No. 17-2998

In The United States Court of Appeals
For the Seventh Circuit

KEVIN W. CULP, MARLOW DAVIS, FREDDIE REED-DAVIS, DOUGLAS W. ZYLSTRA, JOHN S. KOLLER, STEVE STEVENSON, PAUL HESLIN, MARLIN MANGELS, JEANELLE WESTROM, SECOND AMENDMENT FOUNDATION, INC., ILLINOIS CARRY and ILLINOIS STATE RIFLE ASSOCIATION,

Plaintiffs-Appellants,

v.

LISA MADIGAN, in her Official Capacity as Attorney General of the State of Illinois; LEO P. SCHMITZ, in his Official Capacity as Director of the Illinois State Police, and JESSICA TRAME, as Bureau Chief of the Illinois State Police Firearms Services Bureau,

Defendants-Appellees.

Appeal from a Judgment of the United States District Court
for the Central District of Illinois
The Hon. Sue E. Myerscough, District Judge
Case No. 3:14-CV-3320

APPELLANTS' REPLY BRIEF

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Appellate Court No: 17-2998

Short Caption: Kevin W. Culp, et al v. Lisa Madigan, et al

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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, Illinois State Rifle Association

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Law Firm of David G. Sigale, P.C.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Second Amendment Foundation, Inc. - None; Illinois Carry - None; Illinois State Rifle Association - None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Second Amendment Foundation, Inc. - None; Illinois Carry - None; Illinois State Rifle Association - None

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Attorney's Signature: s/ David G. Sigale Date: October 9, 2017

Attorney's Printed Name: David G. Sigale

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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APPELLANTS' REPLY BRIEF

SUMMARY OF ARGUMENT

Defendants acknowledge Plaintiffs' claim is within the scope of the Second Amendment (Dkt. 26, p.32), but continue to argue, as if *Moore v. Madigan* never occurred, the core of the Second Amendment right is limited to the home. Defendants' *amici* falsely claim the same. *See*, *e.g.*, Dkt. #34 at p.5. This fallacy allows the State to wrongly argue this Court's decision in *Moore* did not involve the core of the Second Amendment right. But *Moore* held exactly that in stating: "[t]he Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside." *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012).

It was plain error to apply intermediate scrutiny in *Culp I,* due to the *Moore* decision. Therefore, law of the case should not apply here. Rather, strict scrutiny should be applied, or the "not quite" strict scrutiny of *Ezell v. City of Chicago,* 651 F.3d 684 (7th Cir. 2011). Because the virtual non-resident CCL application ban strikes at the core Second Amendment right of self-defense, it must be struck down.

Fundamental right notwithstanding, Defendants continue to wrongly argue that the State's ban on the public carry of firearms in Illinois by qualified individuals from 45 states substantially serves an important governmental interest. Even if intermediate scrutiny were appropriate, the Defendants are wrong for four reasons:

First, Plaintiffs are the law-abiding persons described in *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010), *Ezell*, and *Moore*, with CCLs in their home states, if not additionally from other states. One Plaintiff is a Colonel in the United States Air Force, one is a woman who owns a firearms store in Davenport, Iowa, also with FFLs in Illinois and Ohio (https://gunfreedomradio.com/guests/jeanelle-westrom/, last checked April 23, 2018), two are an African-American couple from Milwaukee – she is a Chicago nurse and he is retired, and multiple Plaintiffs are Illinois concealed carry instructors. Allowing them to apply for concealed carry licenses will not endanger the public at all. And if the State wants verification of their qualifications, they should offer Plaintiffs the opportunity to do so, rather than the blanket refusal of an application.

Second, the State already trusts Plaintiffs (and all similarly situated) to carry firearms in Illinois in their vehicles, on others' property with permission, and while hunting or at a firing range. This belies any concern about allowing the Plaintiffs access to firearms in Illinois. The State should be encouraging them to undergo training and comply with the Firearms Concealed Carry Act requirements, pay the required fees, and voluntarily enter into the State's network.

Third, the people committing gun crimes in Illinois, whether from Illinois or elsewhere, are not the ones who are complying with the Firearms Concealed Carry Act's requirements, and voluntarily entering the ISP network. This point should be obvious, but the State acts as if everyone with possession of a firearm, even those who comply with the Act, will eventually turn into a mentally deranged person, a terrorist, or a criminal. Though such people undeniably exist, they are not applying for licenses.

Fourth, the substantial concerns the State is claiming are belied by the fact that the ISP does not know what an Illinois resident is doing when they are out of state, yet their CCL's are not revoked when they return. Likewise, a non-resident who lives in one of the 45 banned

states for decades is eligible to apply for an Illinois CCL once they move to Illinois or one of the four approved states, even though the ISP does not know what that person did during those prior decades.

