No. 19-_____

In The
Supreme Court of the United States

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,

Petitioners,

v.

KWAME RAOUL, in his Official Capacity as Attorney General of the State of Illinois; BRENDAN F. KELLY, in his Official Capacity as Acting Director of the Illinois State Police, and JESSICA TRAME, as Bureau Chief of the Illinois State Police Firearms Services Bureau,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

This Court has held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). Illinois prohibits the non-residents of 45 states from applying for an Illinois concealed carry license, regardless of their individual qualifications and training.

The question presented is:

Whether the Second Amendment right to keep and bear arms requires that the State of Illinois allow qualified non-residents to apply for an Illinois concealed carry license.

LIST OF PARTIES AND SUP. CT. RULE 14 DISCLOSURES

Petitioners 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 initiated the proceedings below by filing a complaint against Respondents Lisa Madigan, in her Official Capacity as Attorney General of the State of Illinois (a position now held by Kwame Raoul); Hiram Grau, in his Official Capacity as Director of the Illinois State Police (a position now held in an Acting capacity by Brendan F. Kelly), and Jessica Trame, as Bureau Chief of the Illinois State Police Firearms Services Bureau.

No parent or publicly owned corporation owns 10% or more of the stock in Second Amendment Foundation, Inc., Illinois Carry, or the Illinois State Rifle Association.

RELATED CASES

Kevin W. Culp, et al. v. Lisa Madigan, et al., No. 3:14-CV-3320, U.S. District Court for the Central District of Illinois. Judgment entered September 19, 2017

Kevin W. Culp, et al. v. Lisa Madigan, et al., 2015 U.S. Dist. LEXIS 163423 (C.D. Ill., Dec. 4, 2015)

Kevin W. Culp, et al. v. Lisa Madigan, et al., 840 F.3d 400 (7th Cir. 2016)

RELATED CASES—Continued

Kevin W. Culp, et al. v. Lisa Madigan, et al., 270 F.Supp.3d 1038 (C.D. Ill., September 15, 2017)

Kevin W. Culp, et al. v. Kwame Raoul, et al., 921 F.3d 646 (7th Cir. 2019)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners 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, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

DECISIONS BELOW

The decisions of the United States Court of Appeals for the Seventh Circuit are reported at 921 F.3d 646 (7th Cir. 2019) and 840 F.3d 400 (7th Cir. 2016), and are reprinted in the Appendix (App.) at App. 1 and 82. The decisions of the United States District Court for the Northern District of Illinois in this case are at 270 F.Supp.3d 1038 (C.D. Ill. 2017) (App. 36) and 2015 U.S. Dist. LEXIS 163423 (C.D. Ill. 2015).

JURISDICTION

The judgment of the Court of Appeals was entered on April 12, 2019. Petitioners' Petition for Rehearing *En Banc* was denied on May 13, 2019 (App. 106). This Court granted Petitioners until October 10, 2019 to file a Petition for Certiorari pursuant to 28 U.S.C. § 2101(c)

and Supreme Court Rule 13.5. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Second Amendment to 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."

Section 1 of the Fourteenth Amendment to the United States Constitution provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

430 ILCS 66/40 states, in relevant part:

Non-resident license applications

(a) For the purposes of this Section, "non-resident" means a person who has not resided within this State for more than 30 days and resides in another state or territory.

(b) The Department shall by rule allow for non-resident license applications from any state or territory of the United States with laws related to firearm ownership, possession, and carrying, that are substantially similar to the requirements to obtain a license under this Act.

(c) A resident of a state or territory approved by the Department under subsection (b) of this Section may apply for a non-resident license. The applicant shall apply to the Department and must meet all of the qualifications established in Section 25 of this Act [430 ILCS 66/25], except for the Illinois residency requirement in item (xiv) of paragraph (2) of subsection (a) of Section 4 of the Firearm Owners Identification Card Act [430 ILCS 65/4]. The applicant shall submit:

(1) the application and documentation required under Section 30 of this Act [430 ILCS 66/30] and the applicable fee;

(2) a notarized document stating that the applicant:

(A) is eligible under federal law and the laws of his or her state or territory of residence to own or possess a firearm;

(B) if applicable, has a license or permit to carry a firearm or concealed firearm issued by his or her state or territory of residence and attach a copy of the license or permit to the application;

(C) understands Illinois laws pertaining to the possession and transport of firearms; and

(D) acknowledges that the applicant is subject to the jurisdiction of the Department and Illinois courts for any violation of this Act;

(3) a photocopy of any certificates or other evidence of compliance with the training requirements under Section 75 of this Act [430 ILCS 66/75]; and

(4) a head and shoulder color photograph in a size specified by the Department taken within the 30 days preceding the date of the application.

