may apply for an Illinois concealed-carry license.

Illinois has approached the survey process with a measure of diligence. The surveys sought detailed information from other states, and Illinois officials took steps to follow up with states that failed to respond or provided incomplete information. Illinois also changed prior substantial-similarity determinations in response to receiving new information.

Individuals living outside a substantially similar state are not without firearm privileges in Illinois. To the contrary, the Concealed Carry Act affords all out-of-state residents holding a concealed-carry permit in their home state the right to travel with a firearm in their vehicle while driving in Illinois. See 430 ILCS 66/40(e). And the Illinois Firearm Owners Identification Card Act, 430 ILCS 65/0.01 to 65/16-3, allows out-of-state residents who are authorized to possess a firearm in their home state to do the same in Illinois while on their own premises or in the home of an Illinois resident with permission, see 430 ILCS 65/2(b)(10), while hunting, see 430 ILCS 65/2(b)(5), and while engaging in target practice at a firing or shooting range, see 430 ILCS 65/2(b)(7). Nonresidents may also possess a firearm that is unloaded and enclosed in a case. See 430 ILCS 65/2(b)(9).

C

In 2014 nine individuals who live outside of Illinois, but not in one of the four substantially similar

states, brought suit alleging that Illinois's regulation of out-of-state concealed-carry licensing violates the Second Amendment, the Privileges and Immunities Clause of Article IV, and the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. The individual plaintiffs are responsible, law-abiding individuals who travel to Illinois for business or family reasons and, in the interest of personal safety, wish to obtain a concealed-carry license.

Beyond broadly asking the district court to declare the statute's substantial-similarity requirement unconstitutional, the plaintiffs sought a preliminary injunction. Illinois opposed the motion by submitting an affidavit from the Chief of the Firearms Services Bureau, Jessica Trame, outlining the State's interest in not only carefully vetting applicants for concealed-carry licenses, but also monitoring the ongoing fitness and qualifications of all licensees. Chief Trame relayed substantial detail regarding the challenges Illinois faces obtaining information about out-of-state applicants' criminal and mental health histories at the application stage, due largely to the absence of certain information in national databases and the State's lack of resources to perform a complete record search of applicants from other states.

Chief Trame further explained that Illinois faces even greater difficulties when it comes to obtaining updated information pertinent to monitoring the ongoing qualifications of nonresidents. Illinois, for example, does not have access to other states' mental health information and, as a result, relies on federal databases

to obtain as much information as possible. On this point, Chief Trame was specific: "Out-of-state mental health facilities are not required by their states to report admissions or persons presenting a clear and present danger to [the Illinois Department of Human Services] or to [the Illinois State Police], and do not do so unless [the Illinois State Police] makes a request for that information." "Many out-of-state mental health entities," she added, "do not provide this information even after an [Illinois State Police] request."

After considering the State's showing of these information deficits – all of which went uncontested by the plaintiffs – the district court denied the request for a preliminary injunction. The district judge emphasized that the State has an important and strong interest in protecting the public by ensuring that unqualified individuals are not licensed to carry loaded firearms on Illinois streets. *Culp v. Madigan*, No. 14-CV-3320, 2015 WL 13037427, at *16 (C.D. Ill. Dec. 7, 2015).

We affirmed. *Culp v. Madigan*, 840 F.3d 400, 403 (7th Cir. 2016). Pointing to our decision in *Moore*, we reiterated that Illinois "must permit law-abiding and mentally healthy persons to carry loaded weapons in public." *Id.* at 401. We then concluded that because Illinois lacks access to information about the qualifications of out-of-state residents – in particular, whether nonresidents are law-abiding and mentally healthy – the State's substantial-similarity requirement was consistent with *Moore*'s mandate and did not offend the Second Amendment. See *id.* at 402.

Our prior opinion, to be sure, recognized that the Illinois statute undeniably precludes some law-abiding nonresidents – those living outside a state with substantially similar laws – from receiving a concealed-carry license. See *id.* Against the weight of the State's public-safety interests, however, we concluded that the Second Amendment permitted Illinois's regulatory approach, at least on the record before the district court at the preliminary injunction stage. See *id.* at 402–03.

On remand the parties cross-moved for summary judgment on a nearly identical factual record. (The only change was that Illinois submitted a revised affidavit from Chief Trame to list those states presently deemed substantially similar.) Adhering closely to our decision in *Culp I*, the district court entered summary judgment for the State, emphasizing that Illinois "has a substantial interest in restricting concealed carry licenses to those persons whose qualifications can be verified and monitored" and "[t]he restriction barring nonresidents from states without substantially similar laws from applying for an Illinois concealed carry license is substantially related to that strong public interest." *Culp v. Madigan*, 270 F. Supp. 3d 1038, 1058 (C.D. Ill. 2017). The court also denied the plaintiffs' other constitutional claims. See *id.* at 1058–59.

II

This second appeal mirrors the first in all respects. The facts have not changed, and the legal issue is the exact same. The plaintiffs nonetheless urge us to

overturn our decision in *Culp I*. While we decline to do so, it is appropriate to expand upon our reasoning.

A

The plaintiffs remain clear that they are not challenging any criminal history or mental health limitations Illinois has imposed on concealed-carry. Indeed, at least for purposes of this case, the plaintiffs advance no claim that any licensing-eligibility standard falls outside *Heller*'s recognition of "longstanding prohibitions on the possession of firearms by felons and the mentally ill" that the Supreme Court has identified as "presumptively lawful." 554 U.S. at 626–27 & n.26.

What the plaintiffs instead challenge is how the Concealed Carry Act impacts out-of-state residents. They argue that the Second Amendment confers a fundamental right to carry a firearm in public for self-defense and that principles of strict scrutiny preclude the State from limiting that right to the degree Illinois has done here – to foreclose the law-abiding residents of 45 states from acquiring a license.

This contention is overbroad, for it cannot be squared with the Supreme Court's emphasis in *Heller* that the rights conferred by the Second Amendment are not unlimited. See *id.* at 595. The right to bear arms, as a historical matter, "was not a right keep and carry any weapon whatsoever and for whatever purpose." *Id.* at 626. And most to the point here, the Court underscored the propriety of the "longstanding prohibitions on the possession of firearms by felons and the

mentally ill," while also observing that most courts throughout the 19th century "held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." *Id.*

The plaintiffs accept this historical reality or, at the very least, fail to offer a competing historical account. And the absence of historical support for a broad, unfettered right to carry a gun in public brings with it a legal consequence: the Second Amendment allows Illinois, in the name of important and substantial public-safety interests, to restrict the public carrying of firearms by those most likely to misuse them. See *United States v. Skoien*, 614 F.3d 638, 645 (7th Cir. 2010) (*en banc*). The State has done so here on two dimensions – criminal and mental health history – expressly recognized in *Heller* and unchallenged (either generally or specifically) by the plaintiffs. Perhaps as they must, the plaintiffs expressly admit that they "do not take issue with [firearm] restrictions on individuals with certain criminal histories or a history of admittance to mental health facilities."

Nor does the plaintiffs' position improve if we turn to our decision in *Moore*. While the plaintiffs are right to observe that we held that an individual's Second Amendment right to possess a firearm for self-defense extends outside the home, our opinion in *Moore* did not end there. We went the added step of reiterating the assurances from *Heller* and *McDonald* that the rights conferred by the Second Amendment are not unlimited and, even more specifically, that a state's interest in promoting public safety is strong enough to sustain

prohibitions on the possession of firearms by felons and the mentally ill. See *Moore*, 702 F.3d at 940 ("And empirical evidence of a public safety concern can be dispensed with altogether when the ban is limited to obviously dangerous persons such as felons and the mentally ill.").

Moore, therefore, cannot bear the weight the plaintiffs place on it. We concluded that the individual right to bear arms recognized in *Heller* and *McDonald* extended, at least to some degree, to the public carrying of firearms. See *id.* But neither *Moore* nor the Supreme Court's decisions in *Heller* and *McDonald* preclude a state from imposing criminal history and mental fitness limitations on gun possession. See *Heller*, 554 U.S. at 626; *McDonald*, 561 U.S. at 786.

B

This brings us to the plaintiffs' contention that the State's substantial-similarity requirement impermissibly discriminates against out-of-state residents by denying them the right to carry a handgun in the same manner available to residents. This is the essence of the plaintiffs' challenge to the Illinois Concealed Carry Act. Put most simply, the plaintiffs frame this as a discrimination case.

It remains undisputed, however, that Illinois's licensing standards are identical for all applicants – residents and nonresidents the same. What is more, the plaintiffs do not challenge Illinois's showing that the differential licensing impact is the product of the

information deficit the State faces with vetting and monitoring out-of-state residents. For its part, moreover, Illinois has demonstrated that the substantial-similarity requirement relates directly to the State's important interest in promoting public safety by ensuring the ongoing eligibility of who carries a firearm in public. Intermediate scrutiny requires no more. See *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) (explaining that the tailoring prong of intermediate scrutiny requires that any regulation of firearms must be substantially related to an important government interest); see also *Skoien*, 614 F.3d at 642 (articulating the same standard).

Before us is a State with a weighty interest in preventing the public carrying of firearms by individuals with mental illness and felony criminal records. Illinois established a licensing and monitoring scheme to achieve this public-safety objective, yet the unrefuted evidence shows that information deficits inhibit the State's ability to monitor the ongoing qualifications of out-of-state residents outside of the substantially similar states. Forcing the State to issue concealed-carry licenses to nonresidents despite this information shortfall would thrust upon Illinois a race to the bottom. Licenses would have to issue along eligibility standards incapable of being verified or, at the very least, below those established by the State legislature for its own residents. Once eligible would risk meaning forever eligible. That outcome is hard to reconcile with *Heller*'s acceptance of the "longstanding prohibitions on the possession of firearms by felons and the

mentally ill." 554 U.S. at 626–27 & n.26. And the outcome has even less to say for itself where, as here, the plaintiffs accept the substance of the criminal history and mental health limitations Illinois has imposed on concealed-carry licensing.

The plaintiffs insist that the Second Amendment requires Illinois to let them *apply* for a concealed-carry license. While the observation may be right, it only goes so far. It may be possible for Illinois to take additional steps in vetting initial applications. The State could modify its present practices by, for example, requiring a sworn declaration on a nonresident's mental health from a treating physician or shifting more of the cost of obtaining out-of-state criminal history information to the nonresident applicant.

But focusing on the initial application responds to only part of the State's interest in enforcing the requirements to carry a concealed firearm in Illinois. The State's enforcement authority necessarily must bring with it a practical way of monitoring the ongoing fitness of individuals licensed to carry a firearm on a public street. See *Berron v. Illinois Concealed Carry Licensing Review Board*, 825 F.3d 843, 847 (7th Cir. 2016) ("Illinois is entitled to check an applicant's record of convictions, and any concerns about his mental health, close to the date the applicant proposes to go armed on the streets."). As we put the point in *Culp I*, "[t]he critical problem presented by the plaintiffs' demand – for which they offer no solution – is verification." 840 F.3d at 403.

Monitoring depends on staying informed, on learning of developments that may affect public safety within the State. Take, for instance, a nonresident licensee arrested for domestic battery or who suffers from acute mental illness and, after much persuasion from family and friends, agrees to inpatient treatment. Either development renders the individual ineligible to carry a firearm in Illinois. See 430 ILCS 66/70(a); 430 ILCS 66/25(2) (incorporating 430 ILCS 65/4(2)(iv)), 66/25(4). The State cannot revoke a license without first learning of the development, however. And it is this dual reality – the union of this information deficit and public-safety considerations – that led the Illinois legislature to condition nonresident concealed-carry licensing on an individual living in a state with substantially similar laws.

Yes, "the plaintiffs do make some apt criticisms of Illinois law," *Culp I*, 840 F.3d at 403; yes, the statutory scheme operates to prevent many law-abiding nonresidents from publicly carrying a firearm within Illinois; and yes, by focusing on another state's regulatory scheme, it allows nonresident licensing to turn on a factor beyond any individual's personal control.

While Illinois does not dispute these elements of imperfection, the plaintiffs, for their part, do not dispute the State's monitoring challenges. To the contrary, the plaintiffs accept that Illinois cannot adequately monitor their mental health or potential criminal behavior. And all the plaintiffs say in response is that it is enough on the monitoring front for Illinois to ask license holders to self-report any disqualifying criminal

history or mental health developments. The Second Amendment does not mandate this approach: Illinois is not forced to accept the public-safety risk of relying on individuals to self-report a felony conviction, domestic violence arrest, or mental health crisis. Nor is the State required to tailor its law so narrowly as to sacrifice its important monitoring interest.

In the end, the analysis resolves in Illinois's favor and sustains the State's substantial-similarity requirement. Any other conclusion – compelling the State to issue concealed-carry licenses without then being able to monitor ongoing eligibility – would force Illinois to accept an idiom: what the State does not know cannot hurt it. The State's interest in maintaining public safety is too substantial to mandate that result. On the record before us, then, and giving effect to the permissible criminal history and mental health limitations underscored in *Heller*, we hold that the substantial-similarity requirement of the Illinois Concealed Carry Act respects the Second Amendment.

Our holding responds to the plaintiffs' request for a declaration that the Illinois statute's substantial-similarity requirement is unconstitutional root and branch – as applied to themselves and all law-abiding residents living in 45 states. We have declined the invitation owing in large measure to the expanse of the information deficit that precludes the State from monitoring ongoing fitness. To restate the holding, though, is to recognize a limitation: Illinois's evidentiary showing went uncontested at every stage of this case. The plaintiffs as a group never challenged the State's

showing of an information deficit, nor did any individual plaintiff seek to overcome it by showing such a substantial and regular presence in Illinois to enable the monitoring essential to the State's public-safety interest. So we leave for another day what the Second Amendment may require in a circumstance where the information deficit is no longer present.

III

The plaintiffs also argue that Illinois's concealed-carry regulatory scheme offends the Privileges and Immunities Clause of Article IV. Here, too, we disagree.

The Supreme Court has clarified that states must accord residents and nonresidents equal treatment "[o]nly with respect to those 'privileges' and 'immunities' bearing on the vitality of the Nation as a single entity." *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279 (1985) (quoting *Baldwin v. Fish and Game Comm'n of Montana*, 436 U.S. 371, 383 (1978)). If a challenged regulation deprives nonresidents of a protected privilege, the question becomes whether the state has offered a substantial reason to justify the discriminatory impact and, relatedly, whether its regulatory approach bears a substantial relationship to its objective. See *Barnard v. Thorstenn*, 489 U.S. 546, 552–53 (1989). This inquiry recognizes that "the states should have considerable leeway in analyzing local evils and in prescribing appropriate cures," for only unjustifiable discrimination violates the Privileges and Immunities Clause. *United Bldg. and Constr. Trades*

Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, 465 U.S. 208, 222–23 (1984) (quoting *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)).

