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

MICHAEL MOORE, et al.,	)	
	)	
PLAINTIFFS,	)	11-3134
	)	
VS.	)	
	)	
LISA MADIGAN, et al.,	)	SPRINGFIELD, ILLINOIS
	)	
DEFENDANTS,	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE SUE E. MYERSCOUGH
U.S. DISTRICT JUDGE

AUGUST 4, 2011

A P P E A R A N C E S:

FOR THE PLAINTIFF:	MR. DAVID JENSEN ATTORNEY AT LAW 61 BROADWAY NEW YORK, NY and MR. DAVID G. SIGALE ATTORNEY AT LAW 739 ROOSEVELT ROAD GLEN ELLYN, IL
FOR THE DEFENDANT:	MR. TERENCE CORRIGAN MR. DAVID A. SIMPSON MS. KAREN McNAUGHT ILLINOIS ATTORNEY GENERAL 500 S. SECOND SPRINGFIELD, IL
COURT REPORTER:	KATHY J. SULLIVAN, CSR, RPR OFFICIAL COURT REPORTER 600 E. MONROE SPRINGFIELD, ILLINOIS (217) 525-4199

I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
(NONE.)				

E X H I B I T S

GOVERNMENT'S EXHIBIT NUMBER	IDENTIFIED	ADMITTED

DEFENDANT'S EXHIBIT NUMBER	IDENTIFIED	ADMITTED

P R O C E E D I N G S

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THE COURT: Good morning. We have before us today civil docket case 11-CV-03134, this is Moore versus Madigan.

We have for the Plaintiff Moore, Hooks, and the Second Amendment Foundation, David Jensen.

MR. JENSEN: That's me, Your Honor.

THE COURT: All right. Good morning. And David, is it --

MR. SIGALE: Sigale.

THE COURT: Sigale.

MR. SIGALE: Yes. Good morning, Your Honor.

THE COURT: And on behalf of the defendants we have Terry Corrigan. And who's with you today?

MR. CORRIGAN: David Simpson.

MR. SIMPSON: David Simpson, Your Honor.

THE COURT: Mr. Simpson. I note Ms. McNaught is behind you. She is welcome to join you at counsel table if she wishes.

MS. McNAUGHT: I will just move up here.

THE COURT: All right. This cause is called for hearing on a motion for preliminary injunction. We have briefs by everyone, including

the Amicus brief filed, and the response thereto, last night at 5:00. I have reviewed all of the above and we are here today for argument.

Will there be any evidence presented today?

MR. JENSEN: We don't plan on submitting any evidence, Your Honor.

MR. CORRIGAN: Your Honor, we weren't going to call witnesses, but I do have a copy for the Court of some of the studies that we cited in the brief with Internet references. I just printed them off of the Internet if the Court would like them.

THE COURT: Is there any objection?

MR. JENSEN: We would object on relevance grounds, but we don't have any objection based on authenticity.

THE COURT: I haven't read them so I don't know how to rule on the objection.

MR. JENSEN: Fair enough.

THE COURT: The Court will accept them at this time and review them and then rule on the motion.

All right. Who will be arguing?

MR. JENSEN: I will, Your Honor.

THE COURT: All right. Please proceed.

MR. JENSEN: Well, Your Honor, the argument

is very straightforward. We don't believe that there are any issues of fact.

It makes somewhat sense to simply begin by taking a look at what issues are in dispute and which issues are not in dispute, which I believe is relatively clear based on a review of the papers that have been submitted.

First and foremost, there's no dispute, or there's no significant dispute, that the laws of the state of Illinois prohibit the act of carrying firearms in public. The state defendants do make some claim that the state's prohibition could be characterized as a time, place, and manner restriction in their oppositions papers.

Earlier in the papers there's a general concession that the ban is on carry, and as a practical matter there does not seem to be any dispute that the actual terms of state laws -- of the state laws at issue under virtually all circumstances prohibit private citizens from carrying firearms in public.

There also does not appear to be any substantial dispute that the essential nature of the Supreme Court's ruling in Heller was to conclude that the terms of the Second Amendment, and

particularly the protection of the right of the people to keep and bear arms, protects both the right to possess and carry modern arms including firearms, specifically including handguns.

The issue focuses on whether or not the Heller, and for that matter McDonald rulings, are limited to the home or have never been recognized beyond the home, or whether in fact the Second Amendment does apply as a general proposition and without regard to whether or not a person is standing within the confines of their home.

This is an issue that turns simply on rules of stare decisis and consideration of the issues the court in Heller actually addressed.

The state's -- the Heller court's treatment of the term "bear arms" in the context of interpreting or construing the phrase "keep and bear arms" largely, if not entirely, resolves the present question of whether or not there is a right to bear arms and what exactly that right means.

So while we have an argument from the state that essentially goes along the lines of there may be some sort of a right to bear arms, but it's unclear exactly what that right is; it can be restricted, it can be banned, it's not really clear.