The above has been noted as "apt criticisms" of the challenged law, *Culp I*, 840 F.3d at 403, but they are more than that. Even if there is an important governmental interest at stake, the non-resident virtual CCL ban does not substantially serve it, much less is it a close fit to said purpose. If the State really believed this, then the State would have distributed a survey at some point since 2015, but there has been no disclosed evidence this ever occurred.

The public carrying of firearms for self-defense is a core fundamental right protected by the Second Amendment, as this Court held in *Moore*. Defendants have eliminated public carry for virtually all non-residents, notwithstanding the exceptions about which Illinois apparently has no concern. Further, this case is one degree removed from that, as Plaintiffs simply wish to *apply* for a CCL in Illinois. They would still need to meet all requirements of the Firearms Concealed Carry Act. This is not a lawsuit about reciprocity or automatic acceptance. If it were, the State's claimed justifications would have some merit.

When viewed logically, the challenged non-resident virtual CCL application ban is unconstitutional, and Plaintiffs were entitled to summary judgment.

ARGUMENT

I. THE SECOND AMENDMENT CONFERS A CORE FUNDAMENTAL RIGHT TO CARRY ("BEAR") ARMS IN PUBLIC FOR SELF-DEFENSE PURPOSES, WHICH THE NON-RESIDENT VIRTUAL CCL APPLICATION BAN VIOLATES.

Despite Defendants' repeated assertions, this case is not about concealed carry. The Second Amendment secures a right to carry firearms; the issue of concealed carry is a straw man debate about a particular manner of carrying. While the alternative is allowing open carry[1], for qualified non-residents in 45 states the State prohibits both open and concealed carry. This is an unconstitutional violation of Second Amendment rights.

In *Moore*, the Court ruled the State had to allow the public carrying of firearms, but was able to choose the manner of carrying. Though the State chose a concealed carry system, of which the Plaintiffs wish to avail themselves because it is the only carry option in existence in

[1] Illinois actually did allow the open carry of firearms until 1961, when the Criminal Code of that year was enacted.

Illinois, that does not change this case from one involving public carry, held to be a fundamental right in *Moore*, to a concealed carry case. This differentiates this case from *Peterson v. Martinez*, 707 F.3d 1197, 1209 (10th Cir. 2013) (challenged concealed carry ban did not affect a statewide allowance on open carry for non-residents, which made the public carry of firearms for non-residents still possible), or *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (*en banc* Court declined to discuss lack of open carry), or *Drake v. Filko*, 724 F.3d 426, 440 (3rd Cir. 2013) (open carry technically allowed with handgun carrying permit, but "justifiable need" requirement long-standing and thus outside of Second Amendment).

Therefore, there are significant differences between the issues in the Defendants' cited cases and in this case. Illinois bans open carry, which means that non-residents who wish to exercise their Second Amendment right to public carry in Illinois must obtain a CCL. Except that the non-residents in 45 states are ineligible to do so per 430 ILCS 66/40 and the Defendants' application of that statute, regardless of their qualifications, solely due to their state of residence. The exceptions for carrying within vehicles, on others' property, and at

firing ranges and hunting grounds, are instructive to show the State's actual lack of concern for non-residents coming into the State with firearms, but they do not satisfy the constitutional requirement that Illinois allow the public carry of firearms. In short, the non-resident virtual ban on CCL applications cuts at the core of the Second Amendment right, which is self-defense.

Amicus Everytown evidently wishes to relitigate *Moore*, but the Court was correct in its decision, and the right to public carry is a fundamental right in this Circuit.

The Defendants note *Wrenn v. District of Columbia* supported one of the main holdings of *Moore* when it held "the individual right to carry common firearms beyond the home for self-defense—even in densely populated areas, even for those lacking special self-defense needs—falls within the core of the Second Amendment's protections." *Wrenn v. District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017). Though Plaintiffs did not originally cite *Wrenn*, that decision merely supports the plain and unambiguous law of this Circuit as stated in *Moore*, where the history of public carrying of firearms was amply discussed (702 F.3d at 934) ("The parties and the *amici curiae* have treated us to

hundreds of pages of argument, in nine briefs. The main focus of these submissions is history"). Rather, Defendants wish to relitigate this issue by citing contrary decisions from other Circuits.

Further, Plaintiff's Complaint does not invoke a right to concealed carry. Paragraph 44 specifically states:

> The residency requirement contained in 430 ILCS 66/40, and all other Illinois statutory language, which restricts otherwise qualified non-residents of Illinois the rights and privileges of carrying concealed firearms based solely on their State of residence, on their face and as applied, *violate the Plaintiffs' individual right to possess and carry a handgun for self-defense as secured by the Second Amendment to the United States Constitution*. (italics added)

App. 14.

