No. 22-1482

In the United States Court of Appeals for the Seventh Circuit

JENNIFER J. MILLER, et al.,

Plaintiffs-Appellants,

v.

MARC D. SMITH, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Central District of Illinois, Springfield Division
Case No. 3:18-cv-03085-SEM-TSH

BRIEF OF *AMICI CURIAE* FIREARMS POLICY COALITION AND FPC ACTION FOUNDATION IN SUPPORT OF APPELLANTS AND REVERSAL

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Appellate Court No: 22-1482

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STATEMENT OF INTEREST

Firearms Policy Coalition (FPC) is a nonprofit organization devoted to advancing individual liberty and defending constitutional rights. FPC accomplishes its mission through legislative and grassroots advocacy, legal and historical research, litigation, education, and outreach programs. FPC's legislative and grassroots advocacy programs promote constitutionally based public policy. Its historical research aims to discover the founders' intent and the Constitution's original meaning. And its legal research and advocacy aim to ensure that constitutional rights maintain their original scope.

FPC Action Foundation (FPCAF) is a nonprofit organization dedicated to preserving the rights and liberties protected by the Constitution. FPCAF focuses on research, education, and legal efforts to inform the public about the importance of constitutional rights—why they were enshrined in the Constitution and their continuing significance. FPCAF is determined to ensure that the freedoms guaranteed by the Constitution are secured for future generations.

This case concerns *amici* because it goes to the heart of the fundamental right of the people to keep arms for self-defense, as

protected by the United States Constitution. Additionally, the organizations have substantial experience and expertise in the Second Amendment field—including as frequent *amici curiae*—that would aid the Court.[1]

SUMMARY OF ARGUMENT

The Supreme Court has held that the Second Amendment elevates the right of law-abiding citizens to use arms in defense of hearth and home above all governmental interests. Because self-defense is the central component of the Second Amendment, and the need for self-defense is most acute in the home, the right to keep operable firearms in the home cannot be interest-balanced away. Rather, prohibitory restrictions on self-defense in the home—such as Illinois's restrictions forbidding daycare operators and foster parents, including the Millers, from keeping operable firearms in the home—are categorically unconstitutional.

The Millers' private home is not a "sensitive place." Under Supreme Court precedent, (a) sensitive place regulations apply only to the carrying

[1] No counsel for a party authored this brief in any part. No party or counsel contributed money intended to fund the preparation or submission of this brief. No person other than *amici* and their members contributed money intended to fund the preparation or submission of this brief.

(not keeping) of arms, (b) only public locations can be sensitive, and (c) sensitive place restrictions must be longstanding and historically justified. None of these conditions apply here. The Millers wish to keep arms in their home, their home is not a public location, and Illinois's restrictions are neither longstanding nor historically justified.

At the time of the Second Amendment's ratification, the only location-based restrictions that had ever existed were enacted to protect government functions from violent interference—they covered legislatures, elections, and courts. The analysis does not change if the time of the Fourteenth Amendment's ratification is considered. The only additional restrictions by 1868 were enacted by a few colleges—only two of which were public universities—and did not apply to teachers, staff, visitors, or anyone other than students. No private home had ever been considered a sensitive place when the Second Amendment was ratified in 1791 or when the Fourteenth Amendment was ratified in 1868.

While restrictions on the right to keep operable firearms in the home should be held categorically unconstitutional, Illinois's restrictions are unconstitutional under heightened scrutiny as well. Both strict scrutiny and intermediate scrutiny—including in the Second Amendment

context—require that the government consider less burdensome alternatives. Appellants provided several substantially less burdensome alternatives that the government failed to consider, and the government has not provided any examples of alternatives that it did consider. The restrictions therefore fail any standard of heightened scrutiny.

ARGUMENT

I. *Heller* held that the Second Amendment elevates the right of law-abiding citizens to use arms in defense of hearth and home above all governmental interests.

The Second Amendment declares that "the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. The "central component of the right" is self-defense, and "the home [is] where the need for defense of self, family, and property is most acute." *District of Columbia v. Heller*, 554 U.S. 570, 599, 628 (2008); *see also McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) ("[T]he Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home."); *Ezell v. City of Chicago* ("*Ezell I*"), 651 F.3d 684, 689 (7th Cir. 2011) ("[T]he Amendment secures an individual right to keep and bear arms, the core component of which is

the right to possess operable firearms—handguns included—for self-defense, most notably in the home.").

As a central component of the Second Amendment, the right of Americans to keep operable firearms for self-defense in the home cannot be subjected to judicial "interest-balancing." *Heller*, 554 U.S. at 599, 634; *McDonald*, 561 U.S. at 785; *Ezell I*, 651 F.3d at 703. *Heller* thus declined to consider "arguments for and against gun control," the fact that "handgun violence is a problem," or that the District of Columbia's handgun ban was "limited to an urban area." 554 U.S. at 634. No governmental interests could justify the District's homebound restrictions, because the Second Amendment "surely elevates above all other [governmental] interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635.