The Heller court, in the course of determining whether or not the term "bear" applied to personal conduct as opposed to conduct that was under the auspices of military authority or for military purposes, looked at American authorities from, in particular, the 19th century. And more particularly, many authorities falling within the period between the time the Constitution was ratified and the time that the 14th Amendment was ratified. And concluded that the majority view of state courts in the United States have been that the right to bear arms was a right to carry arms.

In this light most all of the decisions that the state cites to support the claim that the Second Amendment can be constrained in a manner such that people would not have the ability to carry firearms in public under any set of conditions, that these cases really show exactly the opposite.

And that's really what the Supreme Court found in Heller. Which is that the -- first of all, most of the 19th century authorities that are pertinent and that discuss the issue of bearing arms consider the discrete issue of whether states can ban or license the concealment of firearms in public rather than the basic -- the more basic question of whether

states can completely preclude the act of carry.

So many of the state court decisions, as noted by the court in Heller, concludes that while there is a right to carry arms but a restriction on concealed firearms, is simply a restriction on the time, manner, and place that firearms are carried, and that it is a permissible one.

Now that question, which is not the question that's presented in this case, because the laws of the state of Illinois don't allow people to carry or not carry firearms openly or concealed. The answer and the reasoning that's applied in resolving that question indicates that there is a general right to carry arms. And once that point is reached, there is really no remaining dispute, because we don't have a restriction on carrying arms.

We're not here talking about, for example, a requirement that someone have certain attributes in their background. That they -- that they satisfy training requirements, that they meet qualifications requirements, that they meet vision requirements, or any other set of restrictions. We are talking about the fact that no matter what someone's circumstances may be or what conditions they're willing to comply with, there simply is no ability available to them

to carry a firearm for self-defense in Illinois once they have left their own private land.

THE COURT: Well, there is some limited use. I know I've had my gun in the car before for transportation purposes. Broken down and in a case.

MR. JENSEN: Well, Your Honor, I think that's a good point, because the right to bear arms is the right to carry firearms in case of confrontation implies necessarily the ability to actually have firearms operable and functional.

And I suppose what I could really say on that exact, on that exact point, is I'm stopping here today to attend this hearing on my way back from a family trip in Lake Powell in Arizona and Utah to my home in the Hudson Valley of New York. I was lawfully allowed to carry a handgun in my vehicle, loaded and ready for use, at all points in my trip except the point in time when I was in Illinois, at which point I stopped the car, unloaded the gun, put it in a case, and put it in the trunk.

The essential difference in the Illinois regulatory scheme is that there is no provision whatsoever made for the ability to carry an operable firearm.

THE COURT: Was there a recent case in

Illinois that said an Indiana resident did not have to do what you did when coming into Illinois? Are you aware of that case?

MR. JENSEN: I am aware of a relatively recent decision from the Illinois Supreme Court; the name escapes me; and it has to do with non-residents and the firearm owner's I.D. card requirement. But does not have to do with the ability to carry a firearm for protection purposes.

THE COURT: Okay. I found Heller very interesting. I use to be an English teacher so I like the history that was set forth.

But my question to you is; sitting here in this court, what am I to do in light of Ezell and Scion?

My understanding is that the panel in Ezell was required to follow the en banc decision in Scion. It did not, or it certainly digressed. What is stare decisis to me as I sit here today in the 7th Circuit?

MR. JENSEN: Well, first and foremost, setting aside any decision in the 7th Circuit, the first stare decisis concern ought to be what has the Supreme Court necessarily decided. And on that point the issue of what are the bounds of stare decisis.

The relatively clear rule in the 7th Circuit under Sarnov and other authorities is that if a point of rationale is could not be deleted from the opinion without seriously undermining the analytic underpinnings as a part of the whole.

Now, setting aside the question of whether there's some academic basis on which the court could have decided Heller without concluding that the right to bear arms is the right to carry arms, the fact is that how the court decided Heller is you could not remove that aspect of the decision without seriously undermining the analytic underpinnings.

That very issue had been the issue that had been the basis for the District Court's denial of the plaintiff's motion for summary judgment and the D.C. Circuit's reversal of that decision. Whether or not the right to bear arms is the right to carry arms and whether or not -- whether instead it connoted the use of firearms only in a military setting or in accordance with military dictates.

Now, having said that, neither; and I have never known how to say this; Scion nor Ezell addresses the issue of carry. Both of them implicitly recognize that the Second Amendment does not end at the threshold of the home. Even Scion

was caught carrying a gun in his truck. And the very law that's at issue of Ezell is the right to use handguns outside one's home in the city of Chicago.

The real issue that is, we would submit, dispositive of all of the issues in the case, is simply whether there is in fact merit to the argument that the Supreme Court has limited or has not recognized a right to carry outside the home.