Additionally, this Court should specifically reject Defendants' specious argument that *Heller* held the core of the Second Amendment right is only in the home (Dkt.26. p.30-31). The *Moore* Court specifically stated:

> [A] Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower. A woman who is being stalked or has obtained a protective order against a violent ex-husband is more vulnerable to being attacked while walking to or from her home than when inside. She has a stronger self-

> defense claim to be allowed to carry a gun in public than the resident of a fancy apartment building (complete with doorman) has a claim to sleep with a loaded gun under her mattress." 702 F.3d at 937.

"[T]he interest in self-protection is as great outside as inside the home." *Id.* at 941. "The Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside." *Id.* at 942.

Since the Defendants in *Moore* are also Defendants in this case, and since *Moore* led directly to the passage of the Firearm Concealed Carry Act in the first place, this insistence on ignoring *Moore* is puzzling and disingenuous.

II. IT WAS PLAIN ERROR TO APPLY INTERMEDIATE SCRUTINY IN *CULP I*, AS THE SUBJECT BAN SHOULD BE ANALYZED USING STRICT OR NEAR-STRICT SCRUTINY.

The District Court applied intermediate scrutiny, as it was constrained to do by *Culp v. Madigan* (*Culp* I), 840 F.3d 400, 403 (7th Cir. 2016), and the Defendants urge this Court to again apply such intermediate scrutiny now. However, the law of the case doctrine

> is prudential only and, in the words of Justice Holmes, 'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.' *Messenger v. Anderson*, 225 U.S. 436, 444, 32 S. Ct. 739, 740, 56 L. Ed. 1152 (1912). It does

> not mandate perpetuation of error and may even under certain circumstances be inappropriate to preclude reconsideration of those issues that, because of their intrinsic importance, must be left open for *sua sponte* reexamination in other procedural settings.

Christianson v. Colt Indus. Operating Corp., 798 F.2d 1051, 1056 (7th Cir. 1986); *See also Sierra Club v. Khanjee Holding (US) Inc.*, 655 F.3d 699, 704 (7th Cir. 2011) ("Matters decided on appeal become the law of a case to be followed on a second appeal, unless there is plain error of law in the original decision").

Plaintiffs respectfully assert the decision in *Culp I* to apply merely intermediate scrutiny, as opposed to strict or near-strict scrutiny, was plain error.

The Defendants tip their hands on the scrutiny issue by arguing the challenged provision "does not impinge upon a core Second Amendment right." (Dkt. #26 at p.30). It is well-settled that *Heller* requires heightened scrutiny for analyzing Second Amendment claims. *District of Columbia v. Heller*, 554 U.S. at 628, fn 27 (specifically rejecting "rational basis" as a permissible level of scrutiny for Second Amendment challenges).

However, and crucial to this appeal, *Moore* did not apply intermediate scrutiny:

> In *Skoien* we said that the government had to make a "strong showing" that a gun ban was vital to public safety--it was not enough that the ban was "rational." 614 F.3d at 641. Illinois has not made that strong showing--and it would have to make a stronger showing in this case than the government did in *Skoien*, because the curtailment of gun rights was much narrower: there the gun rights of persons convicted of domestic violence, here the gun rights of the entire law-abiding adult population of Illinois.

702 F.3d at 940. Here, Plaintiffs are representative of the law-abiding concealed carry permit-holding population of 45 states.

This case is akin to *Ezell*, in that the ban on public carrying is analogous to the City of Chicago's stricken ban on firing ranges. In *Ezell*, this Court found firing range training to be sufficiently close to the core right of self-defense that "not quite" strict scrutiny was used to analyze plaintiffs' challenge. The Court noted that:

> Here, in contrast, the plaintiffs are the "law-abiding, responsible citizens" whose Second Amendment rights are entitled to full solicitude under *Heller*, and their claim comes much closer to implicating the core of the Second Amendment right. The City's firing-range ban is not merely regulatory; it prohibits the "law-abiding, responsible citizens" of Chicago from engaging in target practice in the controlled environment of a

> firing range. This is a serious encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense.

Ezell, 651 F.3d at 708.

The *Ezell* Court then held the Defendants "must establish a close fit between the range ban and the actual public interests it serves, and also that the public's interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights." *Ezell*, 651 F.3d at 708-09.

The statute at issue is likewise a near-complete prohibition on the exercise of the core Second Amendment right of self-defense by law-abiding citizens. The Defendants cite *Kachalsky v. City of Westchester*, 701 F.3d 81 (2d Cir. 2012) for support, but *Kachalsky* was criticized in *Moore*, particularly "its suggestion that the Second Amendment should have much greater scope inside the home than outside . . . ." *Moore*, 702 F.3d at 941.