As in *Heller*, no governmental interest can justify Illinois's restrictions prohibiting the Millers from "rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Id.* The Millers' right to keep arms for self-defense in the home cannot be interest-balanced away. "[B]roadly prohibitory laws restricting the core Second Amendment right—like the handgun bans at issue in [*Heller* and

McDonald], which prohibited handgun possession even in the home—are categorically unconstitutional." *Ezell I*, 651 F.3d at 703.

Heller noted that "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban." 554 U.S. at 629. By barring the Millers from keeping any handgun or operable firearm in their home, Illinois's restrictions are among those few extraordinary laws.

II. *Heller*'s "sensitive places" dictum is limited to carrying arms in public locations.

While *Heller* held that the "right of law-abiding, responsible citizens to use arms in defense of hearth and home" is paramount, it noted some "presumptively lawful" regulations that might not directly interfere with law-abiding citizens keeping arms in the home: "prohibitions on the possession of firearms by felons and the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," and " laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. at 626–27. Referring to such laws as "longstanding," the Court said it would "expound upon the historical justifications for the exceptions" when the opportunity arises. *Id.* at 627 n.26, 635.

The district court held that the Millers' home is a sensitive place, but this contradicts *Heller* because (a) sensitive place regulations apply only to arms carriage; (b) only public locations are sensitive; and (c) sensitive place restrictions must be longstanding and historically justified.

(a) Sensitive Place Regulations Apply to Arms Carriage.

Heller's sensitive place regulations apply to "laws forbidding the *carrying* of firearms." *Id.* at 626 (emphasis added). The Millers, in contrast, challenge restrictions on their right to *keep* firearms. By its plain terms, *Heller*'s sensitive places language regarding carrying firearms is inapplicable to restrictions on the keeping of firearms.

Heller provided "presumptively lawful" restrictions on *keeping* arms, which applied to "felons and the mentally ill." Since the Millers are neither felons nor mentally ill, the keeping-arms exceptions are inapplicable here as well.

(b) Only Public Locations are Sensitive.

Heller's sensitive place language was limited to public locations—"schools and government buildings." *Id.* This is consistent with the requirement that the regulations restrict the carrying—not keeping—of arms.

Nothing from *Heller* suggests that private homes may be sensitive places, and the Court made no inquiry whatever into Dick Heller's home. The Court ordered the District to issue him a license to keep and carry arms in his home, with the only condition being that "Heller is not disqualified from the exercise of Second Amendment rights." *Id.* at 635. By labeling a private home a sensitive place, the district court extended *Heller*'s dictum far beyond the Court's statement and its holding. Indeed, if a home could be a sensitive place, the sensitive places exception would swallow the hearth-and-home rule.

(c) Sensitive Place Restrictions Must be Longstanding and Historically Justified.

Heller made clear that to be "presumptively lawful," a sensitive place restriction must be "longstanding" with "historical justification." *Id.* at 626–27, 635.[2] As explained next, labeling a private home a sensitive place

[2] *McDonald* makes clear that each "presumptively lawful" regulation must be longstanding: "We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.' We repeat those assurances here." 561 U.S. at 786 (quoting *Heller*, 554 U.S. at 626–27).

is neither longstanding nor historically justified. Thus, the district court's holding that the Millers' home is a sensitive place is entirely unsupported by *Heller*.

III. There is no historical justification for classifying a private home as a "sensitive place."

Although *Heller* mandates a "historical justification" for any "longstanding" sensitive place regulation to be "presumptively lawful," the district court did not conduct a historical analysis. Such an analysis would have revealed how unprecedented its holding was.

A historical analysis must focus on the founding era, because "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Heller*, 554 U.S. at 634–35; *see also id.* at 625 (affirming "our adoption of the original understanding of the Second Amendment"); *McDonald*, 561 U.S. at 765 ("incorporated Bill of Rights protections are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment") (quotation marks omitted); *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (making clear that the right to carry is determined by a "historical analysis to determine whether eighteenth-

century America understood the Second Amendment to include a right to bear guns outside the home").

At the time of the Second Amendment's ratification, few location-based restrictions had ever existed anywhere in America. Those that existed were enacted to protect the functions of government from violent interference—they covered legislatures, elections, and courts.

In 1647, 1650, and 1683, Maryland prohibited anyone from entering either house of the legislature armed. 1 PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND, JANUARY 1637/8–SEPTEMBER 1664, at 273 (William Hand Browne ed, 1883) (1647: noe one shall come into the howse of Assembly (whilst the howse is sett) with any weapon"); (1650: "none shall come into eyther of the houses [of the Assembly] whillst they are sett, with any gun or weapon"); 7 *id.* at 524 (1683: "noe One shall Come Into the house of Assembly whilst the house is Sitting with a Sword, Or other weapon").