If the Supreme Court recognized that the -- if the Supreme Court has recognized the Second Amendment as a right that does not end at the threshold of one's home, then it is a relatively straightforward matter that state law absolutely prohibiting the activity is not going to survive scrutiny and a preliminary injunction should issue.

On the other hand, if the Second Amendment, the right to keep and bear arms, is a homebound amendment or a private property bound right, then for all practical purposes state laws that by their terms prohibit the carry of firearms in public really don't raise any constitutional concerns.

So in a lot of ways Illinois state laws, given their uniqueness in the American landscape, present the cutting edge of Second Amendment. And that is

is this limited to the home or is it a more general right that simply has a zenith or a high point in the home.

THE COURT: Is Peruta your best case on concealed carry?

MR. JENSEN: I don't know if I would call Peruta our best case. I would say that of U.S. District Court decisions that have been issued to date that have addressed the issue of carry, it's the most on point case.

But there is one very significant factor of Peruta that has to be kept in mind. And that is that California state laws did not, by their terms, prohibit people from carrying firearms.

According to the Peruta court's view, the requirement was simply that if you're going to carry a firearm you have to get this carry license, you have to carry the firearm exposed, and you can't have ammunition in it, although you can have ammunition next to it.

Whether that rationale actually stands up in the future remains to be seen. But regardless of whether it stands up, that rationale wouldn't make any difference here because this is not a situation where the state laws of Illinois say it's illegal to

carry a firearm concealed but it's okay to carry one in the open.

THE COURT: So the Supreme Court has not told me what standard to apply, what standard of scrutiny. What standard do I apply?

MR. JENSEN: I think that's a very good question, Your Honor. And the answer to that is twofold.

The most direct and immediate answer is that the Ezell decision largely resolves that. And it resolves it in a manner that is largely consistent with the view that most other circuit Courts of Appeal have taken. Probably the leading case in this regard is the 3rd Circuit opinion in United States versus Marcarella.

The standard under Ezell and as indicated by Heller, the First Amendment is the most analogous protection to the Second Amendment. They both protect affirmative conduct, they're both part of the original eight amendments to the Bill of Rights.

In both contexts the degree of scrutiny that applies depends on how close a regulation comes to the core of the Second Amendment and how substantial the burden -- how substantial of a burden is imposed.

Now, we would submit that just as the controversy in Heller did not actually require resort to a standard of scrutiny, the controversy here also does not require resort to a standard of scrutiny.

And the reason is that laws that simply prohibit things that are affirmatively protected by the Constitution are invalid without regard to a standard of scrutiny.

The entire context of rational, intermediate, and strict scrutiny in this entire framework of means and analysis is examining burdens on the exercise of constitutional rights. If we were in here talking about, well, you've got to wait six months and pay a hundred dollars to get a license before you can carry a gun around, that's a burden. That's where intermediate, rational scrutiny at least in theory come into play.

THE COURT: Well, I'm back again to my original question; Scion or Ezell? Ezell says what you're saying. Scion told me it's an intermediate scrutiny that needs to be applied.

MR. JENSEN: Well, with all due respect, I disagree slightly with that characterization. Scion applied intermediate scrutiny on the facts of this

case, and the ongoing Scion decision retracted the First Amendment analysis in the original panel's decision and said we don't need to reach this issue. The Supreme Court said that certain categories of people can be disqualified.

We think on the facts of this case; which should be remembered was a guy who had been convicted two or three times of domestic violence and was currently on probation for that offense; on the facts of this case we don't find a violation, intermediate scrutiny applies.

What the Scion decision does not say is that without regard to how close the law comes to the core of the Second Amendment, and without regard to how substantial the burden is, intermediate scrutiny applies.

The standard of scrutiny that applies requires you to first look at what is the conduct that's being regulated and what is the nature of that regulation.

THE COURT: I have a question that has not been raised. This posture of this case is different than all of the other cases that I've read that you've cited to me. Is Lisa Madigan the proper party in this case? Does she enforce this law?

MR. JENSEN: Well, her statutory duties include -- to give a short answer to that, her statutory duties include participating in the prosecution of criminal offenses and advising local county attorneys on the prosecution of criminal offenses.

In our view that's a sufficient level of personal participation in enforcement of the law to make the Attorney General a proper defendant. And I would have to note that unless I'm missing something, this is not an argument that's been raised --

THE COURT: No, I just said nobody had raised it, but I kept coming back to it as I read these cases.

MR. JENSEN: I mean given that the statutory duties of the Attorney General include assisting county attorneys in the prosecution of the law, it's certainly not a situation where the Attorney General could come in and say, well, under no set of circumstances are we involved in enforcing this law. You know, there's no set of circumstances where we would give people advice.

It's quite true, I think, that front line of enforcement of this law, and all other criminal

laws, is going to be county attorneys and policemen. But that doesn't mean that the Attorney General is not involved in the law enforcement process.

THE COURT: Okay.

MR. JENSEN: Unless the Court has anything further, that is what we wanted to present.