This Court in *Ezell* specifically distinguished its use of intermediate scrutiny in *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (*en banc*) by noting the plaintiff there was not a responsible, law-abiding

citizen, as opposed to the *Ezell* and *Heller* plaintiffs, and this Court found the right implicated in *Skoien* was not "the central self-defense component of the right." *Moore*, 702 F.3d at 941. Here, Plaintiffs are the law-abiding citizens favored in *Heller, McDonald*, *Ezell* and *Moore*, and the challenged statutes directly infringe on the Plaintiffs' core right of self-defense. While the State claims "public safety" as an interest, there is not a close fit between that interest and the virtual ban on non-resident CCL applications.

This Court in *Culp I* applied intermediate scrutiny without explanation as to why that level was appropriate. In fact, it was plain error to analyze Plaintiffs' claim as if it were far from the core Second Amendment right. Following this Court's now oft-cited analysis in *Ezell*, if a level of scrutiny is employed at all for the challenged categorical bans, strict or near-strict scrutiny is appropriate. Defendants have been arguing intermediate scrutiny as if the Plaintiffs were felons (*United States v. Shields*, 789 F.3d 733 (7th Cir. 2015); *United States v. Williams*, 616 F.3d 685 (7th Cir. 2010)) or domestic abusers (*United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (*en banc*)). The Plaintiffs are of the same law-abiding quality as in *Heller*,

McDonald, *Ezell*, and *Moore*, and all this entire case has ever been about is that Plaintiffs want a chance to prove it.

At a minimum, since "reasonable" cannot be the "reasonable" of rational basis, it must be the "substantial" of intermediate scrutiny. But as long as there are no walls and metal detectors at the state borders, it is both unreasonable and not substantially related to public safety to refuse to allow people to enter their names in the system and prove they have the training and law-abiding background that makes them worthy of a CCL.

III. THE VIRTUAL BAN FAILS EVEN UNDER INTERMEDIATE SCRUTINY.

Though the non-resident application ban cannot survive strict or near-strict scrutiny, the State's defense still fails even if intermediate scrutiny is employed, because the virtual CCL ban for non-residents is in no way substantially related to any important governmental interest. The District Court erred when it entered summary judgment for Defendants, because Defendants and the public would suffer no harm at all by Plaintiffs being allowed to apply for a CCL. In fact, it would benefit the public that Plaintiffs are ensuring they are trained per Illinois requirements, and that they are voluntarily entering into the

Illinois system. Defendants and their *amici* argue otherwise, but their arguments would only have merit if Plaintiffs were advancing a reciprocity system (*See* Dkt. #34 at p.11, fn.6, for discussion of states requiring reciprocity only to similar states). For example, in this Circuit, *amicus* Everytown argues Illinois has the most permissive non-resident CCL application statute of the three states, but Indiana allows reciprocity of CCL permits from every state (*See* IC 35-47-2-21), and Wisconsin states any person who is at least 21 years of age, who is not a Wisconsin resident, and who holds a valid concealed carry license issued by any state on DOJ's list will be recognized in Wisconsin as an out-of-state licensee, per Wis. Admin. Code s. 175.60 (1)(g). Right now that is 41 states plus Puerto Rico (*see* https://www.doj.state.wi.us/dles/cib/conceal-carry/reciprocity, last checked April 23, 2018). But reciprocity is not requested in this case.

The State has advanced two different interests. The first is public safety, and the argument that granting Plaintiffs' claim will decrease it. But this is not true. Per Illinois statute, concealed carry license holders in other states may bring firearms into and throughout the State. They may keep them in their vehicles, on anyone's private land with

permission, and for hunting and sport. Sometimes, as previously noted, these firearms have saved lives. See *Vietnam Veteran Turns Table on Would-Be Robbers, Shooting Both*, The Telegraph, February 3, 2017 (App. 304); *Conway woman survives knife attack and kidnapping in Illinois*, (available at http://www.kspr.com/content/news/Conway-woman-survives-knife-attack-and-kidnapping-in-Illinois-451541183.html, KSPRabc33, October 19, 2017 (last checked November 4, 2017)). App. 306.

See also, as of April 21, 2018:

http://wgntv.com/2017/12/14/man-shot-and-killed-in-parking-lot-of-target-on-the-southwest-side/;

http://www.fox32chicago.com/news/crime/chicago-police-legal-gun-owner-fatally-shoots-robber-in-head;

https://www.wsoctv.com/news/local/grandmother-who-killed-man-in-pet-spa-acted-in-self-defense-da-says/664492744;

http://fox2now.com/2017/12/01/st-louis-pizza-delivery-driver-kills-robber-during-shootout/; https://www.clickondetroit.com/news/cpl-holder-shoots-kills-man-at-gas-station-in-highland-park;

http://froggyweb.com/news/articles/2017/aug/17/verizon-clerk-wounds-

robber-after-exchange-of-gunfire/. Defendants and their *amici* stress gun crime, and not to minimize those occurrences, it is also very important to note at least some of the many occasions when allowing law-abiding persons to carry concealed firearms worked as intended. In the first two instances, however, Plaintiffs point out that the inability of the out-of-state residents to take their firearm out of their car almost got them killed.