The Supreme Court also has recognized that "the Privileges and Immunities Clause was intended to create a national economic union." *Piper*, 470 U.S. at 279–80. This principle aligns with the Court's primary precedents in this area, which have typically involved economic rights. See, *e.g.*, *Hicklin v. Orbeck*, 437 U.S. 518, 526 (1978) (invalidating Alaska's requirement that residents be hired over nonresidents for particular oil and gas jobs); *Toomer*, 334 U.S. at 396 (invalidating a statute that charged nonresident fishermen a fee one hundred times greater than a similar fee charged to resident fishermen); *Ward v. Maryland*, 79 U.S. 418, 432 (1870) (invalidating a statute that imposed licensing and fee requirements on nonresident merchants that were not similarly imposed on resident merchants).

No plaintiffs here contend that carrying a concealed weapon is essential to their ability to work in Illinois. While the Court has never held that the Privileges and Immunities Clause is limited to economic interests, we are equally unaware of a decision holding that a privilege of citizenship includes a right to engage in the public carry of a firearm, or, even more specifically, the right to carry a concealed firearm in another state. Under the law as it presently stands, it seems difficult to conclude that such a right, if it exists,

is essential to the ongoing vitality of the nation. See *Piper*, 470 U.S. at 279.

But we stop short of taking a position on the fundamental right question. The plaintiffs' claim fails for another reason: the Privileges and Immunities Clause does not compel Illinois to afford nonresidents firearm privileges on terms more favorable than afforded to its own citizens. Yet that is the precise import of the plaintiffs' challenge to Illinois's Concealed Carry Act. They demand the right to carry a concealed firearm despite the (uncontested) information barrier Illinois faces when monitoring their continued fitness and eligibility. The State does not face this monitoring barrier with its own citizens, however.

Illinois's adoption of a substantial-similarity requirement to bridge the information deficit places nonresidents on equal regulatory footing with Illinois residents and does not offend the Privileges and Immunities Clause. To the extent the impact of this regulation works to disadvantage nonresidents, such an effect is not the type of unjustifiable discrimination prohibited by the Clause. See *Bach v. Pataki*, 408 F.3d 75, 91, 94 (2d Cir. 2005) (holding that a New York regulation restricting applications for handgun licenses to nonresidents with a primary place of business in the State did not violate the Privileges and Immunities Clause because the "discrimination [was] sufficiently justified by New York's public safety interest in monitoring handgun licensees" and its inability to access sufficient information about the qualifications of nonresidents), overruled on other grounds by *McDonald v.*

Chicago, 561 U.S. 742, 791 (2010). Put another way, the Privileges and Immunities Clause, no more than the Second Amendment, does not force Illinois into a regulatory race to the bottom.

IV

What remains are the plaintiffs' claims that the substantial-similarity requirement violates the guarantees of equal protection and due process found in the Fourteenth Amendment. The plaintiffs, however, have not identified any precedent (from the Supreme Court or otherwise) recognizing that either the Equal Protection or Due Process Clause confers a substantive right to engage in the public carry of a firearm, or specifically, the concealed carry of a firearm in another state. Nor have we.

Furthermore, repackaging a claim that is more appropriately brought under a different constitutional provision – here the Second Amendment – as an equal protection claim will not usurp the settled legal framework that has traditionally applied. See *Bogart v. Vermilion County, Ill.*, 909 F.3d 210, 214–15 (7th Cir. 2018) (endorsing the same reasoning in the context of parallel First Amendment and equal protection claims); see also *Muscarello v. Ogle County Bd. Of Comm'rs*, 610 F.3d 416, 422–23 (7th Cir. 2010) (endorsing the same reasoning in the context of parallel takings and equal protection claims). Regardless, even if we were to consider this claim independent of the plaintiffs' Second Amendment claim, the relevant question under the

Equal Protection Clause is whether the Illinois Concealed Carry Act impermissibly discriminates against a suspect class or deprives out-of-state residents of a fundamental right. The answer here is no for all the reasons in our analysis of the plaintiffs' Second Amendment challenge to the Illinois statute.

We conclude with the plaintiffs' due process claim. There has been no Second Amendment or Privileges and Immunities Clause violation, and therefore, without any authority for their proposition that the Due Process Clause independently confers a right to carry a concealed firearm in Illinois, the plaintiffs cannot show that they have been deprived of a liberty interest without due process. See *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011).

* * *

What makes a case like this difficult is that it pits the Second Amendment against equally important principles of federalism. The Illinois Concealed Carry Act survives the present challenge in large measure because of the undisputed empirical showing that the State today is without a reliable means of monitoring or otherwise learning of intervening, material adverse developments with the criminal history and mental health of nonresidents. The Second Amendment allows Illinois to account for this limitation in determining the terms on which to award concealed-carry licenses to out-of-state residents.

But time does not stand still. Nor can Illinois as other states become willing to make more information

available. The information deficit that today allows and sustains Illinois's substantial-similarity requirement may close and position the State to adjust its licensing scheme. In regulating the public carrying of firearms, Illinois, then, must in good faith continue to evaluate whether to amend its approach. In these ways, our federal structure reacts and evolves to respect local interests and individual rights.

For these reasons, we AFFIRM.

MANION, *Circuit Judge*, dissenting. In *District of Columbia v. Heller*, 554 U.S. 570, 635 (2010), the Supreme Court held our Constitution ensures "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." Shortly thereafter, this court logically extended the Supreme Court's holding to include "a right to carry a loaded gun outside the home." *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012).

Nevertheless, the court today upholds Illinois's scheme that categorically prohibits the citizens of 45 states from fully exercising this right when they find themselves within Illinois's borders. Because Illinois has failed to adequately justify this significant curtailment of individual liberty, I dissent.[1]

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[1] Because I conclude the plaintiffs should succeed on their Second Amendment claim, I do not address their claims brought under other provisions of the Constitution.

I.

In the wake of our decision in *Moore*, Illinois passed the Firearm Concealed Carry Act (FCCA), allowing those whom Illinois licenses to carry concealed firearms in public for self-defense. As the court notes, Illinois allows nonresidents without an Illinois license to bring firearms into the state in very limited circumstances. For instance, nonresidents with a concealed-carry license from their own state may "travel with a firearm in their vehicle," and anyone entitled to possess a firearm in their own state may "possess a firearm . . . on their own premises or in the home of an Illinois resident with permission, while hunting, and while engaging in target practice at a firing or shooting range." Maj. Op. at 9 (citations omitted). But licensed concealed carry remains the only legal way to bear a firearm in public in Illinois, *see* 720 ILCS 5/24-1.6(a) (defining the crime of "Aggravated unlawful use of a weapon" to include the open carry of a firearm), and Illinois unconditionally denies that ability to the residents of 45 states.

It does so by only accepting applications for concealed-carry licenses from nonresidents who reside in states it determines have "laws related to firearm ownership, possession, and carrying, that are substantially similar to the requirements to obtain a license under [the FCCA]." 430 ILCS 66/40(b). The Illinois Department of Police decides which states are "substantially similar." *See id.;* ILL. ADMIN. CODE tit. 20 § 1231.110(c). To determine which states qualified, the Department sent surveys to the states in 2013. Based

on the responses, the Department concluded Hawaii, New Mexico, South Carolina, and Virginia were "substantially similar." In 2015, the Department sent another round of surveys. Hawaii, New Mexico, and South Carolina changed their answers, so the Department took them off the list. But the Department added Arkansas, Mississippi, and Texas. That is the last survey of which we have evidence.[2]

Therefore, as it stands, only the residents of Arkansas, Mississippi, Texas, and Virginia may even apply for a nonresident concealed-carry license. This means Illinois categorically denies the residents of the remaining 45 states the ability to exercise the fundamental right to carry a firearm in public in Illinois simply because of the "ineligible" state in which they reside. Such a regime cannot withstand dutiful judicial scrutiny.

II.

As I explained in my dissent the last time this case was before this court, there is no doubt the FCCA must face "exacting (although not quite strict) scrutiny." *Culp v. Madigan*, 840 F.3d 400, 407 (7th Cir. 2016) (Manion, J., dissenting). Illinois must show "an extremely strong public-interest justification and a close fit between the government's means and its end." *Id.* at 404 (quoting *Ezell v. City of Chicago*, 651 F.3d 684,

[2] At oral argument, counsel for Illinois said the State was "constantly sending out surveys," but there is no evidence of any survey after 2015.

708 (7th Cir. 2011)). I concluded Illinois did not do so at the preliminary injunction stage, and nothing has changed since then.

Illinois's proffered goal for its law – to keep guns out of the hands of felons and the mentally ill in public – assumedly satisfies the "extremely strong public-interest justification" prong of the test.[3] The question is whether Illinois's licensing scheme that prevents law-abiding, healthy citizens from *even applying* for a concealed license is sufficiently tailored to that goal. Certainly, if Illinois is going to have a licensing regime, it has to have some method of ensuring the individuals it licenses are eligible and remain so. However, Illinois has utterly failed to show that banning the residents of an overwhelming majority of the country from even applying for a license is a "close fit" to its goal.

Most importantly, and as I pointed out before, the system is grossly underinclusive and overinclusive. An Illinois resident holding a license could cross the Mississippi River to Missouri, check himself into a mental-health clinic, and then return without Illinois ever knowing. Or a person could live in one or more of the

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[3] However, as some recent cases indicate, *see generally Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019); *Binderup v. Att'y Gen. U.S.*, 836 F.3d 336 (3d Cir. 2016) (en banc), questions about whom a state may dispossess of gun rights are likely to be an issue in the future. Under some interpretations, Illinois's regime, which disqualifies based on a conviction for any felony, 430 ILCS 65/8(c), might go too far, *see generally Kanter*, 919 F.3d at 469 (Barrett, J., dissenting) ("Absent evidence that Kanter would pose a risk to the public safety if he possessed a gun, the governments cannot permanently deprive him of his right to keep and bear arms.").

45 dissimilar states for years and then move to a similar state, automatically becoming eligible to apply for a license even though "Illinois (and, presumably, the substantially similar state as well) [would be] unable to obtain information about his possible criminal or mental problems in those states." *Culp*, 840 F.3d at 403 (majority opinion). But a colonel in the United States Air Force licensed as a concealed-carry instructor in Illinois cannot apply for a concealed-carry license of his own because he is a resident of Pennsylvania. Courts should not allow such slipshod laws to proscribe the exercise of enumerated rights. *See id.* at 408 (Manion, J., dissenting) (citing *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 232 (1987)).

Illinois asks the court to ignore these problems because of presumed administrative difficulties. If it is not allowed to restrict the application process to residents of certain states, it contends, it will have no way of concluding the residents of *dissimilar* states are eligible for a license and continue to be so for the term of the license. Illinois's main objection to allowing applications from anyone is that if an applicant's state does not report certain information to national databases, Illinois would have to obtain the information some other way, and that would be too burdensome.

To start with, "the Constitution recognizes higher values than speed and efficiency"; simply avoiding cost and administrative burden does not justify denying constitutional rights. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *see also Watson v. City of Memphis*, 373 U.S. 526, 537 (1963) ("[I]t is obvious that vindication of

conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them."); *Culp*, 840 F.3d at 407 ("[T]he tailoring requirement prevents [the] government from striking the wrong balance between efficiency and the exercise of an enumerated constitutional right.").

Furthermore, there is no evidence in the record that Illinois could not pursue its goal in a more targeted way that would respect the fundamental right at stake. Perhaps Illinois could pass the costs on to the applicant – it already charges nonresidents twice as much when they apply. *See* 430 ILCS 66/60 (imposing $150 fee for residents and $300 fee for nonresidents). Or Illinois could place the burden on applicants themselves to contact appropriate authorities and acquire the information Illinois demands, and it could require the information be transmitted in some form with sufficient indicia of authenticity.

Similar workarounds could be found for mental-health records, even though some states do not track mental-health information. Illinois already requires every applicant for a concealed-carry license to provide Illinois with the ability to access the applicant's private information. *See* 430 ILCS 66/30(b)(3) (listing among the contents of an application "a waiver of the applicant's privacy and confidentiality rights and privileges under all federal and state laws, including those limiting access to . . . psychiatric records or records relating to any institutionalization of the applicant"). So, to the extent any mental-health records are kept by the authorities, Illinois could access them (or, again, put

the cost and time burden on the applicant to access them and provide certified versions to Illinois). In the case of voluntary mental-health admissions that are particularly likely not to be tracked, Illinois could have every applicant from a dissimilar state conform to the certification procedure already found in Illinois law, which allows those who have been voluntarily treated in the past to obtain a certification of health from "a physician, clinical psychologist, or qualified examiner." *See* 430 ILCS 65/8(u). Indeed, "such certification would provide Illinois with more information than it can obtain about its own residents' out-of-state sojourns, which they admittedly cannot track." *Culp*, 840 F.3d at 409.

To its credit, the court today acknowledges there are reasonable alternatives to an outright ban when it comes to the initial application. *See* Maj. Op. at 16. Nonetheless, the court finds the issue with continued monitoring insurmountable. It says there is an "information deficit" about the ongoing eligibility of licensees that Illinois cannot overcome for any but those who reside in similarly situated states. But this deficit is not as severe as Illinois would have the court believe.

It is true Illinois maintains an extensive monitoring system to keep tabs on its own residents, including their voluntary mental-health treatments. Illinois says that because it cannot keep the same watchful eye on nonresidents, it must depend on those licensees' states to keep substantially similar eyes on them. In practice, this amounts to Illinois relying on national databases it checks quarterly to make sure its nonresident

licensees have no disqualifying issues. Several facts demonstrate that this system is not a "close fit" to Illinois's goal of ensuring an ineligible person is not allowed to keep his license.

To begin with, Illinois's failure to send out a new survey since 2015 significantly undermines its argument that its system is tailored to its goal. In 2013, Illinois decided Hawaii, New Mexico, and South Carolina were "sufficiently similar." But between 2013 and 2015, the laws in those states changed to the point Illinois felt it could no longer trust them. This evidences that laws and practices can materially change in a short amount of time. Nevertheless, Illinois has been content to let Arkansas, Mississippi, Texas, and Virginia remain undisturbed as "substantially similar" states since 2015, without even a check-up survey. Illinois's failure to ensure the states it trusts are still reliable weakens its assertion that depending on those states is critical to protecting its citizens.

Furthermore, relying on other states hardly provides the kind of systematic, up-to-date monitoring Illinois claims it needs. For one thing, two of the "substantially similar" states appear to rely on self-reporting of mental-health issues. Virginia, while it does track voluntary mental-health admissions, does so only by self-reporting. *See* Va. Response to Ill. Survey, App. 293 ("There is no systematic way of checking voluntary admissions in Virginia other than self reporting."). Arkansas indicated it relied on self-reporting as

well. *See* Ark. Response to Ill. Survey, App. 147.[4] Yet these two states have systems upon which Illinois is willing to rely.