THE COURT: Thank you. And I thank you again for your prompt response to the Amicus brief. I know you didn't have very much time and you did a nice job.

MR. JENSEN: We do what we can, Your Honor.

THE COURT: Thank you.

MR. JENSEN: Thank you.

THE COURT: Mr. Corrigan, will you be arguing?

MR. CORRIGAN: Your Honor, if the Court would permit we'd like to split the argument in half, with --

THE COURT: That's fine.

MR. CORRIGAN: -- the question of likelihood of success on the merits addressed by Mr. Simpson who has the historic background knowledge that I don't have.

THE COURT: That's fine.

MR. CORRIGAN: And he will go first.

MR. SIMPSON: Thank you, Your Honor.

Your Honor, this case is not about whether gun regulations are a good or a bad idea. And it's not about broadly whether there's a right to carry guns outside the home. Illinois allows people to carry guns outside the home, loaded and functioning, under certain circumstances.

The question is whether democratically elected legislatures, indeed any democratically elected legislature, can make the choice that Illinois has made here. And Heller does not settle this question.

And I don't want -- I'm not going to spend the whole time reading to you, but there's just two quick things that I think make it clear that Heller doesn't settle this question.

One, Heller itself says on Page 626, that "like most rights, the rights secured by the Second Amendment is not unlimited. From Blackstone through the 19th century cases commentators and courts routinely explain that the right was not a right to keep and carry weapon -- any weapon whatsoever or in any manner whatsoever and for whatever purpose."

So Heller itself, by its explicit terms, doesn't tell us that you always have a right to

carry guns, it says that that right is the -- the definition of carry is limited by historical circumstances.

For the same reason Scion, at Page 640 in the en banc opinion, says explicitly that the Second Amendment creates individual rights, one of which is keeping operable firearms at home for self-defense. What other entitlements the Second Amendment creates and what regulations legislatures may establish were left open in Heller.

So then the question is not a mechanical application of precedent in Heller, because Heller just didn't address the question that we have here. Instead we need to look to Heller's underlying reasoning and underlying methodology in order to figure out whether the Second Amendment has any bearing here.

So being faithful to that understanding in Heller means that we need to undertake the same sort of in-depth historical analysis that the court undertook in Heller.

Heller specifically tells us that the Second Amendment did not create a new right, it merely codified an existing right that existed under English law. And so no matter what tack you take

under Heller, English and founding era history is going to be highly relevant to the consideration. And indeed we maintain as we explain in our brief that it should be dispositive.

Ezell suggested that -- that the increase focus on 19th century history. As we discuss, that's simply just flatly contrary to the United States Supreme Court's approach in every single other constitutional right. There aren't two -- there isn't one Second Amendment as applied to the state and one as applied to the federal government.

Understanding, of course, that you're not going -- we're not going to ask you to take on the 7th Circuit; even if 19th century history is to be excluded and Ezell is right and we should focus on the time of the adoption of the Fourteenth Amendment instead of the Second Amendment, the original understanding of the Second Amendment remains vital. Because the original understanding of that pre-existing English right that was codified in the Second Amendment certainly was going to inform what the framers of the Fourteenth Amendment thought that they were doing.

And so if you look at that history, Your Honor, we see that English law and at the founding it was

well established that people had a right to keep guns in their homes for their own protection. And that's exactly what Heller held; a man's home is his castle. But there was no similar right to carry guns in public places for self-defense. Indeed, English law banned carrying guns in public places for self-defense for hundreds of years.

And those restrictions are mentioned, as we cite in our brief, for Cook and Blackstone. We could have cited others, but those are the most prominent of the common law scholars who tell us that -- that -- in the words of the original English statute, riding or going armed in public places was a crime under English law.

So there's no reason to think that when the framers of the Second Amendment adopted this English right that they meant to change it in any way. Indeed, again, Heller suggests that they didn't. Heller says that they merely codified the same right that had been known for years and years as English law.

Now, the plaintiffs don't rebut this understanding of the founding era and the English era understanding of the right to bear arms. Instead, they point to a series of 19th century

cases; some of which we admit held that there must be a right to carry arms in public, either concealed or openly. There are two problems with this analysis though.

First, these cases are too late to speak to the pre-existing -- the nature of the pre-existing English right. And again, you see this treatment of history in Heller itself. Although Heller discussions 19th century history, on Page 614 in Heller it notes that some of the history discussing took place after the ratification of the Second Amendment and "do not provide as much insight into the original meaning as earlier sources."

So the sort of 19th century understanding of the Second Amendment right to bear arms are too late to speak to what the framers of the Second Amendment thought that they were doing.

But in any event, even if you take these -- take these 19th century cases at their face value, they're at best conflicting. We have some state courts that suggest that the right to bear arms includes a right to carry weapons in public, but you have other courts that suggest otherwise and you have other laws that suggest that the -- that legislatures throughout the 19th century thought

that they had broad power to restrict the carrying of firearms in public, both concealed firearms and open firearms.