Amici seeks to counter the statistics and academic research Plaintiffs put forth in their opening Brief (Dkt. #9), but the *Moore* Court concluded this evidence was inconclusive and was "consistent with concluding that a right to carry fire-arms in public may promote self-defense." 702 F.3d at 942.

So if the alleged governmental purpose is public safety, preventing law-abiding people the ability to apply for a license does not serve that purpose. This Court noted in *Culp I* that Plaintiffs' "claim to be allowed to carry concealed firearms when they are visiting Illinois would be compelling if the Illinois authorities could reliably determine whether in fact a nonresident applicant for an Illinois concealed-carry license had all the qualifications that Illinois . . . require[s] be met." *Culp I*, 840

F.3d at 402. It would better serve public safety to allow law-abiding people to file an application after meeting all training and background check requirements, supplemented by any information the State requests, and put themselves in the State Police's database. Towards this end, for example, the State could require a non-resident applicant to supply criminal background reports from her home state, even at her cost. The applicant could supply a periodic mental health certification, such as in the FOID Act (430 ILCS 65/8(u)). That is the way to meet the concerns articulated in *Culp I*.

The Defendants argue, however, that verifying applicants' continued eligibility itself is the governmental purpose. But that purpose does not further a public interest, not when the aforementioned non-residents may legally bring firearms into Illinois if they have concealed carry licenses in their home states, or when criminals without licenses may sneak illegal firearms across state lines. Whatever the State is trying to prevent, forbidding the Plaintiffs from submitting a CCL application will not prevent it. In other words, it is an illusory interest.

Of course, public safety is an important interest, and this is also not to minimize gun violence – Plaintiffs are trying to protect themselves

from it. Plaintiffs are as interested in public safety as anyone working for the State, and Plaintiffs are not arguing there cannot be firearms regulations; they just must meet constitutional standards. But contrary to the effect the non-resident application ban would have, Plaintiffs' request would actually increase public safety.

Defendants bemoan the hypothetical "menace" that carries a gun in public without training (*See Moore*, 702 F.3d at 940-41), but that argument only proves Plaintiffs' point. In order to apply for an Illinois non-resident CCL, they would still have to prove compliance with the 16-hour CCL training requirement. As it is, non-residents with CCLs in their home state can bring their firearms into the State without any such proof.

And while "Illinois is entitled to check an applicant's record of convictions, and any concerns about his mental health, close to the date the applicant proposes to go armed on the streets." *Berron v. Ill. Concealed Carry Licensing Review Bd.,* 825 F.3d 843, 847 (7th Cir. 2016), Plaintiffs have repeatedly expressed a willingness to supply the State with the information it requires so long as they are able to apply.

The largest discrepancy between what the State says and does is reflected in its Response, when it argues; "an applicant's state of residence serves in this context as a proxy for the ability to confirm the individual's substantive qualifications to carry a firearm, not for its own sake or for a discriminatory purpose." (Dkt. #26 at p.38.) However, denying law-abiding people's ability to apply does not further that goal. And, worse, Plaintiffs have no indication or evidence that Defendants have even sent out a survey since 2015 (*See*, *e.g.*, App. 134 (no "substantially similar" survey conducted in 2016)). Since the Defendants claim their interest is so substantial, one would think they would have sought updated information sometime in the last two-and-a-half years. Apparently, this is not the case.

The State claims it cannot monitor or vet non-residents from the 45 states, but as previously noted the State also cannot monitor the Illinois resident who leaves the State. That person may check himself into a mental health facility or commit a crime while out-of-state, but Illinois does not revoke the CCL of such persons because they cannot be monitored.

Further, someone from the 45 states who moves to Illinois or one of the four approved states becomes eligible for an Illinois CCL, regardless of how, under the Defendants' logic, the State has no way to know what that person did before moving to the approved state.

Because Illinois cannot monitor Illinois resident CCL holders who leave the State, or vet peoples' pasts once they move to an approved state, and because the banned non-residents are (with a CCL in their home state) allowed to possess firearms in Illinois in multiple scenarios, and because there is no evidence of any crimes, terrorism or mayhem resulting from any of this, the Defendants' claims that the non-resident CCL ban has a significant relationship to any governmental interest is simply false.