More generally, amicus Everytown for Gun Safety warns the court of the dangers of relying on "national databases to perform background checks . . . and to monitor permit holders' continued law-abiding status." Br. of Everytown for Gun Safety at 14. Amicus tells us it can take "over a year" for a felony conviction in Mississippi, a "substantially similar state," to find its way onto a national database. *Id.* at 17. Concerning mental-health reporting, amicus lists Arkansas among states that report mental-health records "at a per-capita rate that is aberrantly low compared to other states." *Id.* at 19–20 & n.29. Similar to the failure to send out new surveys, these reported deficiencies undercut Illinois's "close fit" argument.

As a final point, the "information deficit" could be worked around just like problems with the initial application. Instead of relying on these (potentially flawed) databases, Illinois could have nonresident licensees from substantially *dissimilar* states submit verified, quarterly updates on their statuses, including quarterly mental-health certifications.[5] In addition to

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[4] In Arkansas's response to Illinois's survey, it said it requires an applicant for a license to "provide information concerning their mental health status at the time of application" but there is no "check or validation of the information provided by the applicant." Ark. Response to Ill. Survey, App. 147.

[5] In suggesting Illinois could impose quarterly reporting and mental-health-certification requirements, I do not mean to suggest

allowing "law-abiding, responsible" citizens from every state in the Union to seek a license, this approach would have the added benefit of ensuring timely and accurate information the national databases cannot guarantee.

III.

Illinois's scheme categorically prevents the law-abiding citizens from a vast majority of the country from even applying for the ability to exercise their constitutional right to bear arms in public for self-defense in Illinois. That crosses a constitutional line, and Illinois must do more than show its system "broadly serves the public good." *See Binderup v. Att'y Gen. U.S.*, 836 F.3d 336, 380 (3d Cir. 2016) (en banc) (Hardiman, J., concurring in part and concurring in the judgments). It has not done so. I respectfully dissent.

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those would independently pass constitutional muster. But it is enough for the purposes of *this case* to conclude there are significantly less restrictive means of achieving Illinois's goal apart from an outright ban. *See Moore*, 702 F.3d at 942 ("[W]e need not speculate on the limits that Illinois may in the interest of public safety constitutionally impose on the carrying of guns in public; it is enough that the limits it *has* imposed go too far.").

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

KEVIN W. CULP, MARLOW DAVIS, FREDDIE REED-DAVIS, DOUGLAS W. ZYLSTRA, JOHN S. KOLLER, STEVE STEVENSON, PAUL HESLIN, MARLIN MANGELS, JEANELLE WESTROM, SECOND AMENDMENT FOUNDATION, INC., ILLINOIS CARRY, and ILLINOIS STATE RIFLE ASSOCIATION,	)	
Plaintiffs,	)	**No. 14-CV-3320**
v.	)	
LISA MADIGAN, in her Official Capacity as Attorney General of the State of Illinois; LEO P. SCHMITZ, in his Official Capacity as Director of the Illinois State Police, and JESSICA TRAME, as Bureau Chief of the Illinois State Police Firearms Services Bureau,	)	
Defendants.	)	

OPINION

(Filed Sep. 18, 2017)

SUE E. MYERSCOUGH, U.S. District Judge.

This cause is before the Court on the Motion for Summary Judgment (d/e 45) filed by Plaintiffs Kevin W. Culp, Marlow Davis, Freddie Reed-Davis, Douglas W. Zylstra, John S. Koller, Steve Stevenson, Paul Heslin, Marlin Mangels, Jeanelle Westrom, Second Amendment Foundation, Inc., Illinois Carry, and Illinois State Rifle Association and the Motion for Summary Judgment (d/e 43) filed by Defendants Lisa Madigan, in her official capacity as Attorney General of the State of Illinois; Leo P. Schmitz, in his official capacity as Director of the Illinois State Police; and Jessica Trame, as Bureau Chief of the Illinois State Police, Firearms Services Bureau. On August 22, 2017, the Court held a hearing on the motions.

The Court finds that the result in this case is largely dictated by the Seventh Circuit's decision on appeal of this Court's denial of a preliminary injunction. Applying the level of scrutiny applied by the Seventh Circuit on appeal, the Court finds that the challenged law is substantially related to Illinois' important public-safety interest. Therefore, Defendants' Motion for Summary Judgment (d/e 43) is GRANTED, and Plaintiffs' Motion for Summary Judgment (d/e 45) is DENIED.

I. BACKGROUND

Plaintiffs include individuals who are residents of Wisconsin, Colorado, Missouri, Iowa, Pennsylvania, and Indiana[1] who would apply for a concealed carry permit if able and who would carry firearms in Illinois but fear prosecution. The individual Plaintiffs, all of whom hold concealed carry licenses in their home states, work in or visit Illinois. Plaintiffs also include three organizations, Second Amended Foundation, Inc., Illinois Carry, and Illinois State Rifle Association, who assert that they have many non-Illinois resident members who work in, travel to, and spend significant amounts of time in Illinois and would apply for concealed carry permits if able. This Court previously found that Plaintiffs had standing to bring this lawsuit. Culp v. Madigan, No. 14-CV-3320, 2015 WL 13037427, at *11 (C.D. Ill. Dec. 7, 2015) (Culp I).

Plaintiffs allege that Section 40 of the Illinois Firearm Concealed Carry Act (Concealed Carry Act) (430 ILCS 66/40) and all other statutory language that restricts otherwise-qualified nonresidents of Illinois of the rights and privileges of carrying concealed firearms based solely on their state of residence violates their Second Amendment rights, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the Privileges and Immunities Clause of Article IV, § 2, and the Due Process Clause of

[1] At oral argument, the parties advised the Court that Plaintiff Culp, who is a legal resident of Pennsylvania and who was stationed in Illinois when the case was filed, is now stationed in Ohio.

the Fourteenth Amendment. Plaintiffs seek a declaratory judgment that Section 40 of the Concealed Carry Act and all other Illinois statutory language that restricts otherwise qualified nonresidents of Illinois of the rights and privileges of carrying concealed firearms based solely on their states of resident is unconstitutional. Plaintiffs also seek a permanent injunction barring enforcement of the challenged laws.

A. Relevant Law Governing the Possession or Carrying of Firearms in Illinois

Two Illinois statutes govern the possession and carrying of firearms in Illinois: the Firearm Owners Identification Card Act (430 ILCS 65/0.01 et seq.,) (FOID Act) which permits qualified individuals to possess firearms, and the Concealed Carry Act (430 ILCS 66/1 et seq.), which permits qualified individuals to carry concealed handguns in public. Nonresident applicants for a concealed carry license must meet all of the requirements for a FOID card except residency.

1. The FOID Act

The FOID Act generally prohibits a person from possessing a firearm in Illinois unless the person has a FOID card. 430 ILCS 65/2(a). Among its many requirements, the FOID Act requires that an applicant be a resident, with certain exceptions. See 430 ILCS 65/4(a-10). In addition, the FOID Act allows nonresidents to possess a firearm in Illinois without a FOID card in certain instances, including where the nonresident is

currently licensed or registered to possess a firearm in his resident state (430 ILCS 65/2(b)(10)); certain nonresident hunters (430 ILCS 65/2(b)(5), (13)); nonresidents while on a firing or shooting range (430 ILCS 65/2(b)(7)); nonresidents while at a firearm showing or display recognized by the Department of State Police (hereinafter referred to as the Illinois State Police or the ISP) (430 ILCS 65/2(8)); and nonresidents whose firearms are unloaded and enclosed in a case (430 ILCS 65/2(9)).

An application for a FOID card may be denied or revoked based on the applicant's criminal or mental health history (among other reasons not relevant to the issues herein). See generally 430 ILCS 65/8; see also 430 ILCS 65/4(a)(2) (requiring that an applicant submit evidence to the ISP that he meets the qualifications for obtaining a FOID card). Grounds for denial include that the applicant has been convicted of a felony (740 ILCS 65/8(c)); has been convicted within the past five years of battery, assault, aggravated assault, violation of an order of protection, or a substantially similar offense in another jurisdiction in which a firearm was used or possessed (430 ILCS 65/8(k)); has been convicted of domestic battery, aggravated domestic battery, or a substantially similar offense in another jurisdiction before, on, or after January 1, 2012 (the effective date of Public Act 97-158, amending Section 8 of the FOID Act) (430 ILCS 65/8(l)); or is prohibited under an Illinois statute or federal law from acquiring or possessing a firearm or ammunition (430 ILCS 65/8(n)). Those prohibited by federal law from possessing a

firearm include those convicted of a crime punishable by imprisonment for a term exceeding one year; persons adjudicated as a mental defective or who have been committed to a mental institution; and persons convicted in any court of a misdemeanor crime of domestic violence. See 18 U.S.C. § 922(g)(1), (g)(4), (g)(9).

In addition, the FOID card application may be denied or the license revoked if the person has been a patient in a mental health facility within the past five years (430 ILCS 65/8(e)); has been a patient in a mental facility more than five years ago and has not received a certification from a qualified examiner that he is not a clear and present danger to himself or others (Id.); has a mental condition of such a nature that it poses a clear and present danger to the applicant or other person or the community (430 ILCS 65/8(f)); or has been adjudicated a mentally disabled person (430 ILCS 65/8(r)).

The FOID Act also contains a reporting mechanism that allows the ISP to monitor the ongoing qualifications of FOID cardholders. See 430 ILCS 65/8.1. For example, under the FOID Act, Illinois circuit court clerks and other law enforcement agencies must notify the ISP of certain criminal arrests, charges, and disposition information. See 430 ILCS 65/8.1(a); see also 20 ILCS 2630/2.1 (requiring the clerk of the circuit court, Illinois Department of Corrections, sheriff of each county, and state's attorney of each county to submit certain criminal arrests, charges, and disposition information to the ISP); 20 ILCS 2630/2.2 (requiring the circuit court clerk to report to the ISP's Firearm Owner's

Identification Card Office convictions for certain violations of the Criminal Code when the defendant has been determined to be subject to the prohibitions of 18 U.S.C. 922(g)(9)).[2] In addition, a court that adjudicates an individual as a mentally disabled person or finds that a person has been involuntarily admitted must direct the circuit court clerk to notify the ISP's FOID department and forward a copy of the court order to the ISP. 430 ILCS 65/8.1(b); see also 430 ILCS 65/8.1(b-1) (requiring that the circuit court clerk notify the ISP FOID department twice a year if the court has not directed the circuit clerk to notify the ISP FOID department under subsection (b) within the preceding six months because no person has been adjudicated a person with a mental disability or if no person has been involuntarily admitted).

The FOID Act further requires that the Department of Human Services (DHS) report to the ISP all information collected under subsection (b) of Section 12 of the Mental Health and Developmental Disabilities Confidentiality Act "for the purpose of determining whether a person who may be or may have been a patient in a mental health facility is disqualified under State or federal law from receiving or retaining a Firearm Owner's Identification Card, or purchasing a weapon." 430 ILCS 65/8.1(c). Section 12(b) of the Mental Health and Developmental Disabilities Confidentiality Act provides that all physicians, clinical psychologists, and qualified examiners must provide

[2] Providing that a person convicted of a misdemeanor crime of domestic violence cannot possess a firearm. 18 U.S.C. § 922(g)(9).

notice directly to DHS or his or her employer who shall then notify DHS within 24 hours of determining a person poses a clear and present danger to himself, herself, or others, or within 7 days after a person 14 years or older is determined to be a person with a developmental disability as described in Section 1.1 of the FOID Act. 740 ILCS 110/12(b). Notice of an admission of a patient—which includes a person who voluntarily receives mental health treatment as an inpatient or resident or who receives mental health treatment as an outpatient and who poses a clear and present danger to himself, herself, or to others—must be furnished to DHS within seven days of admission. Id.; see also 430 ILCS 65/1.1 (defining "patient").

Similarly, every physician, clinical psychologist, or qualified examiner who determines that a person poses a clear and present danger to himself or others must notify DHS within 24 hours of that determination. 430 ILCS 65/8.1(d)(1). Further, a law enforcement official or school administrator who determines a person poses a clear and present danger to himself or others must notify the ISP within 24 hours of that determination. 430 ILCS 65/8.1(d)(2).

2. The Concealed Carry Act

Illinois also provides a mechanism for individuals to carry a concealed firearm in Illinois by way of the Concealed Carry Act. 430 ILCS 66/1 et seq. Illinois is a "shall issue" state, meaning that the ISP must issue a license if the applicant meets the qualifications,

provides the application and documentation required, submits the requisite fee, and does not pose a danger to himself or a threat to public safety as determined by the Carry Licensing Review Board. 430 ILCS 66/10(a). The license is valid for five years and allows the licensee to carry a loaded or unloaded concealed or partially concealed firearm on or about his person and within a vehicle. 430 ILCS 66/10(c).

To qualify for a concealed carry license, the applicant must be at least 21 years of age; have a valid FOID card and, at the time of the application, meet the requirements for the issuance of a FOID card; have not been in residential or court-ordered treatment for alcoholism, alcohol detoxification, or drug treatment within five years immediately preceding the date of the application; and have completed firearms training. 430 ILCS 66/25(1), (2), (5), (6). In addition, the Concealed Carry Act imposes additional requirements relating to the applicant's criminal history. The applicant must not have been convicted or found guilty in any state of (A) a misdemeanor involving the use or threat of physical force or violence to any person within five years preceding the date of the application or (B) two or more violations relating to driving while under the influence of drugs or alcohol within five years preceding the date of the application. 430 ILCS 66/25(3). Moreover, the applicant must not be the subject of a pending arrest, warrant, prosecution, or proceeding for an offense or action that could lead to disqualification to own or possess a firearm. 430 ILCS 66/25(4).

The Concealed Carry Act requires that the ISP conduct a background check of the applicants for concealed carry licenses. 430 ILCS 66/35. The background check must consist of a search of the following: the Federal Bureau of Investigation's National Instant Criminal Background Check System (NICS)[3]; all available state and local criminal history record information files, including records of juvenile adjudications; all available federal, state, and local records regarding wanted persons, domestic violence restraining orders, and protective orders; DHS files relating to mental health and developmental disabilities; and all other available records of any federal, state, local agency, or other public entity likely to contain information relevant to whether the applicant is prohibited from purchasing, possessing, or carrying a firearm. 430 ILCS 66/35. The ISP may charge applicants for conducting the criminal history records check but that fee shall not exceed the actual cost of the records check. Id.

The specific statutory provision Plaintiffs challenge here, Section 40 of the Concealed Carry Act, governs nonresident concealed carry license applications. Specifically, this section of the Concealed Carry Act directs the ISP to, by rule, allow for nonresident license applications from any state or territory of the United

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[3] According to the FBI website, NICS is a "national system that checks available records on persons who may be disqualified from receiving firearms." https://www.fbi.gov/services/cjis/nics/about-nics. "The NCIS is a computerized background check system designed to respond instantly on most background check inquiries so the [Federal Firearms Licensees] receive an almost immediate response." Id.