And as some of the examples we cite in our brief, if you look at the laws in D.C. or in Wyoming, would have been federal enclaves at the time and would have specifically been subject to the restrictions of the Second Amendment. And it would be strange if say a Congress in 1876 were going to be considering restrictions in the territory of Wyoming even though that was the exact same time period of the incorporation of the Second Amendment against the states through the Fourteenth Amendment.

And as far as that bears on our procedural posture in this case, Your Honor, this conflict, even if we, again, ignore the fact that we have a difference of opinion in 19th century history, that leads us to two conclusions.

One conclusion, of course, is that, as we suggested earlier, whatever later disagreements or misunderstandings may arise about the nature of the right to bear arms, none of that could change what the framers codified in the Second Amendment.

The other is that given this conflict in 19th century law, plaintiffs cannot carry their very high

burden of showing likelihood of success on the merits for preliminary injunction; particularly preliminary injunction as incredibly broad natured as they seek.

So, Your Honor, I don't want -- I don't want to spend extra time on this point. I mean I think it's -- I say it's clear, to summarize, that Heller does not itself settle this case. To argue that the fact that there is a right to carry arms means that the right to carry arms is a right to carry them anywhere under any circumstances is merely to beg the question.

Heller instructs us to engage in an in-depth historical analysis to understand the original meaning of the pre-existing English right that was codified in the Second Amendment. That original analysis demonstrates that there was no widely recognized constitutional right or fundamental right to carry arms in public places at the time of the founding.

So, Your Honor, if the Court doesn't have any questions for me, then I would say there's just -- plaintiffs have not shown a likelihood of success on the merits. And that alone is a reason to deny the preliminary injunction motion.

THE COURT: Thank you, Mr. Simpson. Mr. Corrigan.

MR. CORRIGAN: Thank you, Your Honor.

In addition to the likelihood of success on the merits the Court needs to consider the other elements that are necessary for a preliminary injunction.

The first of those elements that plaintiff need to show is that they are going to suffer irreparable harm if an injunction is not entered.

In this case individually the plaintiffs have made no claim of irreparable harm. Instead, relying on Ezell, they claim they don't need to show irreparable harm because the violation of a constitutional right is in and of itself irreparable harm.

And that is a statement that the Ezell court made. But two factors are distinguishable in this case from the facts before Ezell.

First of all, the nature of the right. In Ezell the Court found not that, as plaintiffs indicated, that there was a Second Amendment right to use such guns outside the home in the City of Chicago. That's not what the Ezell court found.

The Court found that under the facts of that

case the total restriction on the ability for firearm ranges to be built in Chicago impacted adversely the constitutional right to have a firearm in the home for self-protection, the very right that was found in Heller.

The Court said that, first of all, there was a requirement of proficiency in order to get a permit for a gun. They couldn't get proficient without it. And there's -- as an adjunct, people need to be able to be proficient in order to protect themselves in the home. So they found that the -- the ordinance at issue in Ezell burdened the constitutional right to use firearms within the home.

So that in saying that they didn't need to show irreparable harm because there was a violation of a constitutional right; or impingement, I'm sorry, of a constitutional right; it was a recognized constitutional right, a recognized right to use firearms in the home for protection.

In this case plaintiffs are asking the Court to enter a preliminary injunction. We're not talking about a recognized constitutional right. They're asking the Court to do this based on a likelihood of success on the merits, which is different than a finding that there's a constitutional right

impinged.

When there's no recognized constitutional right, there's no authority that says the Court can just assume that that is a burden on the Second Amendment and that irreparable harm does not need to be demonstrated.

Secondly, the Ezell court was dealing with a facial challenge to the statute. And the Ezell court said, because we're dealing with a facial challenge, individual harms are not at issue.

In this case we are not dealing with a facial challenge. Plaintiffs have carefully pled this as applied challenge. A broad, applied challenge, but applied challenge nevertheless. In which case individual harms are not relevant and there has been no showing of any claim of any individual harm.

But more importantly, the plaintiffs have given short shift to the balancing of equities that the Court must undertake in granting the broad relief that the plaintiffs seek.

Their first claim of irreparable harm -- pardon me, of balancing rather, that there's no harm to the public, is their statement that, well, there can't be harm to the public because every other state allows people to carry guns outside the home.

First of all, that concept, that argument, is a repudiation of the concept of federalism that the state legislature of Illinois has to agree with 49 other state legislators -- legislatures as to what is in the best interest of the citizens of this state.

But more importantly, there's no support for the concept that any of those 49 other states allow the broad carrying of guns that this Court would be allowing if the Court granted the preliminary injunction sought.

What plaintiffs are seeking in this case is a preliminary injunction that restricts the ability to carry -- to enforce the laws of the state of Illinois with regard to anybody with a FOID card to carry guns in public in any manner; any weapons in any manner in public. In any place in public.