While Plaintiffs did not depose Defendant's witness, Defendant Trame, she was deposed in a similar case (*Samuel v. Trame*, 15-cv-780-NJR-SCW (S.D.Ill.). Plaintiffs submitted the transcript in the record, where Trame[2] admitted:

[2] Plaintiffs do not concede Trame has the foundation and qualifications to discuss the issues in her Affidavit, but for purposes of the included testimony Plaintiffs will assume such qualifications.

- The only factor in determining if a person is an Illinois resident is eligibility for a driver's license. Someone with a driver's license with another state becomes eligible when they surrender the other state's driver's license. Someone she does not remember from the Secretary of State's Office told her that several years ago (App. 56-57).

- All CCL applicants get checked through various state and federal criminal databases, including but not limited to Triple I (FBI criminal history system), National Crime Information Center (NCIC), Illinois Criminal History Reporting Information, the National Instant Criminal Background System (NICS) (App. 59).

- For non-residents, the State Police also checks the National Law Enforcement Telecommunications System (NLETS), as well as confirming that the applicant has a concealed carry license or equivalent in his home state (App. 60).

- The first thing the ISP does with a CCL application is determine if it is complete, which includes checking the name and personal identifiers, seeing if the training certificate is attached, and seeing if the applicant provided all required information (App. 62-63). For out of state applicants, NLETS is used to verify driver's licenses (App. 67). After identity is verified, the background check is performed (App. 66).

- The applicant for a concealed carry license has to answer questions about mental health and criminal history records. These answers must be submitted under oath; it is a criminal offense to provide false information (App. 92). When an applicant fills out an application, whether from Illinois or some other state, they have provided sworn testimony as to their eligibility (App. 87).

- If a person lived in Montana for 40 years, moved to Springfield six months ago, obtained an Illinois driver's

license, and applied for a FOlD and CCL, they would struggle with it, but the only reason that person may apply for a CCL, while a person who never left Montana would not, is that they "follow the statute and the rules." She did not write the rules. She believes they are to treat residents and non-residents the same (App. 71-72).

- She does not know why two identical twins who lived together their whole lives until six months ago, with identical criminal and mental health histories would be treated differently. She just follows the laws and the rules (App. 72).

- She does not know why a non-resident application costs twice as much as a resident application ($300.00 v. $150.00) (App. 74-75).

- Follow-up background checks are the same as the initial background checks (App. 77). Though some of the databases may not be 100% accurate, that is true whether the person is from Montana, Alaska or Illinois (App. 79). It is possible to obtain both a FOlD and CCL without submitting fingerprints (*Id.*). Illinois does not participate in the National Fingerprint File. She does not know why not. They have access to the National Fingerprint File through NCIC (App. 80).

- If an Illinois resident wanted to avoid being reported to the Illinois Department of Human Services and the ISP because of a voluntary mental health admission, they could just go across the Mississippi River to a mental health facility in downtown St. Louis, and neither the Department of Human Services nor the ISP would ever learn about it. This is true whether the person is an Illinois resident with an Illinois driver's license or not (App. 86).

- If an Illinois resident goes to college in another state, and seeks mental health treatment while there, that would not

be reportable to the Department of Human Services or the ISP (App. 86-87.

- A person that is not a danger to themselves or others, and could otherwise take care of herself and provide for her basic needs, but could not manage her own financial affairs, would be adjudicated as a mental defective and lose her firearm rights (App. 88).

- As far as running a mental health check on CCL applicants, whether Illinois residents or non-residents, the same gaps exist in what ISP is able to access for both residents and non-residents (App. 95).

- If someone wanted to violate the law they would just carry a firearm without a license. It is probably more advantageous to the State to know who was potentially carrying a firearm than not knowing (App. 110).

The above information confirms that the virtual ban is not substantially related to the goal of public safety. The bottom line is Plaintiffs are offering to give *more* information to the State, which is always to the State's benefit. They are willing to submit *more* information if the State requests it. The State is demanding perfect verification, but not only is that apparently impossible even for Illinois residents, but once again the State has failed to show any harm, anywhere, from allowing someone to submit a CCL application. Defendants dismiss what is characterizes as Plaintiffs' "bald assertions," (Dkt. #26 at p.51), but one need only read the news to know

that law-abiding people like Plaintiffs are not committing gun crimes in Illinois.

Defendants claim that "the harm in not being able to determine whether an applicant for a concealed carry license would pose a danger to himself or the public is obvious." (Dkt. #26 at p.43). But it is not obvious; it is not even true. This case is about people who already have CCLs, have proof of training, and are willing to submit whatever information the State wishes. This makes the Plaintiffs and people like them among the safest and most-qualified people that would ever be bringing guns into the State.