(d) In lieu of an Illinois driver's license or Illinois identification card, a non-resident applicant shall provide similar documentation from his or her state or territory of residence. In lieu of a valid Firearm Owner's Identification Card, the applicant shall submit documentation and information required by the Department to obtain a Firearm Owner's Identification Card, including an affidavit that the non-resident meets the mental health standards to obtain a firearm under Illinois law, and the 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.

(e) Nothing in this Act shall prohibit a non-resident from transporting a concealed firearm within

his or her vehicle in Illinois, if the concealed firearm remains within his or her vehicle and the non-resident:

> (1) is not prohibited from owning or possessing a firearm under federal law;
>
> (2) is eligible to carry a firearm in public under the laws of his or her state or territory of residence, as evidenced by the possession of a concealed carry license or permit issued by his or her state of residence, if applicable; and
>
> (3) is not in possession of a license under this Act.

If the non-resident leaves his or her vehicle unattended, he or she shall store the firearm within a locked vehicle or locked container within the vehicle in accordance with subsection (b) of Section 65 of this Act [430 ILCS 66/65].

INTRODUCTION

In *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012), the Seventh Circuit's holding that the carriage of firearms in public for self-defense is a fundamental right, as fundamental as it is inside one's residence. ("The Supreme Court has decided that the [Second] amendment confers a right to bear arms for self-defense, which is as important outside the home as inside").

The Seventh Circuit's ruling in *Moore* led to the passage of Illinois's Firearm Concealed Carry Act (430

ILCS 66/1, *et seq*.) ("FCCA"), which allows qualified persons to obtain a license to carry firearms in public in a concealed manner for self-defense. However, that right to concealed carry is denied, in a discriminatory and arbitrary manner, to the law-abiding and qualified persons in 45 states, who are prohibited from even applying for an Illinois concealed carry license ("CCL"), regardless of their qualifications.

Therefore, Illinois's prohibition on virtually all non-residents obtaining a concealed carry license for self-defense violates the Petitioners' rights under the Second Amendment.

But all throughout this case, Respondents have only offered speculation and fear as justifications for the infringement of Petitioners' Second Amendment rights. Nonetheless, applying intermediate scrutiny, the District Court found the virtual non-resident CCL application ban "substantially related to Illinois' important public-safety interest." App. 37.

This virtual ban means the statute is both discriminatory and unfocused. Respondents have not pointed to a single instance anywhere where (1.) harm occurred because someone was allowed to apply for a non-resident CCL, or (2.) harm was prevented because someone was refused the ability to apply for a non-resident CCL.

Specifically, Petitioners ask this Court to consider whether Respondents' speculative and hypothetical harm, rejected as a justification for the infringement of Second Amendment rights in the Seventh Circuit's

decisions in *Moore* and *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011), nonetheless allows the State to deny the Second Amendment rights of millions of law-abiding persons in 45 states. This case has been couched in terms of "verification," but it remains the State's burden to show that the law serves its purpose. Beyond imagination, however, the State has shown nothing.

The lower courts held, or presumed, while Petitioners were seeking a preliminary injunction against the ban, that they showed a likelihood of success on the merits, irreparable harm, and no adequate remedy at law. The only factor in which the Courts have ruled against Petitioners was the balance of harm/public interest element. But from the inception of this case until now, Respondents still have no evidence that allowing non-resident CCL holders to file CCL applications in Illinois would cause any harm, or that allowing non-resident CCL applications has caused harm anywhere else.

Respondents cannot even argue that CCL reciprocity has caused a problem in any other state. The Respondents have never shown anything factual to support their discriminatory restriction.

Respondents likewise cannot show any resulting harm from allowing non-resident CCL-holders to possess firearms in public while in their cars on Illinois roads (*See* 430 ILCS 66/40(e)), on hunting grounds (*See* 430 ILCS 65/2(b)(5),(13)), firing ranges and sport-shooting locations (*See* 430 ILCS 65/2(b)(7)), and on

Illinois residents' private property (*See* 430 ILCS 65/2(b)(10)). Illinois allows all this yet denies the ability to apply for an actual CCL, which would ensure training, registration into Illinois's CCL system, and compliance with all of Illinois's CCL requirements. While "[f]reedom resides first in the people without need of a grant from government", *Hollingsworth v. Perry*, 570 U.S. 693, 727 (2013) (Kennedy, J., dissenting), in this case Petitioners are actually attempting to participate in the State's licensing system.

Petitioners showed that CCL permit-holders are law-abiding and commit less crime than the general population, which explains why Respondents cannot show that any harm would result from enjoining the ban.