States with laws related to firearm ownership, possession, and carrying "that are substantially similar to the requirements to obtain a license under" the Concealed Carry Act. 430 ILCS 66/40(b). The ISP currently deems a state's law substantially similar when:

> [t]he comparable state regulates who may carry firearms, concealed or otherwise, in public; prohibits all who have involuntary mental health admissions, and those with voluntary admissions within the past 5 years, from carrying firearms, concealed or otherwise, in public; reports denied persons to NICS; and participates in reporting persons authorized to carry firearms, concealed or otherwise, in public through NLETs [sic] [(the National Law Enforcement Telecommunications System)[4]].

20 Ill. Admin. Code § 1231.10. The four states currently deemed to have substantially similarly laws are Arkansas, Mississippi, Texas, and Virginia. See https://www.ispfsb.com/Public/Faq.aspx (all websites last visited September 15, 2017).

Only a nonresident applicant from a state with substantially similar laws may apply for a nonresident concealed carry license. 430 ILCS 66/40(c). The nonresident must meet all of the requirements contained in

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[4] NLETS "is the premiere interstate justice and public safety network in the nation for the exchange of law enforcement-, criminal justice-, and public safety-related information." http://nlets.org/about/who-we-are. The ISP uses NLETS to determine if a nonresident's state-issued concealed carry license is valid. Trame Aff. ¶ 13 (d/e 44-1).

section 25 of the Concealed Carry Act, except for the Illinois residency requirement. 430 ILCS 66/40(c). The nonresident must submit the application and documents required under Section 30 of the Concealed Carry Act and the applicable fee. 430 ILCS 66/40(c)(1). The fee for a new license or renewal is $150 for an Illinois resident and $300 for a nonresident. 430 ILCS 66/60(b), (c).

Nonresidents are also required to meet additional requirements. 430 ILCS 66/40. A nonresident applicant must submit a notarized document affirming that he is eligible to own or possess a firearm under federal law and the laws of his state or territory of residence; that, if applicable, he has a license or permit to carry a firearm, concealed or otherwise, issued by his state; that he understands Illinois law pertaining to the possession and transport of firearms; and acknowledges that he is subject to the jurisdiction of the ISP and Illinois courts for any violation of the Concealed Carry Act. 430 ILCS 66/40(c)(2); see also 430 ILCS 66/40(c)(3), (4) (requiring the applicant to submit a photocopy of any evidence of compliance with the training requirements and a head and shoulder color photograph). In lieu of an Illinois driver's license or Illinois identification card, the nonresident applicant must provide similar documentation from his state or territory of residence. 430 ILCS 66/40(d). In lieu of a valid FOID card, the nonresident applicant must submit the documentation and information required to obtain a FOID card, including an affidavit that the nonresident meets the mental health standards to obtain a firearm under

Illinois law. 430 ILCS 66/40(d) (also requiring that the ISP ensure the applicant would meet the eligibility criteria to obtain a FOID card if he were an Illinois resident).

The Concealed Carry Act specifically provides that nothing in the Act prohibits a nonresident who does not have an Illinois concealed carry license from transporting a concealed firearm in his or her vehicle if the concealed firearm remains in the vehicle and the nonresident is not prohibited from owning a firearm under federal law and is eligible to carry a firearm in public under the laws of his state of residence. 430 ILCS 66/40(e). If the vehicle is unattended, however, the firearm must be stored within a locked vehicle or a locked container. Id.

The Concealed Carry Act imposes an additional reporting obligation on schools. Section 105 requires that school administrators report to the ISP when a student of a public or private elementary school, secondary school, community college, college, or university is determined to pose a clear and present danger to himself or others within 24 hours of such determination. 430 ILCS 66/105.

3. The ISP Sends Surveys to Other States and the District of Columbia

Pursuant to 20 Ill. Admin. Code § 1231.110(c), the ISP sent Surveys to determine if other states had "substantially similar" firearms laws. Trame Aff. ¶¶ 26-30 (d/e 44-1). Specifically, in 2013, the ISP sent Surveys to

each of the 49 other states and the District of Columbia requesting information regarding their regulation of firearms use and reporting and tracking mechanisms relative to criminal activity and mental health issues. Id. ¶ 26. In 2014, the ISP sent a second Survey to those states which did not respond to the first Survey. Id. The following states did not respond to the ISP's 2013 or 2014 requests for information: Colorado, Maine, Maryland, Massachusetts, Nevada, Pennsylvania, and Rhode Island. Id. ¶ 27. Of those states responding to the 2013 Survey, only Hawaii, New Mexico, South Carolina, and Virginia were found to have laws similar to Illinois' laws by regulating who may carry firearms in public, reporting persons authorized to carry firearms though NLETS, reporting denied persons through NICS, prohibiting persons voluntarily admitted to a mental health facility within the last five years from possessing or using firearms, and prohibiting persons involuntarily admitted to mental health facilities from possessing or using firearms. Id. ¶ 28.

In 2015, the ISP again sent Surveys to each of the 49 other states and to the District of Columbia requesting information regarding their regulation of firearm use and reporting and tracking mechanisms relative to criminal activity and mental health issues. Trame Aff. ¶ 29. ISP Firearms Services Bureau staff telephoned the states which did not respond to the 2015 Survey to follow up on the status of the states' responses. Id. Colorado and Maryland never responded to the 2015 Survey. Id. ¶ 30.

The 2015 Survey asked:

1. Does your state issue a Concealed Carry License?

    a. If YES, for what length of time is the license issued?

    b. At what age can an individual apply for a Concealed Carry License?

2. Is a National Instant Criminal Background Check System (NICS) background check completed at the time of issuance of a Concealed Carry License?

    a. Is a secondary/repeated background check conducted after the initial application approval process during the lifetime of the license/permit?

3. Does your state report Concealed Carry Licenses via the National Law Enforcement Teletype System (NLETS)?

4. Does your state prohibit the use or possession of firearms based on adjudication as a mentally defective person or committed [sic] to a mental institutional (18 U.S.C. 922(g)(4))?

5. Does your state report adjudicated mentally defective/committed persons to the NICS Index?

    a. If YES, please describe your state's collection/reporting process in accordance with 18 USC 922(g)(4).

b. If YES, is there a mechanism within the state to check for the federal mental health prohibitor during the lifetime of the license/permit?

6. Does your state prohibit the use or possession of firearms based on a voluntary mental health admission within the last five years?

a. If YES, are mental health admissions reported to your agency by any entity other than the applicant?

If YES, to 6.a., please describe.

b. If YES, does the applicant provide information concerning their mental health status at the time of application?

c. If YES, is there any check or validation of the information provided by the applicant?

If YES to 6.c., please describe.

d. If YES, please provide your state statute reference.

e. If NO, does your state have any process for prohibiting the use or possession of firearms based on a voluntary mental health admission to a treatment facility?

If YES to 6.e., please describe.

7. If you answered NO to any of the questions 4-6, does your state have any other procedures for the consideration of mental health and the use or possession of firearms?

a. If YES, please describe.

8. If you answered NO to any of the questions 4-6, is there pending state legislation that addresses the concern of mental health treatment and the possession of firearms?

a. If YES, what is the effective date?

b. If YES, please provide a copy of the legislative language.

See 2015 Survey (d/e 44-2). The ISP found that only four states had laws that were substantially similar to Illinois' laws: Arkansas, Mississippi, Texas, and Virginia. See https://www.ispfsb.com/Public/Faq.aspx.

B. The Court Denied Plaintiffs' Motion for Preliminary Injunction, and the Seventh Circuit Affirmed

On August 7, 2015, after the close of fact discovery, Plaintiffs filed a Motion for Preliminary Injunction (d/e 17). The Court held a hearing on the Motion and, on December 4, 2015, denied the Motion. Culp I, 2015 WL 13037427. The Court applied intermediate scrutiny and found that Plaintiffs demonstrated "at least a better-than-negligible likelihood of success on the merits." Id. at *16; see also id. at *17 (finding the likelihood of success "neither strong nor weak"). The Court also found that Plaintiffs could show irreparable harm and no adequate remedy at law. Id. at *16. The Court denied the Motion, however, because the balance of harms and the public interest weighed in favor of denying the preliminary injunction. Id. at *17-18.

On October 20, 2016, the Seventh Circuit affirmed the denial of Plaintiffs' Motion for Preliminary Injunction, with Judge Daniel A. Manion dissenting. Culp v. Madigan, 840 F.3d 400 (7th Cir. 2016) (Culp II). The majority noted that Plaintiffs' claim to be allowed to carry concealed firearms when visiting Illinois "would be compelling if the Illinois authorities could reliably determine whether in fact a nonresident applicant for an Illinois concealed-carry license had all of the qualifications that Illinois, or states that have concealed carry laws substantially similar to Illinois, require to be met." Id. at 402. However, while Illinois state police have access to information about Illinois residents, such information is not reliably accessible regarding nonresident applicants, except in the four substantially similar states. Id. (also noting Jessica Trame's "uncontradicted affidavit" regarding the sources the Illinois Firearms Services Bureau relies on in determining eligibility). The majority noted that, while Illinois can request information from local jurisdictions in other states, those jurisdictions charge a fee, and the Bureau lacks the funds to pay the charges. Id. at 403. The Bureau has also encountered significant difficulties in its efforts to obtain mental health information about residents of other states, as many states do not track such information. Id.

The majority also noted Illinois' need for reliable information to monitor the holders of gun permits. Culp II, 840 F.3d at 403. Illinois checks its own databases daily and national databases quarterly for updates that might require a license to be revoked but

cannot obtain such updates from states that do not track or report that information. Id.

The majority recognized that Plaintiffs made "some apt criticism of the Illinois law." Id. For example, an Illinois resident can travel to another state and Illinois authorities will not know if he committed a crime or suffered a mental breakdown while in that other state if it is not one of the four states with substantially similar firearm laws. Id. In addition, anyone who lives in Illinois or one of the four substantially similar states can obtain an Illinois concealed carry license even if he became a resident of that state recently after years of living in a dissimilar state—and Illinois would be unable to obtain information about possible criminal or mental problems in that dissimilar state. Id.

Although the majority concluded the law was imperfect, the majority found it could not say the law was "unreasonable, so imperfect as to justify the issuance of a preliminary injunction." Culp II, 840 F.3d at 403. The majority stated:

> The critical problem presented by the plaintiffs' demand—for which they offer no solution—is verification. A nonresident's application for an Illinois concealed-carry license cannot be taken at face value. The assertions in it must be verified. And Illinois needs to receive reliable updates in order to confirm that license-holders remain qualified during the five-year term of the license. Yet its ability to verify is extremely limited unless the nonresident lives

> in one of the four states that have concealed-carry laws similar to Illinois' law. A trial in this case may cast the facts in a different light, but the plaintiffs have not made a case for a preliminary injunction.

Id.

The dissenting judge disagreed with what he called the rational-basis review applied by the majority. Id. at 404 (Manion, J., dissenting). The dissenting judge concluded that "the nonresident application ban functions as a categorical prohibition of applications from the majority of Americans" and constituted a severe burden on Second Amendment rights. Id. at 407. Accordingly, the dissenting judge applied a level of scrutiny greater than intermediate scrutiny but not quite strict scrutiny and held that Defendants had to show a close fit between the law and a strong public interest. Id. Applying that level of scrutiny, the dissenting judge stated that Illinois' chosen method of regulating "nonresident concealed-carry license applications is not sufficiently tailored to its goal of properly vetting out-of-state applicants' criminal and mental histories." Id. at 404. The dissenting judge also noted the over-inclusive and under-inclusive sweep of the statute, which undercut Illinois' justification for maintaining the nonresident application ban. Id. at 408-09. The dissenting judge further found that Illinois had not shown that it would be impossible or impracticable for out-of-state residents to provide verified records that would satisfy Illinois' requirements. Id. at 409. Nonresidents could pay for criminal searches and

provide relevant records to Illinois. Id. Nonresident applicants could also obtain certification that they satisfy Illinois's mental health requirements. Id. "Potential applicants should at least be given that chance." Id.

C. The Parties Filed Cross Motions for Summary Judgment

In January 2017, the parties filed cross motions for summary judgment. On August 22, 2017, the Court held oral argument on the motions.

Defendants support their Motion for Summary Judgment with the affidavit of Jessica Trame, the Bureau Chief of the ISP Firearms Services Bureau. Trame is responsible for administering the FOID Program, the Firearms Transfer Inquiry Program, and the Concealed Carry Licensing Program and is familiar with the protocols and procedures of each program. Trame Aff. ¶ 2 (d/e 44-1). Trame explains the difficulty of verifying nonresident applicants' identities, criminal history, mental health information, and obtaining updated nonresident information necessary to revoke a concealed carry license. The affidavit submitted in support of summary judgment is substantially the same as the affidavit submitted at the preliminary injunction stage but includes additional information regarding the 2015 Survey. See id.; see also Trame Supp. Aff. (d/e 52-1) (explaining that the ISP recently reviewed the 2015 Survey data and determined that Arkansas, Mississippi, Texas, and Virginia have substantially similar laws).

According to Trame, the Firearms Services Bureau performs a background check on each applicant for a concealed carry license. Trame Aff. ¶ 4. This background check process is intended to ensure public safety by identifying persons who are unqualified to carry firearms. Id. ¶ 8.

The background check includes queries of the national systems such as the National Crime Information Center (NCIC),[5] NICS, the Interstate Identification Index,[6] Immigration and Customs Enforcement, and NLETS. The Bureau also checks the Illinois systems, including the Criminal History Record Information system, driver's license or identification systems maintained by the Secretary of State, and the Computerized Hot Files system, which is "a central online repository for numerous officer and public safety information repositories" that is maintained by the ISP. Trame Aff. ¶ 6.

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[5] This is the mechanism criminal justice agencies use to access over 13 million active records. The NCIC database consists of 21 files, including 14 "persons" files such as the National Sex Offender Registry, Foreign Fugitives, Immigration Violations, Orders of Protection, and Wanted Persons. See Trame Aff. ¶ 13. "The NCIC has operated under a shared management concept between the FBI and federal, state, local, and tribal criminal justice users since its inception." See https://www.fbi.gov/services/cjis/ncic

[6] The Interstate Identification Index is the national criminal history record system. See Trame Aff. ¶ 13. As of March 31, 2016, 30 states and the District of Columbia participate only in the Interstate Identification Index while 20 states participate in Interstate Identification Index and the National Fingerprint File. https://www.fbi.gov/services/cjis/compact-council/interstate-identification-index-iii-national-fingerprint-file-nff

For Illinois residents, the Firearm Services Bureau is able to locate criminal history through Illinois' Criminal History Record Inquiry, a system maintained by ISP; the Computerized Hot Files; and from federal systems. Id. ¶ 11. Because the Bureau does not have direct access to other states' local or state criminal history databases, the Bureau relies on federal databases to obtain out-of-state criminal history information. Id. ¶ 12. Trame indicates, however, that many states provide the federal databases with only a summary of an arrest. This information is often inadequate to assess an applicant's eligibility for a concealed carry license. Id. Although the ISP may request a criminal record if the federal database is incomplete, many jurisdictions charge for records, and the ISP does not have funds appropriated to pay for any records. Id.