The State cites to a website run by the Violence Policy Center as "evidence" that concealed carry holders are violent, dangerous individuals who are out committing homicides (Dkt. #26 at p.50), but the VPC has come under fire for manipulating data to achieve its clear policy aims (*See* https://crimeresearch.org/2014/04/massive-errors-in-the-violence-policy-centers-concealed-carry-killers/, last checked April 23, 2018); http://newsok.com/article/5582259/policy-centers-gun-study-marred-by-omissions-flaws, dated February 6, 2018 (last checked April

23, 2018). Thus, the efforts to smear Plaintiffs and people like them are not credible.

The State again cites to *Horsley v. Trame*, 808 F.3d 1126 (7th Cir. 2015), which involved a restriction on those between the ages of 18-20 from obtaining a FOID card without permission. In rejecting the claim, the Court held:

> Significantly, although Horsley's arguments treat the challenged statute as a categorical ban on firearm possession, the FOID Card Act does not in fact ban persons under 21 from having firearms without parent or guardian consent. Having a parent or guardian signature may speed up the process, but it is not a prerequisite to obtaining a FOID card in Illinois. Rather, a person for whom a parent's signature is not available can appeal to the Director of the Illinois State Police. Upon a sufficient showing regarding the applicant's criminal record, lack of dangerousness, and the public interest, the Director may issue a card. 430 ILCS 65/10(c). And if the Director were to deny the application, the denial is subject to judicial review. 430 ILCS 65/11(a).

Id. at 1131-1132.

Contrary to all the safeguards listed in *Horsley*, there are no such possibilities here. If you reside in one of the 45 banned states, you are banned regardless of qualifications, even with the existence of the Concealed Carry Licensing Review Board, which could handle any

questioned non-resident applications. Of course, if you move to Illinois or one of the four approved states; then you become eligible.

The sort of deferential treatment sought by Defendants, that which defers to a prohibition of the exercise of fundamental rights, is not allowed (". . . the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 554 U.S. at 636). It is undisputed the State may regulate the use of firearms within constitutional boundaries. But a prohibition dressed up as a regulation is still a prohibition, and that the State may not do.

This Court did not allow the State's speculative fear-mongering in *Moore*, nor did it accept Chicago's baseless speculations in *Ezell*:

> In the district court, the City presented no data or expert opinion to support the range ban, so we have no way to evaluate the seriousness of its claimed public-safety concerns. Indeed, on this record those concerns are entirely speculative and, in any event, can be addressed through sensible zoning and other appropriately tailored regulations.

Ezell, 651 F.3d at 709.

The State still has no evidence that allowing non-residents with CCLs in their home states to apply for a CCL here after complying with all requirements and paying all fees has caused any harm to the public,

in Illinois or anywhere else. This makes perfect sense, because in Illinois where non-residents with CCLs from their home state are already able to bring firearms into the State for a variety of purposes, the potential harm of allowing those people to apply for an Illinois CCL is nil. This Court addressed this exact question in *Moore*, relying on the study of social scientists:

> "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. Based on available empirical data, therefore, we expect relatively little public safety impact if courts invalidate laws that prohibit gun carrying outside the home, assuming that some sort of permit system for public carry is allowed to stand." Philip J. Cook, Jens Ludwig & Adam M. Samaha, *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. Rev. 1041, 1082 (2009).

Moore, 702 F.3d at 937-38.

Plaintiffs do not take issue with "restrictions on individuals with certain criminal histories or a history of admittance to mental health facilities, or who may pose a present danger to themselves or the public" (Dkt. #26 at p.7), but Plaintiffs do take issue with the State's default assumption that all people from 45 states are criminals and/or mentally ill and/or terrorists who are lying on an Illinois CCL application. The

Court in *Culp I* stressed the need for verification, and that is fair, but Plaintiffs must be given a fair chance to do so.

Further, the Defendants can speculate about the non-resident wrongdoer who brings a firearm into the State to commit criminal acts, but even in that extremely unlikely scenario the fact the person was allowed to apply for a CCL (or was even granted a CCL) would have nothing to do with it. *Amici* Everytown decries Chicago gun violence, but that is the reason Plaintiffs are making this claim, not to contribute to the violence, but to protect themselves from it. That Plaintiffs are not the cause of said gun violence is why Defendants' application ban should fail. Defendant cites to the worst examples (*See Jankovich v. Ill. State Police*, 2017 IL App (1st) 160706 (1st Dist. 2017); *See also Perez v. Ill. Concealed Carry Licensing Review Bd.*, 2016 IL App (1st) 152087 (1st Dist. 2016), *Baumgartner v. Greene Cty. State's Attorney's Office*, 2016 IL App (4th) 150035 (4th Dist. 2016)), in some sort of attempted comparison to the Plaintiffs, but in those cases the system worked, and the applicant was denied. If Plaintiff non-residents, despite having a CCL in their home state submit information of arrests and convictions, no doubt they will be denied as well.