It has been the Respondents' burden to justify their restriction on fundamental rights. *See, e.g., Ezell*, 651 F.3d at 708-09. In *City of L.A. v. Alameda Books*, 535 U.S. 425 (2002), this Court held:

> This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either

> manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Id. at 438-39.

Respondents did not meet their burden under *Alameda Books*, as all the "evidence" Respondents have ever offered is they are worried something may happen. That is not good enough. While the State may regulate the CCL system in a constitutional manner, the current enforcement of Section 66/40 against the Petitioners and the law-abiding CCL holders of 45 states is not constitutional.

Because of the potential harm to Petitioners and other law-abiding persons from enforcement of the challenged statute, and the lack of harm to public safety from overturning it, certiorari should be granted and the statute must be enjoined.

STATEMENT OF THE CASE

1. Illinois' Statutory Scheme

The Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

However, per 430 ILCS 66/40(b) and (c), a nonresident of Illinois may only apply for an Illinois concealed carry license if she lives in a state with firearm

laws deemed "substantially similar" to Illinois', and she must still fulfill all statutory qualification requirements. 430 ILCS 66/40(c).

Per the Illinois State Police website, "substantially similar" means "the 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."

Since *Culp v. Madigan*, 830 F.3d 400 (7th Cir. 2016) (*Culp I*), the Illinois State Police deemed Arkansas, Mississippi, Texas, and Virginia "substantially similar" for non-resident application purposes (*See* https://www.ispfsb.com/Public/FAQ.aspx, last viewed October 7, 2019). None of the individual Petitioners reside in these states.[1]

720 ILCS 5/24-1, titled "Unlawful Use of Weapons," and 720 ILCS 5/24-1.6, titled "Aggravated unlawful use of a weapon" criminalize the possession of a concealed firearm on one's person for self-defense without a valid Illinois concealed carry license per 720 ILCS 5/24-1.6(3)(A-5),(B-5) and 720 ILCS 5/24-2(a-5), unless on one's own property or on another's property with the owner's permission, whether as an invitee or

[1] At the time of *Culp I*, the "substantially similar" states were Hawaii, New Mexico, South Carolina, and Virginia. App. 84.

business invitee. These statutes prohibit the Petitioners, and residents of the "other 45 states" from applying to obtain a CCL, and therefore from the public concealed carry of firearms for self-defense.

2. The Petitioners and the Scheme's Application[2]

Kevin W. Culp is a legal resident of Centerville, Ohio. Culp is an Air Force Colonel who until recently was stationed in Illinois, but is now stationed in Ohio (formerly Pennsylvania when this case was initiated, to the same effect). He has Pennsylvania and Ohio licenses to carry a concealed weapon, as well as a Florida concealed carry license. Culp is also a Basic Pistol Instructor and an Illinois concealed carry licensing instructor.

Marlow Davis lives in Milwaukee, Wisconsin. He possesses a Wisconsin driver's license and a Wisconsin license to carry a concealed weapon. He is retired and spends approximately half of his time in Chicago. He is the husband of co-Petitioner Freddie Reed-Davis.

Freddie Reed-Davis lives in Milwaukee, Wisconsin. She is the wife of co-Petitioner Marlow Davis. She possesses a Wisconsin driver's license and a Wisconsin license to carry a concealed weapon. She is a nurse working in Chicago.

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[2] The facts are cited generally at App. 38 and 85, but all information regarding the Petitioners contained herein was presented in Petitioners' Complaint and (except for Petitioner Westrom) in Declarations submitted to the lower courts.

Douglas W. Zylstra lives in Munster, Indiana. He possesses an Indiana driver's license and an Indiana license to carry a concealed weapon, as well as a concealed carry license and instructor certification from Utah. Zylstra is an Illinois State Police certified concealed carry instructor working for a firearm training company in Lansing, Illinois.

John S. Koller lives in Castle Rock, Colorado. He possesses a Colorado driver's license and a Colorado license to carry a concealed weapon, as well as concealed carry licenses from Utah, Nevada and Arizona. Koller was born and raised in Chicago, Illinois, and still has family in the Chicago area, who he visits. He also makes periodic business trips to Illinois.

Steve Stevenson lives in Aurora, Colorado. He possesses a Colorado driver's license. Stevenson has a Colorado resident concealed carry license, as well as a concealed carry license from Utah, and must occasionally traverse Illinois on I-80 or I-88 to visit relatives in both Illinois and Michigan.

Paul Heslin lives in Defiance, Missouri. He is originally from Lake County, Illinois. He possesses a Missouri driver's license and a Missouri license to carry a concealed weapon, as well as a concealed carry license from Florida, and a Type 03 federal firearms license. He is also an Illinois certified concealed carry instructor.