The ISP uses NLETS to determine whether a nonresident applicant's state-issued concealed carry license is valid and to check the continued validity of the home-state issued concealed carry license. Trame Aff. ¶ 13. The ISP is unable to obtain accurate and updated information via NLETS and NCIC for residents from states which do not fully participate in those systems. Id. ¶ 14.

In addition, information from the Interstate Identification Index may be limited because states are not uniform in their reporting of different levels and types of offenses. Id. ¶ 15. Only the National Fingerprint File (NFF) provides detailed extracts directly from states' local databases. Id. However, as of December 2016, only 20 states participate in the NFF: Colorado, Florida,

Georgia, Hawaii, Idaho, Iowa, Kansas, Maryland, Minnesota, Missouri, Montana, North Carolina, New Jersey, New York, Ohio, Oklahoma, Oregon, Tennessee, West Virginia, and Wyoming. Id.

Through the Illinois Department of Human Services FOID Mental Health System, the Firearm Services Bureau can access information on Illinois mental health facility admissions and determine whether an individual has been involuntarily admitted into a mental health facility in Illinois or been a patient in a mental health facility in Illinois within the past five years or more. Trame Aff. ¶ 17. This System does not, however, contain records on out-of-state mental health facility admissions. Id. ¶ 18. In addition, the ISP does not have access to other states' mental health facility admission databases, to the extent the other states may have them. Id.

Trame states that, in her experience, federal databases contain only limited information regarding involuntary mental health admissions or mental disability adjudications and do not contain voluntary mental health admission information. Trame Aff. ¶ 19. To search for mental health information regarding nonresidents, the ISP is limited to information available through the NICS Index, which contains some information regarding individuals prohibited from firearm possession for mental health reasons under 18 U.S.C. § 922(g)(4) (making it unlawful for any persons who has been adjudicated as a mental defective or who has been committed to a mental institution from possessing a firearm). Id. ¶ 20. Moreover, not all states

participate in the NICS Index. Id. ¶ 20. NICS does not provide any information on voluntary mental health admissions. Id.

On a daily basis, all resident concealed carry license holders are checked against the Illinois Criminal History Record Inquiry and DHS Mental Health Systems (by virtue of their FOID card) for any new conditions that would disqualify them from holding a FOID card or a concealed carry license. Trame Aff. ¶ 21. All concealed carry license holders, both resident and nonresident, are checked against the federal databases on a quarterly basis. Id.

Trame explains in her affidavit why it is difficult for the Firearm Services Bureau to obtain updated nonresident information relevant to revoking a concealed carry license. Trame states that, while Illinois physicians, law enforcement officials, and school administrators are required to report persons that may be a clear and present danger to themselves or others, the ISP does not receive reports from out-of-state physicians, law enforcement officials, or school administrators concerning out-of-state persons presenting a clear and present danger. Id. ¶ 22. Moreover, daily checks of the DHS Mental Health Systems would not reveal information concerning persons in other states. Id.

In addition, Illinois circuit clerks must report to ISP persons who have been adjudicated as mentally disabled or those involuntary admitted to a mental health facility. Trame Aff. ¶ 23. Trame is not aware of any other state that is required to, or does, report such

cases to ISP. Id. Similarly, DHS must report to ISP information collected pertaining to voluntary and involuntary mental health treatment admissions, as well as patients with intellectual or development disabilities or those who have been deemed to be a clear and present danger. Id. ¶ 24.

The ISP can request information from out-of-state mental health entities, but many of the out-of-state mental health entities do not provide mental health information even after an ISP request. Id. ¶ 24. According to Trame, the ISP's lack of access to this type of data held by other states would make it virtually impossible to effectively conduct the level of screening and monitoring on nonresident concealed carry license applications that is performed on resident applicants. Id. ¶ 25.

II. LEGAL STANDARD

Summary judgment is proper if the movant shows that no genuine dispute exists as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The movant bears the initial responsibility of informing the court of the basis for the motion and identifying the evidence the movant believes demonstrates the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). No genuine issue of material fact exists if a reasonable factfinder could not find in favor of the nonmoving party. Brewer v. Bd. of Trs. of the Univ. of Ill., 479 F.3d 908, 915 (7th Cir. 2007). When ruling on a

motion for summary judgment, the court must consider the facts in the light most favorable to the nonmoving party, drawing all reasonable inferences in the nonmoving party's favor. Blasius v. Angel Auto., Inc., 839 F.3d 639, 644 (7th Cir. 2016).

III. PLAINTIFFS' REQUEST FOR DISCOVERY

As an initial matter, the Court notes that Plaintiffs assert, in their response to Defendants' Motion for Summary Judgment, that they should have been allowed a brief period to disclose expert witnesses and conduct limited discovery. Pls. Resp. at 7 (d/e 56). Plaintiffs claim that the "entire pendency of this case involved a preliminary injunction Motion and the appeal thereof." Id. Plaintiffs also state that they incorrectly believed that when the appeal was concluded in favor of Defendants there would be a period of time for discovery before dispositive motions were due. Plaintiffs argue that, at a minimum, Defendants' motion should be denied and any factual disputes fleshed out through an abbreviated discovery process.

Plaintiffs' contention that the entire pendency of this case involved a preliminary injunction and an appeal is incorrect. The record reflects that Plaintiffs had the opportunity to conduct discovery and failed to do so.

Plaintiffs filed suit in October 2014. In March 2015, United States Magistrate Judge Tom Schanzle-Haskins entered a Scheduling Order (d/e 16). The Scheduling Order provided the following deadlines: (1) Plaintiffs

shall identify testifying experts and provide Rule 26 expert reports by July 24, 2015; (2) Defendants shall identify testifying experts and provide Rule 26 expert reports by September 22, 2015; (3) the parties shall complete fact discovery by June 24, 2015; (4) the parties shall complete expert discovery by October 22, 2015; and (5) the parties shall file dispositive motions by November 23, 2015. Id.

On August 7, 2015, after the close of fact discovery, Plaintiffs filed the Motion for Preliminary Injunction (d/e 17). On October 16, 2015, the Court held a hearing on the Motion. On November 23, 2015, Defendants filed a Motion for Summary Judgment (d/e 27).

On December 4, 2015, the Court issued a decision denying Plaintiffs' Motion for Preliminary Injunction (d/e 29). Plaintiffs appealed, and the Seventh Circuit affirmed. Culp II, 840 F.3d 400.

On November 16, 2016, following the issuance of the mandate, this Court entered a text order setting the dispositive motion deadline for December 28, 2016 and setting trial and pretrial dates. On December 23, 2016, Plaintiffs filed a motion (d/e 38) seeking an extension of time to complete discovery and to file motions for summary judgment. Plaintiffs indicated that they wanted the opportunity to disclose an expert witness and allow Defendants the opportunity to depose that witness. Plaintiffs also wanted the opportunity to depose Defendant's main witness, Jessica Trame, and obtain any updated records from Defendants regarding the issues in the case.

On January 3, 2017, Judge Schanzle-Haskins denied Plaintiffs' request to reopen discovery. Opinion and Order (d/e 42). Judge Schanzle-Haskins found that Plaintiff had the opportunity to conduct discovery in this case prior to the discovery deadline but did not do so. Id. at 9. For example, Defendants served Plaintiffs with interrogatories, which asked Plaintiffs to identify any persons who would offer opinion testimony in the case. Id. at 8. Plaintiffs never responded or objected to the interrogatories. Id. In addition, Defendants disclosed Jessica Trame in their initial Rule 26 disclosures. Id. Plaintiffs could have deposed Trame anytime between April 16, 2015 and the close of expert discovery on October 22, 2015. Id. at 9. Plaintiffs apparently made no attempt to take Trame's deposition. Id. Judge Schanzle-Haskins extended the dispositive motion deadline to January 13, 2017. Plaintiffs did not object to this Order. See Fed. R. Civ. P. 72(a) (providing that a party may object to a magistrate judge's ruling on a nondispositive matter within 14 days after being served with the order and that the party "may not assign as error a defect in the order not timely objected to").

This Court could consider the issue sua sponte and allow discovery if the Court finds Judge Schanzle-Haskins' Order clearly erroneous or contrary to law. See Fed. R. Civ. P. 72(a); Schur v. L.A. Weight Loss Ctrs., Inc., 577 F.3d 752, 760-61 (7th Cir. 2009) (noting that the district judge is not precluded from reviewing a magistrate judge's order even when a party does not object). The Court finds that the Order was neither

clearly erroneous nor contrary to law and, therefore, will not reopen discovery. The Court now turns to the merits of the motions for summary judgment.

IV. ANALYSIS

Plaintiffs seek a permanent injunction barring enforcement of Section 40 of the Concealed Carry Act and all other Illinois statutory language that restrict otherwise-qualified nonresidents of Illinois from carrying concealed firearms based solely on their states of residence. To obtain a permanent injunction, Plaintiffs must prevail on the merits and demonstrate: (1) irreparable injury; (2) inadequate remedy at law; (3) that the balance of hardships favors a remedy in equity; and (4) that the public interest would not be disserved by a permanent injunction. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006); Sierra Club v. Franklin Cnty. Power of Ill., LLC, 546 F.3d 918, 935 (7th Cir. 2008).

Plaintiffs move for summary judgment, asserting that Illinois' licensing mechanism is discriminatory and unconstitutionally burdens the exercise of Plaintiffs' constitutional rights.

Defendants move for summary judgment asserting that the challenged regulations are reasonably related to Illinois' important and substantial interest in protecting the public by ensuring initial and continued eligibility for concealed carry licenses and Illinois' related interest in obtaining information necessary to make those determinations.

A. Defendants are Entitled to Summary Judgment on Plaintiffs' Second Amendment Claim

The Second Amendment of the United States Constitution provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend. II. In District of Columbia v. Heller, the United States Supreme Court held that there is a guaranteed "individual right to possess and carry weapons in case of confrontation" based on the Second Amendment. Heller, 554 U.S. 570, 592 (2008) (also holding that the Second Amended "codified a pre-existing right") (emphasis in original). Consequently, the Court found that the District of Columbia's ban on handgun possession in the home violated the Second Amendment. Id. at 635.

Nonetheless, the Court recognized that the right was not unlimited, and that:

> nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications in the commercial sale of arms.

Id. at 627 (also recognizing that limits on the carrying of dangerous and unusual weapons may be imposed);

see also McDonald v. City of Chi., 561 U.S. 742, 750 (2010) (finding the Second Amendment fully applicable to the states through the Due Process Clause of the Fourteenth Amendment).

A two-step framework applies when resolving Second Amendment cases. The Court first determines whether the regulated activity falls within the scope of the Second Amendment, and, if so, examines the "strength of the government's justification for restricting or regulating the exercise of Second Amendment rights." Ezell v. City of Chi., 651 F.3d 684, 703 (7th Cir. 2011) (Ezell I).

Here, Defendants agree that the regulated conduct falls within the scope of the Second Amendment. Defs. Mot. at 11 (d/e 44); see also Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012) ("The Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside."); Southerland v. Escapa, 176 F. Supp. 3d 786, 790 (C.D. Ill. 2016) (Myerscough, J.) (finding that the acts criminalized by the Illinois statute, "the ability to openly carry any firearm, as well as the ability to carry a concealed firearm aside from pistols, revolvers, and handguns, is clearly within the scope of the Second Amendment"). Therefore, the issue here is the strength of Defendants' justification for restricting or regulating the exercise of Second Amendment rights. See Ezell v. City of Chi., 846 F.3d 888, 892 (7th Cir. 2017) (Ezell II) (noting that the government bears the burden of justifying the law under a heightened standard of scrutiny).

Under the second step of the framework, the Court must examine the "regulatory means the government has chosen and the public-benefits end it seeks to achieve." Ezell I, 651 F.3d at 703. The rigor of this review depends on "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right." Id.; see also Ill. Ass'n of Firearms Retailers v. City of Chi., 961 F. Supp. 2d 928, 935 (N.D. Ill. 2014) ("[T]he level of scrutiny applied varies according to the breadth of the challenged Second Amendment restriction").

Broad prohibitory laws restricting core Second Amendment rights are likely categorically unconstitutional. Ezell I, 651 F.3d at 703 (citing Heller and McDonald, which involved regulations that prohibited handgun possession in the home). For other laws, however, the appropriate standard of review is somewhere between intermediate and strict scrutiny. As Heller made clear, a rational-basis review is inappropriate in the Second Amendment context. Heller, 554 U.S. at 628 n.27 (holding that "if all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect"); Ezell II, 846 F.3d at 892 (rational-basis review does not apply to laws restricting Second Amendment rights).

When a court applies a standard closer to intermediate scrutiny, the law must be substantially related to an important government interest. See Horsley v. Trame, 808 F.3d 1126, 1132 (7th Cir. 2015) (finding the

law "substantially related to the achievement of the state's interests"); United States v. Shields, 789 F.3d 733, 750 (7th Cir. 2015) (concluding that "keeping firearms out of the hands of violent felons is an important objective and, because the defendant was a violent felon, applying § 922(g)(1) to the defendant was substantially related to that objective"). When a court applies a stronger form of intermediate scrutiny—one closer to strict scrutiny—the government must demonstrate a strong public-interest justification for the law and a close fit between the law and the public interests the law serves. Ezell I, 651 F.3d at 708-09; Culp II, 840 F.3d at 407 (noting that when a law "curtails the fundamental right of law-abiding citizens to carry a weapon for self-defense," the government must show a close fit between the law and a strong public interest) (Manion, J., dissenting).

In deciding the appropriate level of scrutiny here, this Court has the benefit of the Seventh Circuit's decision on appeal of the denial of a preliminary injunction. Although the Court finds the dissent in Culp II to be a well-reasoned analysis, this Court is bound by the holding of the majority, which appears[7] to find that

[7] This Court says "appears" because the dissent accuses the majority of applying a rational-basis review based on the majority holding that the "application ban" was not unreasonable. Culp II, 840 F.3d at 404. However, precedent clearly establishes that a rational-basis review is never applied in the Second Amendment context. In addition, several courts have used the term "reasonable" when applying intermediate scrutiny. See Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, 700 F.3d 185, 207 (5th Cir. 2012) (applying intermediate scrutiny to regulations prohibiting firearms dealers from selling

intermediate scrutiny—and not the near-strict scrutiny applied by the dissent—applies. Culp II, 840 F.3d at 403; Sierra Club v. Khanjee Holding (US) Inc., 655 F.3d 699, 704 (7th Cir. 2011) ("Matters decided on appeal become the law of a case to be followed on a second appeal, unless there is plain error of law in the original decision."). Applying that level of scrutiny, the Seventh Circuit found, based on the evidence presented at that point, including the uncontroverted affidavit of Trame, that the law was not unreasonable or so imperfect as to justify the issuance of a preliminary injunction. Culp II, 840 F.3d at 403. The majority noted, however, that a trial in the case may cast the facts in a different light. Id.