Now, there's a separate statute, section of the statute, that prohibits carrying weapons in certain places because it's considered aggravated unlawful use of weapons if they're in certain government buildings. It's unclear whether or not the plaintiffs are asking for that to be stricken down.

And there's another section which makes it aggravated if it's in -- I believe it's in the

aggravated section; but it's unlawful to have a weapon in a place serving alcoholic beverages. It's unclear whether that's a public place that plaintiffs are seeking to strike it down.

But subject to that, they are asking that any other location this Court allow any person that has a FOID card, with or without training, without regard to age, without regard to any mental impairment that hasn't resulted in withdrawal of FOID privileges, be allowed to carry a weapon in any place that they want.

And there is no suggestion that any state has that broad statute that would allow that without any restriction whatsoever on either place or manner of carrying firearms that plaintiffs are asking this Court to impose.

And beyond that, there is significant evidence; and granted, we will say that there is conflicting evidence; in studies done that indicates that there is a societal cost to carrying firearms in public.

There's suggestion that the rate of firearms deaths goes up with public carrying of firearms. There's actually evidence that crime in general goes up with the carrying of firearms in public. So there are societal costs that need to be considered

even with restricted carrying of firearm in public -- firearms in public.

Based on that, it's highly likely that the unrestricted carrying of firearms in public that plaintiffs have asked this Court to impose would have great societal costs.

Plaintiffs suggest in their brief, at Page 11, that the Court can't look at the damage that would be caused by the injunction that they are asking the Court to impose. And instead say that the Court must look at the harm that would be created by a properly regulated statute. They don't define what's properly regulated. They certainly aren't asking the Court to write a contrary statute, they're asking the Court to simply strike down the statute.

And the basis for that argument is a single sentence in the Ezell opinion. And that sentence was that the court said that it doubted that there would be serious harm from properly regulated firearms ranges in the City of Chicago. That certainly is a far cry from indicating that the Court can't considered the impact of its injunction, particularly if we consider what was going done in Ezell.

Ezell did not say that the City of Chicago could not regulate firearms, or that they struck down an ordinance that prohibited all firearms ranges. They didn't say that every citizen in Chicago could erect targets in their backyard and start blasting away.

That's the equivalent of what the plaintiffs are asking for in this injunction. They're not asking for properly regulated firearms carrying in the state of Illinois, they're talking about completely unregulated.

And it's important to consider the firearms ranges at issue in Ezell were not going to spring up instantaneously. It required that somebody go back to the City of Chicago, get zoning permits that would allow the firearms ranges. There was going to be regulations. All the court said is we're enjoining you from denying all firearms ranges based on this statute. That's a far cry from what the plaintiffs are asking in this case. There was going to be every opportunity for there to be regulations in the City of Chicago.

And so the Court does, in fact, have to look at the harm that would be caused by the injunction that the Court's being asked to impose.

The plaintiff's final argument in regard to the balancing is that at Page 14 they make the assertion that they're entitled to this injunctive relief no matter what the societal costs are. In other words, to hell with the public, they're entitled to their guns no matter how many innocent lives it will cost.

That is not the standard for a preliminary injunction. There is no authority that allows the Court to completely disregard societal damages as plaintiffs would suggest based on their claim that this Court should enter a preliminary injunction.

This Court, on a preliminary injunction, must consider the balancing of harms. And the plaintiffs have offered nothing to negate the fact that society will be harmed. And it's significant because this is an item on which the plaintiffs bear the burden of proof when asking for injunctive relief. They have offered no evidence whatsoever that their injunction will not harm the public. And that's part of what the plaintiffs need to prove in order to establish a right to a preliminary injunction.

One point I wanted to discuss; the Court's question about whether Lisa Madigan is a proper party. We didn't raise that and we didn't raise it for a reason. While we still reserve the right in

any answer to raise it as an affirmative defense, there is 7th Circuit authority, I believe it was on the case discussing sexually explicit games or ultraviolent games, and a prohibition on games, that Lisa Madigan was a proper party because she could enforce the law.

It was either that or on videos, I forget off the top of my head which case it was. It was either videos or games. But the court did say that she was a proper party. And we certainly are not asking this Court to overrule the 7th Circuit in that regard. And so that's why we didn't raise it.

THE COURT: Thank you, Mr. Corrigan.

MR. CORRIGAN: If I could just have a second to make sure I didn't forget anything I wanted to...

I do want to point out as one final factor that plaintiffs in this case are asking for injunctive relief beyond that confined to the parties in this case, which the Court is not authorized to impose. The Court's not authorized to grant injunctive relief that extends to non-parties.

But even if the Court were; and this is as to -- even as to the members of the plaintiff's organization; the Court needs to consider that

carrying a FOID card in the state of Illinois is not synonymous with legal ownership of guns.