Marlin Mangels lives in Keokuk, Iowa. He possesses an Iowa driver's license and an Iowa license to carry a concealed weapon, as well as concealed carry

licenses from Utah and Arizona. Keokuk is just across the Mississippi River from Hamilton, Illinois. Mangels frequently rides his bicycle up the River Road in Illinois, eats in restaurants in Hamilton, Illinois, travels to see his wife's family in the Chicago area, and travels I-80 through Illinois to visit friends in Massachusetts.

Jeanelle Westrom lives in Davenport, Iowa. She possesses an Iowa driver's license and an Iowa license to carry a concealed weapon, as well as one in Georgia. She has a firearms business in Davenport, Iowa but also a separate firearms business in Geneseo, Illinois, where she spends a considerable amount of her time. Westrom also possesses three federal firearms licenses, which are required for her businesses.

The individual Petitioners are licensed to possess concealed handguns in their home states, but are prohibited by 430 ILCS 66/40 from applying for an Illinois CCL. This is because their home states are not approved for applications for concealed carry licensing by the Respondents, as they do not live in Arkansas, Mississippi, Texas, or Virginia.

The individual Petitioners would apply for and obtain an Illinois concealed carry license, and would carry a loaded and functional concealed handgun in public in a concealed manner for self-defense, but refrain from doing so because they fear arrest, prosecution, fine, and imprisonment as it is unlawful for an unlicensed individual to carry a concealed handgun in Illinois.

Second Amendment Foundation, Inc., Illinois State Rifle Association, and Illinois Carry are non-profit membership organizations in Washington (SAF), and Illinois (ISRA and IC). Their members include non-residents of Illinois who wish to obtain an Illinois concealed carry license but do not have a concealed carry license from an "approved state" according to the Illinois State Police. Their organizational purposes include education, research, publishing and legal action focusing on the Constitutional right privately to own and possess firearms. They have sued on behalf of themselves and their members.

Members of SAF, ISRA, and IC who are not residents of Illinois and have concealed carry licenses from a non-approved state, would carry a loaded and functional concealed handgun in public in a concealed manner for self-defense, but refrain from doing so because they fear arrest, prosecution, fine, and imprisonment as they understand it is unlawful for an unlicensed individual to carry a concealed handgun in Illinois.

The individual Petitioners are members of the above-named organizations.

3. Procedural History

Petitioners filed suit on October 22, 2014. On October 20, 2016, the Seventh Circuit denied Petitioners' request for a preliminary injunction. App. 88. Even though Petitioners demonstrated irreparable harm, a likelihood of success on the merits, and no legal remedy (since the panel majority went right to the balance of

harms element, Petitioners presume the Seventh Circuit agreed with the District Court that Petitioners met these first three factors), that court weighed the balance of harms in favor of the Respondents.

Based on *Culp I*, the District Court on September 18, 2017, granted the Respondents summary judgment and denied summary judgment to the Petitioners (App. 81), even though the Respondents still had not shown any actual harm resulting from allowing the non-resident CCL applications.

On April 12, 2019, the Seventh Circuit affirmed. 921 F.3d 646 (7th Cir. 2019) (App. 1, 26). The panel majority saw the interest of the State as "ensuring the ongoing eligibility of who carries a firearm in public" (App. 17), discussed the State's "information deficit," *id.*, and upheld the ban under intermediate scrutiny. *Id.*

Petitioners moved for a panel rehearing or rehearing *en banc*, but the requests were denied. App. 106.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit's Decision Contradicts *Heller*.

The Supreme Court has held that the enumerated right to possess a firearm for lawful purposes, most notably for self-defense, is fundamentally core to the Second Amendment. *Heller*, 554 U.S. at 629. *See also McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010).

This right "is fully applicable to the States." *McDonald*, 561 U.S. at 750.

In *Heller*, this Court held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons." 554 U.S. at 592. The Seventh Circuit held that, under *Heller*, that right extends outside of the home. *Moore*, 702 F.3d at 937.

Much is made about the "disclaimer" portion of *Heller*. *See* 554 U.S. at 626. But nothing therein justifies the non-resident ban that has been so far upheld in this case. And while the lower court incorrectly believed that Petitioners are arguing for "a broad, unfettered right to carry a gun in public," (App. 15), this is not true. Rather, there is a fundamental right to carry a firearm for self-defense in public, and that infringements of that right be analyzed using strict or near-strict scrutiny, given how close a ban on public carry of firearms for self-defense comes to the core of the Second Amendment right (*See Heller*, 554 U.S. at 630 (law that makes it impossible for citizens to use firearms for the "core lawful use of self-defense" is unconstitutional)). However, Petitioners acknowledge the licensing system for Illinois CCLs, and seek only the opportunity to comply. Maybe they will pass muster, and maybe they will not qualify. Either way, they must be allowed the opportunity to complete an application.