Plaintiffs concede the important governmental interest of public safety, and share that interest. However, in evaluating whether the challenged statute substantially furthers that interest, this Court should still follow its analysis in *Ezell* and *Moore* and require actual evidence that allowing a non-resident with a CCL in their home state to apply for a CCL in a foreign state, after complying with all requirements, ever caused any public harm. Because there is no such evidence of harm, the District Court should be reversed, and the Plaintiffs' request for summary judgment and a permanent injunction should have been granted.

IV. PLAINTIFFS SHOULD ALSO SUCCEED ON THEIR OTHER CONSTITUTIONAL CHALLENGES.

1. Fourteenth Amendment Equal Protection Clause

The Defendants are wrong when they assert rational basis as the standard of review for Plaintiffs' Equal Protection claim. As this Court noted in *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014): "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any

reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 654.

In this case, a fundamental constitutional right, namely Plaintiffs' Second Amendment rights, are infringed. The District Court erred in ruling otherwise, and because of this, the standard applied was rational basis instead of the correct strict scrutiny. And just as for a suspect class, the analysis of discrimination as to a fundamental right requires "a compelling showing that the benefits of the discrimination to society as a whole clearly outweigh the harms to its victims." *Id.* at 655. Defendants have not met this standard, as there is no actual evidence of a benefit of the 45 state CCL application ban.

2. Article IV Privileges and Immunities

This claim succeeds for the same reason as the Second Amendment claim discussed above. Defendants argue the 45 state ban on CCL applications bears a substantial relationship to the State's objective, but as noted above the non-resident ban has no relationship to any governmental interest that involves public safety or crime prevention. The two are simply not related. And because the State cannot satisfy intermediate scrutiny on the Second Amendment claim, much less near-

strict scrutiny, they likewise are unable to meet that burden under the Article IV analysis. Defendants claim Plaintiffs miss the point and there is a substantial interest in "ensuring that all people who carry concealed firearms in the State are qualified to do so." (Dkt. 26 at p.53). But it is not the interest that is in dispute, it is that the 45 state CCL application ban has nothing to do with furthering that interest. It is simply another example of stripping rights from law-abiding people and claiming that the ban somehow stops crime. It does not.

3. Fourteenth Amendment (Procedural) Due Process Clause

The State cannot meet any of the four factors of *Mathews v. Eldridge*, 424 U.S. 319 (1976) or *Gilbert v. Homar*, 520 U.S. 924 (1997). By again trying to make the case about concealed carry rather than public carry, the Defendants again erroneously argue there is no right at stake. This is untrue. The risk of error is enormous, since practically no qualified non-resident is even allowed to file an application. Procedural safeguards, such as being allowed to file an application and be evaluated on the merits, would certainly provide value, and the State's interest in this may be important, but the means are unconnected to serving that interest. In the meantime, Plaintiffs

suffer irreparable harm, both constitutional and, as the examples herein demonstrate, to their personal safety.

CONCLUSION

Plaintiffs are entitled to summary judgment against the challenged statute. The historical evidence, the Supreme Court's language in *Heller* and *McDonald*, and *Moore* make clear that some method of carrying is within the core fundamental right of armed self-defense. The State has chosen a concealed carry regime to the exclusion of allowing open carry, but wrongfully denies the meaningful exercise of that fundamental right to qualified persons from most of the Country.

The State's ban on, and criminal penalties for, carrying of firearms by non-residents without a license for which they are ineligible, are subject to the "not quite" strict scrutiny employed by this Court in *Ezell*. As with the laws stricken down in *Heller*, *McDonald*, *Ezell*, and *Moore*, the statute here targets only the law-abiding; criminals do not care about getting a CCL, and thus public safety is lessened, in that the likelihood that only criminals will possess firearms in public is increased, as is the risk that harm will befall a qualified non-resident who is arbitrarily denied the right to defend herself. Thus, while

regulation will be allowed in some constitutional measure, the challenged statute is an unconstitutional prohibition infringing on a core right without a close fit to the professed interest it allegedly serves.

Further, even if the intermediate scrutiny applied in *Culp I* is again employed, Defendants have not shown a substantial relationship between the non-resident CCL application ban and public safety.

Because of this, Plaintiffs are suffering irreparable harm every day the statute is in effect. They have no remedy at law for the loss of fundamental constitutional rights. Further, based on the record, Plaintiffs have succeeded on the merits, since Defendants have not shown the challenged statutes meet the required level of heightened scrutiny mandated by *Ezell* or even *Culp I*.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court reverse the District Court, and remand with instructions to enter Summary Judgment and a Permanent Injunction in Plaintiffs' favor, as well as to grant Plaintiffs any and all other relief this Court deems just and proper.

Dated: April 24, 2018

Respectfully submitted,

By: /s/ David G. Sigale

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Dated: April 24, 2018

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