As the affidavits attached to defendant's response establish, there have been cases where courts in Illinois, circuit courts, have given orders that FOID cards had to be issued to persons that are prohibited from carrying firearms by federal law. That federal law, of course, only extends to firearms that travel in interstate commerce. But since there are no firearms manufacturers in the state of Illinois, that pretty much ferrets out anything that isn't homemade.

But there are also limitations on the ability to do background checks. Limitations that on a cost benefit analysis the state has accepted in the case of firearms in the homes and firearms outside of incorporated areas that the state of Illinois might well impose greater checks and balances before they would ever allow people to carry firearms on the streets of the state of Illinois.

And that needs to be considered, that there are limitations currently on the ability to regulate who has the mental means, who has the criminal background that would allow them to carry firearms. So that the two are not synonymous.

Finally, I would like to address the suggestion that the Court should jump to the permanent injunction question today and skip any question of discovery and evidence in this case. That is directly contrary to Ezell. Or more correctly, we do believe the Court could grant judgment for the defendants without any evidence certainly on our motion to dismiss.

We believe that if the Court is applying intermediate scrutiny, the plaintiffs have not challenged application, they've challenged whether or not intermediate scrutiny is appropriate, but they haven't challenged how we've applied that.

And if, in fact, intermediate scrutiny is what the Court uses to ultimately view the statute, the application as suggested in our brief would show that the Court can enter judgment for the defendant on the merits.

However, if the Court were to find that higher level scrutiny is appropriate when the Court rules on the motion to dismiss, the Court cannot enter judgment for the plaintiffs at that stage because Ezell indicated that if any higher level of scrutiny is being applied the Court needs to have data and expert opinions; and criticized the City of Chicago

for having not offered that.

We have certainly supplied the Court with some data, but if the Court's applying a higher level of scrutiny and believes that that's appropriate, we would ask that we be allowed to present evidence, that we go through the exchanging of expert disclosures, and we be allowed to present expert testimony on that question.

So before the Court can ever enter judgment on the merits for the plaintiffs under Ezell, the Court has to allow the opportunity for evidence and expert opinion.

Thank you.

THE COURT: Thank you, Mr. Corrigan.

Mr. Jensen.

MR. JENSEN: Thank you, Your Honor.

Well, the plaintiffs don't seek the ability to carry firearms anywhere or any place for any purpose, first and foremost. And that is a key point that needs to be raised, particularly based on the objections that have been lodged by the state.

There are several provisions of the Illinois Penal Code that prohibit the carrying of firearms. We have simply identified for this lawsuit the two provision, unlawful use of weapon and aggravated

unlawful use of weapon, that prohibit the general act of carrying firearms.

There are additional prohibitions; and I would need to grab a copy of the statues to run through all of them, but that include areas such as schools, government buildings, bars, certain public assemblies that are not challenged in this lawsuit and that would not be enjoined by the issuance of an injunction.

The reason that a proper -- the reason that the balance of hardships looks at the harm that comes from a properly regulated system is that the question is not what is the suitability of the current -- the question is not what legislation should the state adapt. The question is simply does the recognition of this right necessarily impose this cost.

It may very well be true that the Firearms Owner Identification Card system is not an adequate check on people who wish to carry guns. More pertinently, it may be true that the legislature would conclude that more onerous requirements ought to be imposed.

If the legislature does that, that is their prerogative. Under Marbury versus Madison the role

of this Court isn't to instruct the state legislature how it should regulate the issue, the issue is simply are the laws of the state as enacted constitutional.

If the Constitution guarantees the right to bear arms is a fundamental civil right, that is a floor in any state law or set of state laws that prohibits the exercise of that right violates that constitutional floor. There is no defense to say that, well, we don't have an adequate system in place.

And as a point of fact, when both McDonald versus Chicago and Ezell versus Chicago went up, a leading argument that the City of Chicago put in was, hey, Court, you can't issue an injunction and tell us not to enforce our laws because we're going to have this regulatory vacuum.

In McDonald they said handguns are really dangerous, we've banned them. If you tell us we can't have our ban, we don't know what we're going to do, people will run around on the streets shooting each other, mayhem will reign.

In reality the Supreme Court issued its decision four days later that the City of Chicago city council had enacted regulations to comply.

That's also what happened when Heller came down.

In Ezell Chicago came in and said, well look, shooting ranges are really dangerous; talking about people discharging guns in a densely populated city. How can you simply force us to allow people to do that?

Well, the reality is the City of Chicago actually passed a law allowing gun ranges one day before the Ezell decision came down. And Ezell, towards the end of the decision, spends a fair amount of time discussing the fact that the notion of a regulatory vacuum is no grounds for denying an injunction because the ramification of that would be that the state doesn't need to comply with the constitution as long as it's already not complying with the constitution.

Under this reasoning the school district in Topeka, Kansas, would still be segregated because all the kids would have died, or pardon me, would have graduated, and there would be no remaining live dispute. Or otherwise stated, the school district would still be segregated because the school board could come in and say, well, desegregating the school is going to be really complicated, we don't have a system in place, how can you force us to do

it.