The first sentence of the *Heller* "disclaimer" noted "that the [Second Amendment] right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S.

at 626. But this sentence goes to the "what" and "why" of firearm possession; it does not speak to who may possess them.

Then, *Heller* stated 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. . . ." *Id*. at 626-27. Of course, *Heller* does not discuss prohibitions on "those whom the State wonders if they may someday fall into one of these categories, but will not give an opportunity to prove otherwise."

Petitioners have concealed carry licenses in their home states, but this is not a case about reciprocity. Petitioners are not asking for any special treatment, contrary to the Seventh Circuit's opinion. App. 23. They wish to undergo the same training, pay double the application fee, and go through all the same background check and qualification requirements as Illinois residents.

The Seventh Circuit noted of *Culp I*:

> 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. . . .

App. 13.

The problem is the State has never shown that infringing on Petitioners' rights actually furthers public safety, or that obliging Petitioners' rights would endanger it. And the restriction is arbitrary in light of all the places in Illinois a non-resident can possess a firearm if licensed in her home state.

The *Culp v. Raoul* Court found the Respondents' claim convincing that they cannot properly vet or monitor a non-resident applicant or CCL holder. However, even if this were true (which it is not), there is no harm shown from that scenario, not logically nor from the information submitted by the Respondents. There is no evidence that any violence problems in the 45 states are due to those states' CCL application procedures. Non-residents from the 45 banned states can move to one of the four allowed states, or Illinois itself, and apply for a CCL. Illinois CCL holders who leave the State do not have their CCL's revoked or suspended, even though the State cannot possibly know what those persons did while out of Illinois, unless they get convicted of an offense that lands them in a federal database. These people are all throughout Illinois, yet it is well-known these CCL holders are not the cause of any gun violence problem that may exist in Illinois.

The real problem, of course, is if someone wanted to bring a gun illegally into Illinois, he would just do so. It is ludicrous to suggest that being ineligible for a CCL would prohibit such an occurrence.

Therefore, the non-resident CCL application virtual ban is both under-inclusive and over-inclusive,

and is not sufficiently tailored to any public safety goal. App. 29 (Manion, J., dissenting). The laws are "designed to ensure that felons and the mentally ill do not obtain concealed carry licenses." App. 76-77. However, given that (1.) there is no proof the laws actually further this goal; (2.) non-resident CCL-holders can legally bring guns in to the State in numerous circumstances; and (3.) criminals who wish to bring guns into the State do not apply for a license to do so, the challenged statute does not pass constitutional scrutiny.

Petitioners' position is borne out by academic studies and statistical research. Peer reviewed academic studies show that "most guns are in the hands of people who are unlikely to misuse them." Cook, Philip J., Ludwig, Jens, Samaha, Adam M., *Gun Control After* Heller*: Threats and Sideshows From a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1046 (2009) (available at www.uclalawreview.org/pdf/56-5-1.pdf, last viewed October 7, 2019).

"The available data about permit holders also imply that they are at fairly low risk of misusing guns, consistent with the relatively low arrest rates observed to date for permit holders." *Id*. at 1082.

"During President Obama's administration, the number of concealed handgun permits has soared to over 14.5 million—a 215% increase since 2007." "In another 11 states, a permit is no longer required to carry in all or virtually all of the state. Thus the growth in permits does not provide a full picture of the overall

increase in concealed carry." "Each one percentage point increase in rates of permit-holding is associated with a roughly 2.5 percent drop in the murder rate." "Concealed handgun permit holders are extremely law-abiding. In Florida and Texas, permit holders are convicted of misdemeanors and felonies at one-sixth of the rate at which police officers are convicted." John R. Lott Jr., *Concealed Carry Permit Holders Across the United States: 2016*, Report from the Crime Prevention Research Center, at p.3 (2016) (found at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2814691_code16317.pdf?abstractid=2814691&mirid=1&type=2 (last viewed October 7, 2019)). Page 17 of this study shows that Illinois had 180,583 concealed carry permits as of June 17, 2016 (*Id*. at p.17).

What Respondents omit is the obvious fact that most concealed carry applicants have no criminal history and hence will have no gaps to research. Consider the "cohort study of handgun purchasers ages 21 to 49 in California in 1991, 2,761 with a non-prohibiting criminal history at the time of purchase and 4,495 with no prior criminal record, followed for up to 5 years." "A new conviction for a felony or violent misdemeanor leading to ineligibility to possess firearms under federal law was identified for 0.9% of subjects with no prior criminal history and 4.5% of those with 1 or more prior convictions. . . ." Wright M.A., Wintemute G.J., *Felonious or violent criminal activity that prohibits gun ownership among prior purchasers of handguns: incidence and risk factors*, J. Trauma, Oct.; 69(4) at pp.948-55 (2010) (available at https://www.ncbi.nlm.

nih.gov/pubmed/20440225, last viewed on October 7, 2019).