On summary judgment, Plaintiffs attempt to controvert Trame's affidavit and cast the facts in a different light. Plaintiffs argue that the issues raised by Trame in her Affidavit are outside the scope of the Concealed Carry Act. While this argument is not entirely clear, Plaintiffs seem to be arguing that, under the statutes, Illinois does not play any role in verifying compliance or qualifications of applicants but is limited to checking the available database and records. See Pls. Mem. at 11 (d/e 46) (stating that the applicant is responsible for ensuring eligibility); at 13 ("Defendants cannot deny an application if they either choose

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handguns to persons under age 21 and examining whether the law was "reasonably adapted to an important government interest"); Ezell I, 651 F.3d at 708 (noting that, in commercial-speech cases, intermediate scrutiny requires a reasonable fit between the legislature's ends and the means chosen to accomplish those ends).

to use an imperfect database, or if they get a less than perfect response from their inquiries."); at 13 (the statutes do allow for out-of-state law enforcement objections); at 15 ("The actual reading of the law does not require 'verification' but instead requires the check be made of the six listed categories."); at 15-17 (appearing to suggest that the ISP cannot verify nonresident mental health information under the statutes because nonresidents only have the burden of providing additional notarized statements, affidavits, and other listed documents and that the statute does not allow an application to be denied if the ISP has difficulty obtaining a "perfect investigation"). According to Plaintiffs, if the available databases and records do not contain information that would bar the applicant, then the State must issue the license.

The Court disagrees that Trame's affidavit is outside the scope of the Act. The Concealed Carry Act provides that the ISP shall ensure that applicants comply with the requirements of the Act as a condition for licensure. See 430 ILCS 66/35 ("The Department shall conduct a background check of the applicant to ensure compliance with the requirements of this Act and all federal, State, and local laws."); see also 430 ILCS 66/40(d) ("[T]he Department shall ensure that the applicant would meet the eligibility criteria to obtain a Firearm Owner's Identification card if he or she was a resident of this State."); 430 ILCS 66/10 (directing the Department to issue licenses if the applicant, among other things, "meets the qualifications of Section 25 of [the] Act."). In addition, as the majority in Culp II

noted, "[a] nonresident's application for an Illinois concealed-carry license cannot be taken at face value. The assertions in it must be verified." Culp II, 840 F.3d at 403. Finally, to the extent Plaintiffs argue that the legislature did not grant the ISP authority to deny licenses for lack of information, the legislature has expressly directed the ISP to accept applications only from Illinois residents or nonresidents from states having substantially similar firearm laws. See 430 ILCS 66/40(c). An applicant from a state with dissimilar laws is not denied because of a lack of information about the applicant but because the applicant is not from a qualifying state. Therefore, the Court finds that Trame's Affidavit is relevant evidence.

Plaintiffs also assert that Illinois' laws governing nonresidents are arbitrary, pointing to what Plaintiffs contend are discrepancies regarding the Surveys Illinois conducted of other states. Some of the discrepancies Plaintiffs cite appear to have been caused by the fact that Illinois sent out a Survey in 2015 but did not determine which states had substantially similar laws until after Plaintiffs filed their Motion for Summary Judgment in January 2017.

For example, Plaintiffs argue that, as of January 2017, Illinois recognized South Carolina as having substantially similar laws even though South Carolina answered "no" to questions about voluntary mental health admissions and the question whether South Carolina reported concealed carry licenses via NLETS. Pls. Mem. at 36 (d/e 46) (citing 2015 Survey Response). However, South Carolina was deemed to have

substantially similar laws after receipt of the 2013 Survey, in which South Carolina responded "yes" to all of the questions. After Illinois received the 2015 Survey responses—to which South Carolina responded that it did not report concealed carry license via NLETS and did not prohibit use or possession of firearms based on a voluntary mental health admission within the last five years—Illinois determined that South Carolina no longer had substantially similar laws. Compare 2013 Survey (completed in March 2014) (d/e 44-1 at 50 of 87) with 2015 Survey (d/e 44-2 at 142-43 of 166).

Plaintiffs also argue that New Mexico answered the 2013 and 2015 Surveys the same way but was removed from the substantially similar list after the 2015 Survey. Pls. Resp. at 40 (d/e 56). However, in the 2013 Survey (which New Mexico responded to in May 2014), New Mexico answered "yes" to the question, "Does your state prohibit the use or possession of firearms based on a voluntary mental health admission within the last five years?" See New Mexico Resp. to 2013 Survey (d/e 44-1 at 41 of 87). In response to the same question in 2015, New Mexico answered "no." See New Mexico Resp. to 2015 Survey (d/e 44-2 at 120 of 166).

Plaintiffs next argue that Arkansas and New Mexico answered the 2015 Survey the same way but only Arkansas is currently deemed to have substantially similar laws. Pls. Resp. at 40. Defendants explain, however, that Arkansas clarified its 2015 Survey response by stating that while there "are no blanket

prohibitions on use or possession based on a voluntary admission" within the last five years, an Arkansas applicant is ineligible for a concealed carry license if the applicant has ever been voluntarily admitted to a mental health facility. Arkansas Resp. to 2015 Survey (d/e 44-2 at 15 of 166). New Mexico provided no such clarification.

Plaintiffs argue that Virginia answered "no" to the question asking whether Virginia conducts an NICS background check when Virginia issues a concealed carry license but that Illinois still found Virginia had substantially similar laws. Pls. Resp. at 41. Defendants explain that Virginia answered "yes" to the question: "Does your state report adjudicated mentally defective/committed persons to the NICS Index." See Virginia Resp. to 2015 Survey (d/e 44-2 at 158 of 166). According to Defendants, the question Virginia answered "yes" to is the critical question for purposes of § 1231.10 and tracks the third requirement of § 1231.10—that the state report denied persons to NICS. Defendants further assert that the "substantially similar" definition does not require that states conduct background checks through NICS. See 20 Ill. Admin. Code § 1231.10 (only defining "substantially similar" as including a state that reports denied persons to NICS).

Plaintiffs also fault the ISP for finding Mississippi substantially similar because Trame, in her affidavit, attested to the difficulty of obtaining criminal history information from Mississippi. See Trame Aff. ¶ 12 (giving Mississippi as an example of a state that reports limited information to the Interstate Identification

Index and requires a fee for criminal history information, as much as $80 for a search of the two criminal courts and two civil courts in just one county). Defendants explain that, when the Affidavit was prepared, Mississippi had not been deemed to have substantially similar laws and that Trame provided a truthful example of the difficulty of obtaining criminal history information from a state that did not fully participate in federal or multi-state systems. Defendants further state that Mississippi is currently deemed a substantially similar state because Mississippi now participates in reporting persons authorized to carry firearms, concealed or otherwise, in public through NLETS, which was a change from the 2013 Survey Response. Compare Mississippi 2013 Survey Response (d/e 44-1 at 34 of 87) with 2015 Survey Resp. (d/e 44-2 at 106 of 166).

The only "discrepancy" that Plaintiffs cite that appears to have some merit is the claim that Virginia is deemed to have substantially similar laws even though Virginia has no official mechanism for the reporting of voluntary admissions to a mental health treatment facility. Specifically, while Virginia law prohibits use or possession of firearms based on a voluntary mental health admission within the last five years, Virginia relies on self-reporting and does not have a systematic way of checking voluntary admissions. See Virginia 2015 Survey Resp. (d/e 44-2 at 158-59 of 166).

This shows that Illinois' law is not perfect and could call into question the genuineness of Illinois' alleged need to track voluntary admissions. However, Virginia qualified as a substantially similar state

because the definition of "substantially similar" in the regulation requires that the state's law prohibit those with voluntary mental health admissions within the past five years. 20 Ill. Admin. Code § 1231.10. Virginia met that requirement.

Turning to the merits, the Court finds that Illinois has an important and compelling interest in its citizens' safety. Schall v. Martin, 467 U.S. 253, 264 (1984) ("The 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted."). Plaintiffs argue, however, that Defendants have no proof that keeping concealed handguns out of the hands of nonresidents is needed to protect the public. In particular, Plaintiffs cite to scholarly articles suggesting that firearm permit holders—like Plaintiffs, all of whom hold concealed carry licenses in their home state—are at a low risk of misusing guns. See Pls. Resp. at 43-45.

Long-standing prohibitions on the possession of firearms by felons and the mentally ill are permissible. Heller, 554 U.S. at 627; Moore, 702 F.3d at 940 ("And empirical evidence of a public safety concern can be dispensed with altogether when the ban is limited to obviously dangerous persons such as felons and the mentally ill."). If prohibitions on the possession of firearms by felons and the mentally ill are permissible, a state must have a way of determining whether an applicant is a felon or mentally ill.

Illinois' laws are designed to ensure that felons and the mentally ill do not obtain concealed carry

licenses. In addition, Illinois' laws are designed to monitor those who have concealed carry licenses to ensure that the license holders remain qualified. Specifically, the FOID Act and the Concealed Carry Act impose reporting requirements on circuit clerks, physicians, mental health providers, law enforcement agencies, school administrators, and the Department of Human Services so that the ISP can monitor license holders. In addition, Illinois uses federal and Illinois electronic databases to verify initial eligibility and monitor continued eligibility for concealed carry licenses. On a daily basis, Illinois checks all resident concealed carry license holders against the Illinois Criminal History Record Inquiry and DHS Mental Health Systems. Trame Aff. ¶ 21. Illinois checks all concealed carry license holders, both resident and nonresident, against the federal databases on a quarterly basis. Id.

If another state does not have substantially similar firearm laws as Illinois' laws, Illinois cannot confirm that nonresidents from that state are qualified to hold and maintain an Illinois concealed carry license. For instance, one way Illinois can monitor nonresidents is by use of NLETS. The ISP checks NLETS to confirm that a nonresident's concealed carry license in his home state remains valid. If another state has substantially similar firearm laws and reports concealed carry licenses via NLETS, then Illinois can verify that the nonresident applicant continues to meet Illinois' requirements.

The Court recognizes that Illinois' firearm laws relating to nonresidents is not perfect. Nonetheless, the law is substantially related to achieving Illinois'

interest in keeping the concealed carry licenses out of the hands of felons and the mentally ill. See Culp II, 840 F.3d at 403 (finding at the preliminary injunction stage, on substantially the same evidence, that Illinois' firearms laws relating to nonresidents met intermediate scrutiny). Illinois has a substantial interest in restricting concealed carry licenses to those persons whose qualifications can be verified and monitored. The restriction barring nonresidents from states without substantially similar laws from applying for an Illinois concealed carry license is substantially related to that strong public interest. Consequently, the Court finds that the challenged laws do not violate the Second Amendment.

B. Defendants are Entitled to Summary Judgment on the Remaining Counts

Plaintiffs also claim that the nonresident application regulation/ban is unconstitutional under the Equal Protection Clause, Due Process Clause, and Privileges and Immunities Clause. However, because the nonresident application regulation/ban passes scrutiny under the Second Amendment, then the regulation/ban passes scrutiny under the other provisions because they do not require a stronger showing.

The Equal Protection Clause requires strict scrutiny of a legislative classification when the classification impermissibly interferes with the exercise of a fundamental right or operates to the disadvantage of a suspect class. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312

(1976). Where a Second Amendment challenge fails, some courts have held that the equal protection claim is subject to rational basis review and other have held the claims is subject to intermediate scrutiny. See, e.g., Kwong v. Bloomberg, 723 F.3d 160, 170 n.19 (2d Cir. 2013) (noting that "courts have applied 'rational basis' review to Equal Protection claims on the theory that the Second Amendment analysis sufficiently protects one's rights); Flanagan v. Harris, No. LA CV 16-06164 JAK (ASx), 2017 WL 729788, at *6 (C.D. Cal. Feb. 23, 2017) (holding that when a law survives a Second Amendment challenge and does not involve a suspect classification, courts have applied rational basis review to equal protection claims, the rationale being that the Second Amendment analysis sufficiently protects the individual's rights); United States v. Hayes, No. No. 2:14-CR-72-PPS, 2014 WL 5390553, at *3 (N.D. Ind. Oct. 22, 2014) (noting that the Seventh Circuit has used intermediate scrutiny to review Second Amendment and Equal Protection challenges to some restrictions on gun ownership). In any event, a more stringent level of review does not apply under the Equal Protection Clause than under the Second Amendment in this case.

Plaintiffs argue that the nonresident application ban violates the Privileges and Immunities Clause of Article IV of the Constitution, which provides that "[t]he Citizens of each State [are] entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. Art. IV § 2, cl. 1. The purpose of this Clause was "intended to 'fuse into one Nation a collective of

independent, sovereign States.'" Supreme Court of N.H. v. Piper, 470 U.S. 274, 279 (1985) (quoting Toomer v. Witsell, 334 U.S. 385, 395 (1948)). In light of the purpose of the Clause, the United States Supreme Court has held that the State must accord residents and nonresidents equal treatment "[o]nly with respect to those privileges and immunities bearing on the vitality of the Nation as a single entity." Piper, 470 U.S. at 279 (internal quotation marks omitted); see also Minix v. Canarecci, No. 305-CV-144-RM, 2007 WL 1662666, at *3 (N.D. Ind. June 6, 2007). Examples of fundamental privileges protected by Article IV's Privilege and Immunities Clause include pursuit of a common calling and rights to travel and migrate interstate. See United Bldg. & Constr. Trades Council of Camden Cnty. & Vicinity v. Mayor & Council of City of Camden, 465 U.S. 208, 219 (1984); Zobel v. Williams, 457 U.S. 55, 78-79 (1982) (O'Connor, J., concurring in the judgment).

When a law deprives nonresidents of a privilege or immunity protected by the Privilege and Immunity Clause, the law is invalid unless (1) there is a substantial reason for the difference in treatment; and (2) the discrimination against nonresidents bears a substantial relationship to the State's objectives. Barnard v. Thorstenn, 489 U.S. 546, 552 (1989). Even if the right to bear arms constitutes a privilege under the Privilege and Immunities Clause, the standard—requiring a substantial relationship to the State's objectives—is equal to or less than the standard that applies in the Second Amendment context in this case. Therefore, Plaintiffs have not shown a violation of the Privilege and Immunities Clause.

Finally, Plaintiffs are not entitled to relief on their Fourteenth Amendment procedural due process claim. When analyzing a procedural due process claim, the Court asks (1) whether there exists a liberty or property interest of which the person has been deprived, and (2) whether the procedures followed were constitutionally sufficient. Swarthout v. Cooke, 562 U.S. 216, 219 (2011); Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 460 (1989). Plaintiffs assert a liberty or property interest arising out of the Second Amendment. However, because this Court has found no Second Amendment violation, Plaintiffs have not demonstrated that they were deprived of a property or liberty interest.