The reality of the situation is that the court's role is simply to declare whether or not what the state has done satisfies constitutional requirements. If what the state has done does not satisfy constitutional requirements, then the Court's duty is to say so. And it then becomes incumbent on the state to adopt a regulatory process that satisfies the constitutional requirements.

So in this way really the issue simply comes back to is there a general right to carry guns in public. The reality is that Ezell's discussion of irreparable injury does not actually add that much to the dispute -- to this dispute, and likely any other Second Amendment dispute, because it is relatively well established that the deprivation of constitutional rights is irreparable injury so long as we are not talking about a deprivation that looks to money damages; for example, a deprivation for the taking clause.

So for the 7th Circuit to say, hey, you're not letting people keep and bear arms, but they have a fundamental right to do so, that's irreparable harm, is really somewhat unremarkable. Having said that, because the 7th Circuit has made that point any

doubt has been removed. If there is a right to carry guns in public then the deprivation of that right is per se irreparable injury. That is the very nature of what it means to enumerate something as a constitutional guarantee in the first place.

THE COURT: I only wish the Second Amendment were as explicit as you are in your argument. It would have made it a lot easier. If the Supreme Court has also used those very words, it would make this case easier.

MR. JENSEN: I would actually say that the Supreme Court did on the facts it could view on the facts in Heller, because the plaintiff in Heller, as well as the plaintiff in McDonald, purposefully confined their claims to the home and said we want to possess and carry guns in our home, we don't want to go any further.

The Ezell court actually noted that explicitly, which is something we put in our reply. You're nodding. But simply that the court didn't need to go any further than that. It's not a matter that the court said, hey, the Second Amendment ends at the home. It's a matter that the complaint ends at the home. That's as far as the court needs to go. But that doesn't diminish the fact that the court

couldn't decide that case without reaching that core legal ruling. Even if it could, it didn't, and that could not be removed from the court's decision without undermining the analytic foundations for it.

Finally, you know, I am loath to even go there, but the resort to statistics is essentially impertinent. This is a court of law, not a court of social science. About the only thing that really matters is the observation that the simple fact that states are allowing people to keep and bear arms is not of necessity associated with people running around and shooting people like lunatics.

If that were the case then what we would see, and what we do not see, is that Illinois would have the absolute lowest rate of violent crime or firearms related crime in the country. The reality is there are -- there's a lot more factors that go in to some end of the data result like that to plausibly say, well hey, this is what is going to result if you take this regulatory choice off the table.

I guess I think that a final point that needs to be made is that the state's argument largely concedes that 19th century jurisprudence on the question what does the term "bear arms" mean

recognizes a general right to carry guns.

And while there may be some disagreement with the result, I still haven't heard anything that undercuts the fact that the Supreme Court reached that conclusion to interpret the phrase "keep and bear arms". And not only that, the Supreme Court largely grounded its conclusion on its own review of 19th century authorities.

So in that way the invitation to come in now and say, well, let's review all those 19th century authority to see if they, in fact, recognize the general right to carry guns, is really just an invitation to revisit the core of the Heller decision.

The appeal to looking to English common law is itself largely a concession that under the standard that governs in the 7th Circuit, which is how is the right to keep and bear arms understood in 1868 when the Bill of Rights became binding against the states, that under that standard they can't pass -- the Illinois laws cannot pass scrutiny.

But be that as it may, the Heller court itself discussed the role of English common law and its relation to the Second Amendment at some length.

One aspect of that discussion that is somewhat

missed in the state's argument is that falling at Page 627 of the Heller decision where it discussed historical prohibitions on the carry, going riding or armed with dangerous and unusual weapons in a manner that was likely to frighten the populace.

What the court's discussion does not accept is this proposition that there was a simple blanket ban on keeping and bearing arms in English law. The reality is that -- the adoption of the Second Amendment was largely a response to England's attempt to disarm the colonies.

So looking to English law and saying English law defines the right of -- defines the boundaries of the right to keep and bear arms, when the English never codified the right as a constitutional amendment is a little bit misplaced.

The reason that the American colonists proposed the Second Amendment after reviewing the constitution is that they wanted to make sure that that right, the right to possess and carry firearms, would be protected as an absolute constitutional matter.

Your Honor, unless the Court has anything further, that's all we have.

THE COURT: Thank you, Mr. Jensen.

I'll take this matter under advisement and I will try to issue an opinion directly. I will not promise it will be tomorrow. You've both raised substantial arguments in addition to what was in your briefs. I'm not being critical by any means, but I appreciate the clarifications that you've given me today. And I have quite a bit of work to do before I issue my ruling.

Thank you.

(Whereupon court was recessed in this case.)

I, KATHY J. SULLIVAN, CSR, RPR, Official Court Reporter, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

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