It is not in the public interest, and does not actually prevent any harm to the Respondents (or anyone else in Illinois), to deprive the Second Amendment rights of the many with no arrests whatsoever because of the inherent problem in any database that affects so few applicants.

Respondents argue that the isolated difficulties in verifying out of state applications will cause dire consequences in Illinois. That implication is easily refuted by comparing the states with the most people carrying concealed firearms because there is no permit system, to those states that have the fewest permits because of stringent concealed carry permit systems. "In 2014, the seven states that allowed concealed carry without a permit had much lower rates of murder and violent crime than did the seven jurisdictions with the lowest percentage of permit holders." Lott, *Concealed Carry Permit Holders Across the United States: 2016* at p.10.

While the Respondents have argued that Illinois' current *ad hoc* procedure has database errors, the statutory scheme of a background check system of the Federal Bureau of Investigation (430 ILCS 66/35(1)), which all applicants must undergo, is the gold standard. "No single source exists that provides complete and up-to-date information about a person's criminal history. The FBI-maintained criminal history database, however, is certainly one of the better sources because it is based on positive identification and can

provide, at a minimum, nationwide leads to more complete information." *THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS* – June 2006, p.6 (located at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&ved=0ahUKEwiP16rIkrDRAhUZ0IMKHRUeCxwQFghBMAY&url=https%3A%2F%2Fwww.bjs.gov%2Fcontent%2Fpub%2Fpdf%2Fag_bgchecks_report.pdf&usg=AFQjCNEZlC-op7B4tylG42ZrrdOyEzRucg&sig2=b8g6FxwPwTgmdEqmY8WkMQ&cad=rja (last viewed October 7, 2019).

Finally, per the record below, it cannot be understated that someone who moves to Illinois, after living their whole lives in another state, regardless of what that state wrote on the "substantially similar" survey, is immediately eligible to obtain a FOID and apply for a CCL in Illinois. The same is true for one who moves to an approved state after a lifetime in a non-approved state. Further, someone who leaves the State for mental health treatment but does not report it (perhaps leaving the State for that reason), or for example gets mental health treatment while attending an out-of-state school, will not have their CCL eligibility revoked.

What this all means is that the non-resident CCL application virtual ban is both under-inclusive and over-inclusive. Under the strict or near-strict scrutiny required in this case, the ban does not pass muster. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 232 (1987) (sales tax on printed media with exemptions that were over-inclusive and under-inclusive for

stated purpose violated First Amendment using strict scrutiny).

Petitioners also cited to two examples of actual criminal attacks thwarted only because the non-resident victim had the good fortune to be in their car where their firearm was located. *See Vietnam Veteran Turns Table on Would-Be Robbers, Shooting Both*, The Telegraph, February 3, 2017 (reprinted at https://www.pkatarms.com/2017/02/03/vietnam-veteran-turns-tables-robbers-shooting/) (last viewed October 6, 2019); *see also Conway woman survives knife attack and kidnapping in Illinois*, KSPRabc33, October 19, 2017 (available at http://www.kspr.com/content/news/Conway-woman-survives-knife-attack-and-kidnapping-in-Illinois-451541183.html) (last viewed October 5, 2019). This is the harm caused by the offending statute, not the hypotheticals the Respondents have offered throughout this case.

It is obvious a person intending to commit gun violence in Illinois is not going to undergo the training, fulfill the requirements, and pay the fees to first get an Illinois CCL. If someone wanted to bring a gun illegally into Illinois, he would just do so. It is ludicrous to suggest that being ineligible for a CCL would prohibit such an occurrence. However, while this is acknowledged, the lower court just paid lip service to it. The Petitioners wish to participate in the system and are willing to fulfill all requirements in order to do so. In light of the above, the lower court should have enjoined the enforcement of 430 ILCS 66/40.

The Respondents and the lower court concluded that the harm is the inability to verify, not that the State has tried. The State has not even sent out a survey since 2015. In the interim, states (currently approved or non-approved) may have changed their standards, and the fact that Illinois does not know this information and has not made efforts to update its information completely undercuts its verification arguments, especially if one of the four approved states has since amended its firearm carriage and/or possession laws.

However, the harm that *should* be considered is the physical harm that has resulted from allowing non-residents, anywhere, to apply for a concealed carry license. The answer, of course, is none. The Respondents did not point to one act of gun violence that resulted because a non-resident was allowed to apply for a license.