V. CONCLUSION

For the reasons stated, Defendants' Motion for Summary Judgment (d/e 43) is GRANTED and Plaintiffs' Motion for Summary Judgment (d/e 45) is DENIED. THIS CASE IS CLOSED.

ENTER: September 15, 2017

FOR THE COURT:

s/Sue E. Myerscough
SUE E. MYERSCOUGH
UNITED STATES
DISTRICT JUDGE

In the
United States Court of Appeals
For the Seventh Circuit

No. 15-3738

KEVIN W. CULP, *et al.*,

Plaintiffs-Appellants,

v.

LISA MADIGAN, in her official capacity as Attorney General of Illinois, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois.
No. 3:14-CV-03320—**Sue E. Myerscough**, *Judge*.

ARGUED SEPTEMBER 22, 2016—DECIDED OCTOBER 20, 2016

Before BAUER, POSNER, and MANION, *Circuit Judges*.

POSNER, *Circuit Judge*. Illinois' Concealed Carry Act, 430 ILCS 66/1 *et seq.*, authorizes an Illinois resident to carry, on his person or next to him in a car, a loaded or unloaded firearm as long as it is fully or partially concealed and he (or she) meets the qualifications set forth in the Act. We held in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), that the Second Amendment entitles qualified persons to carry guns outside the home; just a few months ago we said that "the

constitutional right to 'keep and bear' arms means that states must permit law-abiding and mentally healthy persons to carry loaded weapons in public." *Berron v. Illinois Concealed Carry Licensing Review Bd.*, 825 F.3d 843, 845 (2016). But "qualified," "law-abiding," and "mentally healthy" are significant limitations on the right of concealed carry.

The qualifications in the Act are numerous but to decide this case we need consider only a few of them: that the applicant for a concealed-carry license not present a clear and present danger to himself or others or a threat to public safety and not in the last five years have been a patient in a mental hospital, or been convicted of a misdemeanor involving the use or threat of physical force or violence, or been in a residential or court-ordered drug or alcohol treatment program, or have committed two or more violations involving driving under the influence of drugs or alcohol, or be subject to a legal proceeding that could lead to being disqualified to possess a gun. 430 ILCS 66/25, 65/4(a)(2)(iv).

In compliance with *Moore v. Madigan, supra*, Illinois has authorized residents of Illinois who meet the criteria listed above to obtain concealed-carry licenses. But what about a nonresident of Illinois? Can he or she obtain a right to carry a concealed firearm in Illinois? Yes, but only if he resides in a state or territory that has "laws related to firearm ownership, possession, and carrying, that are substantially similar to the requirements to obtain" an Illinois concealed-carry license, and submits a notarized statement confirming

that he is eligible under both federal law and the laws of his home state to own a gun and licensed by that state to carry a gun. 430 ILCS 66/40(b), 66/40(c)(2). A state's gun laws are deemed "substantially similar" to Illinois' if the state does the following four things:

1. "regulates who may carry firearms, concealed or otherwise, in public;"
2. "prohibits all who have involuntary mental health admissions, and those with voluntary admissions within the past 5 years, from carrying firearms, concealed or otherwise, in public;"
3. "reports denied persons to NICS [National Instant Criminal Background Check System];" and
4. "participates in reporting persons authorized to carry firearms, concealed or otherwise, in public through NLETs [National Law Enforcement Telecommunications System]."

20 Ill. Admin. Code 1231.10. As we'll see, these four requirements are not imposed in order to punish nonresidents because of where they live or because Illinois disapproves of other states' gun regimes. The sole purpose is to protect Illinois residents. The Illinois State Police determines which states make the cut by conducting a fifty-state survey and posting the results on its website. 20 Ill. Admin. Code 1231.110(b), (c). Currently only Hawaii, New Mexico, South Carolina, and Virginia qualify as "substantially similar" in the relevant respects to Illinois. Illinois State Police Firearm

Services Bureau, "Frequently Asked Questions: How can I find out if my state's laws are considered 'substantially similar?,'" www.ispfsb.com/Public/Faq.aspx (visited Oct. 19, 2016).

Illinois recognizes certain exceptions for citizens of not "substantially similar" states. A person who has a firearm license from his own state is allowed to carry a firearm in Illinois while hunting or at a firing range or on property whose owner permits him to carry a gun, 430 ILCS 65/2(a), (b), and if he has a concealed-carry license from his state he can transport a firearm in his car or other vehicle in Illinois as long as he doesn't remove it from the vehicle. 430 ILCS 66/40(e).

The plaintiffs in this case, nonresidents of Illinois each of whom has a concealed-carry license from his home state, travel to Illinois whether on business or for family or other reasons and want, while they are in Illinois, to be allowed to carry a firearm even if they are not within the exceptions to the restrictions on nonresident gun carrying just listed, but are not allowed to do so because they aren't residents of states that have firearm laws substantially similar to Illinois'. They argue that Illinois' refusal to issue concealed-carry licenses to them violates Article IV of, and the Second and Fourteenth Amendments to, the Constitution. The district judge declined to issue a preliminary injunction, precipitating this appeal.

The plaintiffs' claim to be allowed to carry concealed firearms when they are visiting Illinois would be compelling if the Illinois authorities could reliably

determine whether in fact a nonresident applicant for an Illinois concealed-carry license had all the qualifications that Illinois, or states that have concealed-carry laws substantially similar to Illinois, require be met. But while the Illinois state police have ready access to information about Illinois residents (mainly about whether the applicant for a concealed-carry license has a criminal history or a history of mental illness) that is necessary to determine whether an applicant is eligible to obtain such a license, they lack reliable access to the information they need about the qualifications of non-resident applicants other than residents of the four "substantially similar" states.

An uncontradicted affidavit from Jessica Trame, the chief of the Illinois Firearms Services Bureau, lists information sources that the Bureau relies on in determining whether an applicant for a concealed-carry license is eligible. They include records of drivers' licenses and a computerized criminal history records system. There is also the federal database of criminal histories mentioned earlier (NLETS) that the police can access, but it is incomplete because many states submit incomplete information on their arrest and prosecution records to the database. And while the Illinois Bureau can request information from local jurisdictions (cities, counties, etc.) in other states, those jurisdictions charge for the information; and the Bureau claims without contradiction that it lacks the funds required to pay the charges (Illinois state agencies are notoriously underfunded). The Bureau has for example encountered significant difficulties in its

efforts to obtain mental health information about residents of other states; many of those states don't track such information.

But it's not just the initial application process that has Illinois concerned. Illinois needs reliable information in order to be able to monitor the holders of gun permits, which are good for five years. 430 ILCS 66/50, 66/35. So after issuing a concealed carry license Illinois checks its own databases daily and national ones quarterly for updates that might require a license to be revoked. But it is unable to obtain updates from states that don't track or report the information. This practical need explains all four of the requirements for "substantially similar" gun laws listed above.

All this said, the plaintiffs do make some apt criticisms of the Illinois law. They point out for example that the concealed-carry license of an Illinois resident is not revoked or reassessed if he returns from a trip to, or a sojourn in, another state, even though the Illinois authorities will not know what he did in that state—whether for example he committed a crime or had a mental breakdown. And anyone who lives in Illinois or one of the four substantially similar states is eligible to obtain an Illinois concealed-carry license even if he had become a resident of such a state recently, having spent many years living in dissimilar and therefore non-approved states, with Illinois (and, presumably, the substantially similar state as well) unable to obtain information about his possible criminal or mental problems in those states.

So the Illinois law regulating the concealed-carry rights of nonresidents is imperfect. But we cannot say that it is unreasonable, so imperfect as to justify the issuance of a preliminary injunction. Cf. *Moore v. Madigan, supra*, at 940. The critical problem presented by the plaintiffs' demand—for which they offer no solution—is verification. A nonresident's application for an Illinois concealed-carry license cannot be taken at face value. The assertions in it must be verified. And Illinois needs to receive reliable updates in order to confirm that license-holders remain qualified during the five-year term of the license. Yet its ability to verify is extremely limited unless the nonresident lives in one of the four states that have concealed-carry laws similar to Illinois' law. A trial in this case may cast the facts in a different light, but the plaintiffs have not made a case for a preliminary injunction.

AFFIRMED

MANION, *Circuit Judge*, dissenting. Just four years ago, this court invalidated Illinois' decades-old blanket ban on the carrying of firearms in public. *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012). We recognized that the Second Amendment requires states to "permit law-abiding and mentally healthy persons to carry loaded weapons in public." *Berron v. Ill. Concealed Carry Licensing Review Bd.*, 825 F.3d 843, 845 (7th Cir. 2016). It was only in response to our decision in *Moore* that Illinois finally became the last state in the nation to enact a concealed-carry law.

Although Illinois now reluctantly allows its residents to carry concealed weapons with a license, it still significantly restricts the rights of nonresidents to do so. State law prevents the residents of 45 states from even applying for an Illinois concealed-carry license because the Department of State Police has not classified their states' public-carry qualifications as "substantially similar" to those Illinois imposes. These nonresidents, including the plaintiffs in this case, have no opportunity to prove that they meet Illinois' requirements. Based solely on their states of residence, they are deprived of any opportunity to exercise their Second Amendment rights in Illinois.

When a state law infringes on the fundamental Second Amendment right to keep and bear arms for self-defense, it must satisfy heightened scrutiny. Our precedents instruct that to sustain such a law, a state must present "an extremely strong public-interest justification and a close fit between the government's means and its end." *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011). Illinois has not done so here. As explained below, the state's chosen method to regulate non-resident concealed-carry license applications is not sufficiently tailored to its goal of properly vetting out-of-state applicants' criminal and mental histories. Therefore, the ban violates the Second Amendment.

Nevertheless, the court holds that the plaintiffs are not entitled to preliminary relief because the application ban is not "unreasonable." The court's application of rational-basis review to the nonresident application ban is directly contrary to Supreme Court

and Seventh Circuit precedent. Under the proper standard of review, the plaintiffs are certain to succeed on the merits of their Second Amendment claim.[1] I would reverse the district court's judgment and remand with instructions to issue a preliminary injunction. I respectfully dissent.

I. Background

Illinois law requires the Department of State Police to issue a concealed-carry license to each Illinois resident who applies and meets certain qualifications. 430 ILCS 66/25. The Department must also issue a license to some nonresidents who meet all of these qualifications other than Illinois residency. 430 ILCS 66/40(b). Under the statute, the Department may only process applications from residents of states "with laws related to firearm ownership, possession, and carrying, that are substantially similar to the requirements to obtain a license under [Illinois law]." *Id.* The definition of "substantially similar" is left to the Department's discretion.

Department regulations define "substantially similar" states as those that do all of the following: (1) regulate who may carry firearms in public; (2) prohibit all

[1] The parties indicated at oral argument that the record before us now is the same one that is before the district court for the pending summary judgment motion. Therefore, there is no need to hedge on the plaintiffs' likelihood of success at this stage. The result will not change should this case return on appeal from the grant of the state's motion for summary judgment. That is why I would hold that the plaintiffs are certain to succeed on the merits.

who have had involuntary mental health admissions, and those who have had voluntary admissions in the past five years, from carrying firearms; (3) report denied persons to the National Instant Criminal Background Check System; and (4) participate in reporting those authorized to carry through the National Law Enforcement Telecommunications System. Ill. Admin. Code 1231.10. The Department periodically sends a survey to each state to determine whether it meets these criteria. At present, the Department has identified only Hawaii, New Mexico, Virginia, and South Carolina as "substantially similar" states.[2] The law therefore operates as a total ban on concealed-carry license applications from residents of the other 45 states.

The individual plaintiffs are law-abiding nonresidents who hold concealed-carry licenses in their resident states. Some are even certified Illinois concealed-carry instructors. They wish to apply to carry firearms in Illinois. The plaintiffs contend that the ban on applications from their states violates the Second Amendment, the Equal Protection Clause, the Due Process Clause, and the Privileges and Immunities Clause of Article IV. The district court denied their

[2] The Department sent the surveys that identified the four currently approved states in 2013. At that time, seven states did not respond at all to Illinois' survey. Illinois indicated at oral argument that it recently sent another survey and that the Department is currently analyzing the results. The list of approved states is subject to change based upon the results of this most recent survey.

motion for a preliminary injunction, and the plaintiffs timely appealed.

II. Discussion

A. Preliminary Injunction Standard

To determine whether the plaintiffs are entitled to preliminary relief, this court applies a two-part "sliding scale" test. As a threshold matter, the movants must establish (1) some probability of success on the merits; (2) lack of an adequate remedy at law; and (3) irreparable harm in the absence of an injunction. *Stuller, Inc. v. Steak N Shake Enters., Inc.*, 695 F.3d 676, 678 (7th Cir. 2012). If they clear that hurdle, the district court then must balance the harms that both parties would suffer in the event of an adverse decision. In this analysis, it must consider the public interest in granting or denying an injunction and weigh the threshold factors against each other, depending on how strongly each factor points in favor of each party. *See id.* We generally review the district court's legal analysis *de novo* and its balancing of the factors for abuse of discretion. *Id.* However, "a decision to deny a preliminary injunction that is premised on an error of law is entitled to no deference and must be reversed." *United Air Lines, Inc. v. Int'l Ass'n of Machinist & Aerospace Workers, AFL-CIO*, 243 F.3d 349, 361 (7th Cir. 2001).

B. Likelihood of Success on the Merits

At this stage, the principal issue is whether the plaintiffs are likely to succeed on the merits of their

Second Amendment claim.[3] The "sliding-scale" nature of the preliminary injunction inquiry means that the plaintiffs' precise chances of success are highly relevant to whether an injunction should issue. A movant with just a slight chance of success must make a much greater showing of harm than one who is certain to prevail. *See Storck USA, L.P. v. Farley Candy Co.*, 14 F.3d 311, 314 (7th Cir. 1994).

As with any constitutional case, the strength of the plaintiffs' Second Amendment claim depends upon two things: (1) which standard of means-ends scrutiny applies to the claim; and (2) whether the evidence is sufficient to sustain the challenged law under the chosen scrutiny. I will address these in turn.

1. Proper Standard of Review

The Supreme Court has recognized that "the Second Amendment secures a pre-existing natural right to keep and bear arms." *Ezell*, 651 F.3d at 700 (citing *District of Columbia v. Heller*, 554 U.S. 570, 595, 599–600 (2008)). "[I]ndividual self-defense is 'the *central component*' of the Second Amendment right," which is fundamental and therefore enforceable against the states. *McDonald v. City of Chicago*, 561 U.S. 742, 767–68 (2010) (quoting *Heller*, 554 U.S. at 599). We have held that the right to bear arms for self-defense "is as important outside the home as inside." *Moore*, 702 F.3d

[3] Because I conclude that the plaintiffs' Second Amendment claim is certain to succeed on the merits, I do not address their remaining constitutional challenges to the Illinois statute.

at 942. Illinois recognizes that holding and correctly concedes that the nonresident application ban implicates the Second Amendment. The dispute centers on the proper standard of review.