Petitioners (and indeed both the Seventh Circuit majority and dissent) noted multiple ways the State could obtain initial and continuing verification from non-resident applicants, including passing the increased cost of obtaining information to the applicant, requiring the applicant to obtain necessary information from her home state, and requiring periodic continued verification, such as from a mental health professional and criminal background checks. App. 18 (panel majority), App. 31-32 (Manion, J., dissenting). In fact, the State already has such requirements in the FCCA (*See* 430 ILCS 66/40(d)). Therefore, the Illinois legislature has defined how to treat non-resident

applicants. They have the burden of providing additional notarized statements, affidavits and other listed documents, including that they are eligible and complying with the FCCA.

Respondents' claims of concerns about verification ignore the overinclusive and underinclusive nature of the process. App. 29 (Manion, J., dissenting). Depriving virtually all non-residents applying for their Second Amendment rights will not make anyone safer. Petitioners know this because if it did, Respondents would have said so, and pointed to examples. Instead, the Respondents have repeatedly said "what if," and "maybe," and "we can't know." However, we do know that criminals will not obey the laws, will bring guns into the State, and will definitely not make the effort of applying for a license first.

Petitioners reiterate what the Seventh Circuit held in *Moore*:

> [T]he Supreme Court made clear in *Heller* that it wasn't going to make the right to bear arms depend on casualty counts. 554 U.S. at 636. 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.

Moore, 702 F.3d at 939.

Preventing the law-abiding from self-defense by infringing on their constitutional rights, with a law

that will not stop criminals from bringing guns into the State, directly contradicts the core purpose and right recognized in *Heller*, and is also a public safety hazard. The Court should address this issue of exceptional and urgent importance.

II. Review is Necessary to Reinforce to the Lower Courts That the Second Amendment Right Discussed in *Heller* To Bear Arms For Self-Defense Must Be Respected.

It has become abundantly clear in the years since *Heller* was decided that without this Court's attention and review, the lower courts will continue to shrink and limit the holdings in *Heller* to its specific fact pattern, as if that were all the Court was saying, thus ignoring *Heller*'s admonition that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Heller*, 554 U.S. at 634-35.

"[N]oncompliance with our Second Amendment precedents warrants this Court's attention as much as any of our precedents. . . ." *Friedman v. City of Highland Park*, 136 S. Ct. 447, 447 (2015) (Thomas, J., dissenting from denial of certiorari). "[A] considerable degree of uncertainty remains as to the scope of [the Second Amendment] right beyond the home and the standards for determining whether and how the right can be burdened by governmental regulation." *United States v. Masciandaro*, 638 F.3d 458, 467 (4th Cir. 2011).

In dissenting from the denial of certiorari in *Friedman*, Justice Thomas wrote: "I would grant certiorari to prevent the Seventh Circuit from relegating the Second Amendment to a second-class right." *Friedman*, 136 S. Ct. 447, 450 (2015) (Thomas, J., dissenting). *See also Jackson v. City and Cnty. of San Francisco*, 135 S. Ct. 2799, 2802 (2015) (Thomas, J., dissenting from denial of certiorari) (listing cases wherein this Court has shown a "repeated willingness to review splitless decisions involving alleged violations of other constitutional rights").

Though the Seventh Circuit is in fact one of the few to explicitly recognize that the Second Amendment right extends outside of the home (*See also Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017)), such recognition is hollow to the Petitioners, who are nonetheless unable to even apply to be able to fully exercise the right. If Petitioners are lucky enough to be in their cars, or hunting, or at a friend's house with permission to possess a firearm, or at a firing range when they are attacked, then they may be able to defend themselves. Otherwise, they are prohibited solely due to where they reside.

This case, while narrow, is but one example of the lower courts restricting Second Amendment rights in the face of *Heller* because that case did not address the specific factual situation in front of the lower court at that moment. Absent instruction from this Court, the Second Amendment will continue to be diluted.

It may be true that "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment." *McDonald*, 561 U.S. at 785, and Petitioners are not challenging the substantive licensing requirements in the Illinois FCCA. However, by refusing to allow Petitioners to apply and comply, Respondents cross the line from "reasonable firearms regulations" to unconstitutional infringement that fails to meet heightened scrutiny.

That State and local governments do not have *carte blanche* to experiment with fundamental rights is apparent when it comes to establishing religion *via* school prayer (*Engel v. Vitale*, 370 U.S. 421 (1962)), using libel and nuisance laws to suppress freedom of the press (*Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931)), "separate but equal" educational facilities (*Brown v. Board of Education*, 347 U.S. 483 (1954)), prohibitions on interracial marriage (*Loving v. Virginia*, 388 U.S. 1 (1967)), interference with family planning (*Griswold v. Connecticut*, 381 U.S. 479 (1965)), or prohibitions on same-sex marriages (*Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)). Though many lower courts are apparently content to treat the Second Amendment as a second class right, *Heller* prohibits disarmament as a social experiment as well. *See Heller*, 554 U.S. at 661.

III. The Seventh Circuit Applied an Incorrectly Deferential Level of Scrutiny, Which Underscores the Need for a Cohesive Standard of Review in Second Amendment Cases.

The main vehicle the lower courts use to water down the Second Amendment right is the level of scrutiny to be applied in Second Amendment cases. The lower court applied intermediate scrutiny, which put the law-abiding Petitioners on the same level as the domestic abuser in *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010); the felon-in-possession in *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010); and the drug abuser in *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010). This is horribly unfair.

In contrast, the law-abiding Petitioners in *Ezell* enjoyed "not quite 'strict scrutiny'" in their challenge to Chicago's firing range ban. *Ezell*, 651 F.3d at 708. Here, the Petitioners are also the law-abiding persons. "[T]here is no doubt the FCCA must face 'exacting (although not quite strict) scrutiny.'" App. 28 (Manion, J., dissenting).

"Without clear or complete guidance from the Supreme Court, lower court judges have proposed an array of different approaches and formulations, producing a 'morass of conflicting lower court opinions' regarding the proper analysis to apply" in Second Amendment cases. Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 706 (2012) (footnote omitted). By applying intermediate scrutiny, the lower

court made it easy to ignore the Respondent's lack of evidence and rule against Petitioners.

But employing intermediate scrutiny is wrong. The Petitioners are law-abiding, the Respondents have shown no information they are not, and there were as-applied as well as facial challenges to the law.

The proper level of scrutiny is not just critical for this case ("Under the proper standard of review, the Petitioners are certain to succeed on the merits of their Second Amendment claim") *See Culp I*, 840 F.3d at 404 (Manion, J., dissenting), but applying exacting scrutiny on large scale infringements to law-abiding persons will provide clarification and certainty to an issue that unfortunately has much ambiguity surrounding it. If law-abiding persons, seeking only to further follow the law, are treated like domestic abusers, drug users, and felons in their claims, it only diminishes Second Amendment jurisprudence in the lower courts.

Of course, this is assuming that interest-balancing levels of scrutiny should be applied at all, since *Heller* specifically rejected them. *Heller*, 554 U.S. at 634-35. There, this Court held:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting

> upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.

Heller, 554 U.S. at 634.

Instead, this Court in *Heller* based its decision on the text and history of the Second Amendment. *Heller*, 554 U.S. at 595. Applying that here, the Respondents made no showing that non-residents were historically barred from possessing arms, or that this was within the traditional understanding of the right to bear arms.

The parties, and the Courts, agreed that the Second Amendment right was implicated (App. 67), conceding that non-residents being allowed to carry firearms for self-defense, even into other states, was historically understood by the Framers, whether in 1791 or 1868, to be within the scope of the Second Amendment right. Under *Heller*'s text and history analysis, since there was no long-standing prohibition of the type imposed in this case, it should be struck down. The State can regulate, but the outright ban at issue simply goes too far.

The Seventh Circuit's deference to the "what if" and "maybe" sort of speculative harm advanced by the State in this case is similar to that Court's conclusion that "[i]f a ban on semiautomatic guns and large-capacity magazines reduces the perceived risk from a mass shooting, and makes the public feel safer as a result, that's a substantial benefit." *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015). In

neither situation was any actual harm shown; rather, the Court deferred to the government's imagined fears.

Unless the Court grants the Petition, virtually all Americans will be deprived of their full Second Amendment rights while in the State of Illinois, based on nothing more than their state of residence. This contradicts *Heller*'s teaching that "the *inherent right* of self-defense has been central to the Second Amendment right." *Heller*, 554 U.S. at 628 (emphasis added), and that self-defense "was the *central component* of the right itself." *Id.* at 599 (emphasis in original).

Therefore, this Court should reaffirm that the rules of evidence require more than speculation, especially when it comes to the deprivation of a fundamental right that affects the law-abiding persons in most of the United States.

CONCLUSION

It is vitally important that the fundamental nature of the right to the public carry of firearms for self-defense be affirmed by this Court, so that all Americans may enjoy the full measure of protection in their exercise of constitutional rights. And while Petitioners do not challenge the Respondents' other licensing standards, they seek the opportunity to complete an application and prove themselves. As the evidence submitted by Petitioners shows, it may save their lives.

The issues raised by the decision below are important, ongoing, and affect most of the United States. Further, this case presents a narrow issue through which the Court can bring much-needed guidance to the scope and analysis of Second Amendment jurisprudence. Petitioners respectfully pray that the Court grant their petition.

Respectfully submitted,

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October 10, 2019