In *Heller*, the Supreme Court did not resolve this question for all future Second Amendment claims. However, it made it abundantly clear that rational-basis review is inappropriate where a law affects Second Amendment rights. *Heller*, 554 U.S. at 628–29 & n.27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."). Because of *Heller* and *McDonald*, this court is by default "left to choose an appropriate standard of review from among the heightened standards of scrutiny the [Supreme] Court applies to governmental actions alleged to infringe enumerated constitutional rights." *Ezell*, 651 F.3d at 703.

Our precedents instruct that this critical choice should depend on two factors: "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on that right." *Id.* Since *Heller* rules out rational-basis review, we must apply either intermediate scrutiny, strict scrutiny, or another form of heightened scrutiny in between those standards. Intermediate scrutiny generally requires the government to show that the challenged law is "substantially related to an important government objective" *United States v. Skoien*, 614 F.3d 638, 641 (7th

Cir. 2010) (en banc), while under strict scrutiny the government must prove that the law is "necessary to serve a compelling state interest" and "narrowly tailored to achieve that interest." *Milwaukee Deputy Sheriffs' Ass'n v. Clarke*, 588 F.3d 523, 530 (7th Cir. 2009).

Three recent Second Amendment cases are particularly relevant to the standard of review question. First, in *Skoien*, we considered the constitutionality of the federal ban on the possession of firearms by those convicted of misdemeanor domestic violence. There, rather than enter "deeply into the 'levels of scrutiny' quagmire," the *en banc* court simply accepted the government's concession that intermediate scrutiny applied to the ban. *Id.* at 641–42. It held that "logic and data establish a substantial relationship" between the statute and the goal of "preventing armed mayhem." *Id.* at 642.

In *Ezell*, the plaintiffs sought a preliminary injunction against Chicago's ban on firing ranges. We described the firing-range ban as "a serious encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense." *Ezell*, 651 F.3d at 708. Critically, unlike the criminal defendant in *Skoien*, the *Ezell* plaintiffs were "the 'law-abiding, responsible citizens' whose Second Amendment rights are entitled to full solicitude under *Heller*." *Id.* Because Chicago's law reached close to the core of the Second Amendment and curtailed the rights of law-abiding citizens, we required "a more rigorous showing than that applied in *Skoien* . . . if not quite

'strict scrutiny.'" *Id.* Under this standard, the city had to demonstrate "a strong public interest justification for its ban" and "a close fit between the range ban and the actual public interest it serves." *Id.* at 708–09. Chicago failed to carry that burden, significantly because it could not show that its public safety interest could not be "addressed through sensible zoning and other appropriately tailored regulations." *Id.* at 709.

Finally, we have *Moore.* In that case, we applied *Ezell*-like scrutiny to invalidate Illinois' blanket ban on the public carrying of firearms. *Moore*, 702 F.3d at 940 (categorizing the level of scrutiny as "a stronger showing" than required in *Skoien*). We explained that, because the ban on concealed-carry curtailed "the gun rights of the entire law-abiding population of Illinois," as opposed to a small group of people convicted of domestic violence, intermediate scrutiny was insufficient. *Id.* As we put it then, "so substantial a curtailment of the right of armed self-defense requires a greater showing of justification than merely that the public *might* benefit on balance from such a curtailment, though there is no proof it would." *Id.* Like Chicago's firing range ban, Illinois' total prohibition on concealed-carry could not withstand such scrutiny. *See id.* at 939 ("If the mere possibility that allowing guns to be carried in public would increase the crime or death rates sufficed to justify a ban, *Heller* would have been decided the other way, for that possibility was as great in the District of Columbia as it is in Illinois.").

These cases establish the basic principles that govern the present dispute. Whenever a law infringes

on the right to bear arms for self-defense, that law must be at least substantially related to an important government interest. And a law that curtails the fundamental right of law-abiding citizens to carry a weapon for self-defense must pass even more exacting (although not quite strict) scrutiny. Defenders of such a law must show a "close fit" between the law and a strong public interest. *Ezell*, 651 F.3d at 708–09. That "close fit" is functionally equivalent to the "narrow tailoring" requirement for content-neutral speech restrictions to which strict scrutiny is inapplicable. *See*, *e.g.*, *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014); *see also Ezell*, 651 F.3d at 706–08 (discussing the adaptation of First Amendment precedent to Second Amendment cases). As in First Amendment cases, the tailoring requirement prevents government from striking the wrong balance between efficiency and the exercise of an enumerated constitutional right. *McCullen*, 134 S. Ct. at 2534.

Just as in *Ezell* and *Moore*, the plaintiffs in this case are precisely the type of law-abiding citizens "whose Second Amendment rights are entitled to full solicitude under *Heller*." *Ezell*, 651 F.3d at 708. What is more, the nonresident application ban functions as a categorical prohibition of applications from the majority of Americans. It is therefore a severe burden on the recognized Second Amendment right. Indeed, Illinois' application ban has the potential to affect even more people than did the sweeping restrictions we invalidated in *Moore* and *Ezell*. Therefore, it must satisfy the same exacting scrutiny that we applied in those cases.

In sum, "a ban as broad as Illinois' can't be upheld merely on the ground that it's not irrational." *Moore*, 702 F.3d at 939. The court's cursory application of rational-basis review is directly contrary to Supreme Court and Seventh Circuit precedent. As a result, the court adds confusion to our case law and allows the states impermissible latitude to violate the Second Amendment rights of law-abiding Americans.

2. Application of *Ezell* Scrutiny

Having established the appropriate standard of review, I now turn to its application in this case. Illinois submits that the prohibition of so many nonresident applications is necessary because the state can properly vet only applicants from Illinois and the four Department-approved states. Illinois says that it cannot afford to pay to access information, such as applicants' criminal records, from jurisdictions that do not report to the national databases Illinois uses to look up those records. Moreover, some states do not track mental health information at all. According to Illinois, it cannot obtain mental health records for potential applicants from many states and thus cannot evaluate whether applicants from these states are qualified under Illinois law to carry a firearm.

The plaintiffs do not challenge Illinois' power to maintain a licensing scheme with some conditions on the right to carry a firearm in public. *See Berron*, 825 F.3d at 847. Nor do they challenge the conditions themselves. On the contrary, they *want the opportunity to*

comply with those conditions. They seek the opportunity to be treated the same way Illinois treats its own residents and those of the four Department-approved states. The current statutory scheme deprives them of that opportunity.

Since the court erroneously subjects the application ban only to rationality review, it fails to answer the dispositive question. Namely, is the ban is sufficiently tailored to Illinois' interest in vetting applicants to pass *Ezell* scrutiny? I would hold that it is not. The court seemingly admits that the law is significantly underinclusive (because it regulates too few people to be effective in addressing the stated goal) and overinclusive (because it regulates too many people that do not fall under its public interest justification). These features, which the court concedes make the law "imperfect," suffice to demonstrate that the required close fit between means and ends is lacking. *Cf. Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 232 (1987) (holding that regulations fail narrow-tailoring analysis when they are both overinclusive and underinclusive).

The nonresident application ban is significantly underinclusive in two principal ways. First, as the court correctly notes, "the concealed-carry license of an Illinois resident is not revoked or reassessed if he returns from a trip to . . . another state, even though the Illinois authorities will not know what he did in that state—whether for example he committed a crime or had a mental breakdown." Maj. Op. at 6. Second, a potential applicant who moves to one of the four

approved states becomes immediately eligible to apply for an Illinois concealed-carry license. This is true "even if he had become a resident of such a state recently, having spent many years living in dissimilar and therefore non-approved states, with Illinois (and, presumably, the substantially similar state as well) unable to obtain information about his possible criminal or mental problems in those states." *Id.* As broad as the application ban is, it does not allow Illinois to vet potential license-holders or future applicants in two quite plausible situations. This severely undercuts Illinois' justification for maintaining it.[4] *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417–18 (1993) (ban on news racks containing "commercial handbills" lacked the required "reasonable fit" between the government's asserted end and the means chosen because it was woefully underinclusive).

The ban is also overinclusive. While a categorical application ban no doubt prevents many disqualified people from obtaining an Illinois concealed-carry license,[5] it also prohibits many who would meet Illinois'

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[4] Moreover, Illinois law already permits non-residents who hold firearm licenses from their resident states to possess a gun in various other ways in Illinois. See Maj. Op. at 3–4. The fact that Illinois trusts nonresidents to bring guns into the state to use on firing ranges or simply to carry in a vehicle undermines its policy rationale for restricting these same people from applying to carry a concealed weapon.

[5] While I do not doubt the statute's effectiveness at preventing these people from obtaining a license, whether it actually prevents gun violence is another matter altogether. In *Moore*, we properly recognized that "[t]he available data about permit holders . . . imply that they are at fairly low risk of misusing guns,

qualifications from applying for a license. The plaintiffs in this case are exemplary. All are responsible gun owners with significant firearm training, no criminal or mental histories, and valid concealed-carry licenses from other states. Plaintiffs Kevin Culp, Douglas Zylstra, and Paul Heslin are Illinois-certified concealed-carry instructors who hold carry licenses in multiple states. A law that prevents an Illinois-licensed concealed-carry instructor from even *applying* for a license to carry in that state sweeps up far too many people to be appropriately tailored under any exacting standard of scrutiny.

Once more, it is important to emphasize that the plaintiffs seek only the right to apply for a concealed-carry license. Should they prevail, they would gain only the ability to seek a license on the same basis as residents of Illinois and the four Department-approved states. While such a process may impose an additional burden, Illinois has not shown that it would be impossible, or even impractical, for these out-of-state applicants to provide verified records that satisfy Illinois' requirements. For instance, nonresidents could attempt to shoulder the burden of paying for criminal

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consistent with the relatively low arrest rates observed to date for permit holders." *Moore*, 702 F.3d at 937–38 (quoting Philip J. Cook, et al., *Gun Control After* Heller: *Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. Rev. 1041, 1082 (2009)). There is no indication that this is any less true for concealed-carry license holders in one state who wish to apply for a license in another state. To put it plainly, it is unlikely that someone wanting to commit a gun crime in Illinois will first avail himself of the licensing process for out-of-state residents.

record searches in their resident state and providing the relevant records to Illinois. Prospective applicants could also seek certification that they satisfy Illinois' mental health requirement. In many cases, such certification would provide Illinois with more information than it can obtain about its own residents' out-of-state sojourns, which they admittedly cannot track.[6] Potential applicants should at least be given that chance.

In sum, the absolute denial of nonresidents' right to apply for an Illinois concealed-carry license lacks the required close fit to the state's asserted interest in properly vetting applicants. It is woefully overinclusive *and* underinclusive relative to that aim. Therefore, 430 ILCS 66/40(b) violates the plaintiffs' Second Amendment rights. I would hold that the plaintiffs are certain to succeed on the merits.

C. Remaining Preliminary Injunction Factors

Because I would hold that the plaintiffs are certain to succeed, I must proceed to the remaining preliminary injunction factors. In addition to demonstrating some probability of success on the merits, the plaintiffs

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[6] For example, there is no reason that Illinois cannot require nonresident applicants to submit their health records as proof that they have not been treated for a mental illness. The state could also require an affidavit from a treating physician certifying an applicant's lack of mental admissions. This information would be far more valuable to Illinois than the simple fact that an applicant has a Hawaii concealed-carry license. After all, there is no guarantee that Hawaii was aware of its applicants' mental health admissions in other states before granting licenses.

must establish that they would be "irreparably harmed if [they do] not receive preliminary relief, and that money damages and/or an injunction ordered at final judgment would not rectify that harm." *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 16 (7th Cir. 1992). The district court properly found that the plaintiffs satisfy all of the threshold requirements here. *See Ezell*, 651 F.3d at 697–99 (holding that irreparable harm is presumed in Second Amendment cases and that damages could not compensate for a violation). I need not belabor these points.

More critical is the district court's balancing of the harms. Although the district court correctly concluded that the plaintiffs met all the threshold requirements for an injunction, it still denied their motion based on its conclusion that issuance of an injunction would harm the state more than a failure to issue one would harm the plaintiffs. The district court reasoned that the state would be harmed by its inability to conduct background checks on newly eligible applicants, while the plaintiffs could carry guns into Illinois for various other purposes and retained the right to concealed-carry in their resident states even in the absence of an injunction.

Because it was premised on an error of law, the district court's balancing of the factors is due no deference. *United Air Lines*, 243 F.3d at 361. Since the district court erred by applying only intermediate scrutiny to the plaintiffs' Second Amendment claim, it erroneously concluded that the plaintiffs' claim was "neither strong nor weak." Had it applied the proper

standard of review and held that the plaintiffs are certain to succeed, the district court would have required a much weaker showing of harm before it issued the injunction. *Storck USA*, 14 F.3d at 314 ("[T]he greater the movant's chance of success on the merits, the less strong a showing must it make that the balance of harms is in its favor.").

Given the plaintiffs' certainty of success, I would hold that the balance of harms tips in their favor. Simply permitting law-abiding citizens who have concealed-carry licenses in other states to apply for an Illinois license will not irreparably harm the state. Illinois may still deny those who do not meet its stringent criteria, so an injunction will not result in a flood of new concealed-carry license-holders. Meanwhile, the plaintiffs suffer irreparable harm each day they cannot avail themselves of Illinois' concealed-carry licensing scheme. *See Ezell*, 651 F.3d at 699 ("If they're right [on the merits], then the range ban was unconstitutional when enacted and violates their Second Amendment rights every day it remains on the books."). The fact that they can still possess firearms in other limited ways in Illinois and exercise the right to carry a firearm in their home states is irrelevant. *Id.* at 697-98. The application ban prevents them from taking the first step towards exercising their fundamental constitutional rights in Illinois.

III. Conclusion

Today's decision will have a profound and unfortunate impact on the scope of Second Amendment rights in our circuit. The court's decision has unnecessarily muddied the waters and cast significant doubt upon our holdings in *Ezell* and *Moore*. Rather than create confusion, we should reaffirm that state laws affecting the fundamental right to carry a firearm for self-defense are subject to exacting scrutiny. Under this standard, the plaintiffs are entitled to a preliminary injunction. I respectfully dissent.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

May 13, 2019

Before

DANIEL A. MANION, *Circuit Judge*
DAVID F. HAMILTON, *Circuit Judge*
MICHAEL Y. SCUDDER, *Circuit Judge*

No. 17-2998

KEVIN W. CULP, *et al*.,

Plaintiffs-Appellants,

v.

KWAME RAOUL, in his official capacity as Attorney General of the State of Illinois, *et al*.,

Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois

No. 3:14-cv-3320

Sue E. Myerscough, *Judge*.

ORDER

Plaintiffs-appellants filed a petition for rehearing and rehearing *en banc* on April 26, 2019. No judge in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing and rehearing *en banc* is therefore DENIED.