Delaware and New York acted to secure the election process. Delaware's 1776 Constitution forbade firearms at polling places on election day. DEL. CONST., art. 28 (1776) ("TO prevent any Violence or Force being used at the said Elections, no person shall come armed to any

of them"). New York in 1787 made it illegal to use arms to intimidate voters. 1787 N.Y. Laws 345, ch. 1 ("That all elections shall be free and that no person by force of arms nor by malice or menacing or otherwise presume to disturb or hinder any citizen of this State to make free election").

In 1786, Virginia banned arms in courts. 1786 Va. Acts 35, ch. 49 ("no man, great nor small, of what condition soever he be, except the Ministers of Justice . . . be so hardy to come before the justices of any court, or either of their Ministers of Justice, doing their office, with force and arms").

Every location-based restriction in the colonial and founding eras applied in public. None provide any support for labeling a private home a "sensitive place."

While *Heller*, *McDonald*, and *Moore* demonstrate that the founding-era understanding is what matters for historical analyses, *Heller*, 554 U.S. at 625, 634–35; *McDonald*, 561 U.S. at 765; *Moore*, 702 F.3d at 942, *Ezell I* suggests that the period surrounding the Fourteenth Amendment's ratification is also relevant, 651 F.3d at 705; *but see Heller*, 554 U.S. at 614 ("Since those [post-Civil War] discussions took place 75 years after the ratification of the Second Amendment, they do not provide

as much insight into its original meaning as earlier sources."). Because no pre-Fourteenth Amendment location-based restriction applied to private homes either, consideration of this time-period does not change the analysis.

By the Fourteenth Amendment's ratification, the only new locational restrictions across the country applied at a small number of colleges. Two public universities—University of Virginia (1824)[3] and University of North Carolina (1838)[4]—and four private colleges—Waterville College (1832),[5] Kemper College (1840),[6] University of Nashville (1837),[7] and

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[3] *Meeting Minutes of University of Virginia Board of Visitors, 4–5 Oct. 1824, 4 October 1824*, FOUNDERS EARLY ACCESS, https://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-print-04-02-02-4598 (last visit May 8, 2022); ENACTMENTS BY THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, FOR CONSTITUTING, GOVERNING AND CONDUCTING THAT INSTITUTION 9 (1825).

[4] THE ACTS OF THE GENERAL ASSEMBLY AND ORDINANCE OF THE TRUSTEES, FOR THE ORGANIZATION AND GOVERNMENT OF THE UNIVERSITY OF NORTH-CAROLINA 15 (1838).

[5] LAWS OF WATERVILLE COLLEGE, MAINE 11 (1832).

[6] THE LAWS OF KEMPER COLLEGE, NEAR SAINT LOUIS, MISSOURI, ENACTED BY THE TRUSTEES, MARCH 1840, at 9 (1840).

[7] 3 AMERICAN ANNALS OF EDUCATION AND INSTRUCTION. FOR THE YEAR 1837, at 185 (1837).

Dickinson College (1830)[8]—forbade students from keeping arms. None of these restrictions applied to teachers, staff, visitors, or anyone other than students.

Regardless of whether the Second Amendment's ratification or the Fourteenth Amendment's ratification represents the relevant timeframe, no private home in the country had ever been considered a sensitive place when the Second Amendment was ratified in 1791 or when the Fourteenth Amendment was ratified in 1868. There is no historical justification for Illinois's extraordinary homebound restrictions.

IV. The restrictions are poorly tailored because substantially less burdensome alternatives exist.

As "broadly prohibitory laws restricting the core Second Amendment right," Illinois's restrictions should be held "categorically unconstitutional." *Ezell I*, 651 F.3d at 703. *Moore*'s ruling invalidating Illinois's severe restriction on self-defense outside the home was "not based on degrees of scrutiny," 702 F.3d. at 941, and neither should be a ruling invalidating Illinois's severe restrictions on self-defense inside the home.

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[8] THE STATUTES OF DICKINSON COLLEGE, AS REVISED AND ADOPTED BY THE BOARD OF TRUSTEES, APRIL 16, 1830, at 22–23 (1830).

Yet even if heightened scrutiny applies, Illinois's restrictions are unconstitutional. Among other things, the government failed to consider less burdensome alternatives.

Strict scrutiny requires that the challenged regulations be "the least restrictive means of achieving a compelling state interest," *McCullen v. Coakley*, 573 U.S. 464, 478 (2014) (citing *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000)), while intermediate scrutiny requires that "the means chosen are not substantially broader than necessary to achieve the government's interest," *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989).

Several federal Circuit Courts, including this Court, have considered less burdensome alternatives while applying intermediate scrutiny in Second Amendment challenges.

Ezell I held Chicago's firing range ban unconstitutional in part because several less burdensome alternatives existed. This Court noted "the availability of straightforward range-design measures that can effectively guard against accidental injury" and that "[o]ther precautionary measures might include limiting the concentration of people and firearms in a range's facilities, the times when firearms can

be loaded, and the types of ammunition allowed." 651 F.3d at 709. This Court also cited other states' range safety statutes and range safety manuals to demonstrate the availability of less burdensome alternatives. *Id.* at 709–10.

In *Heller v. District of Columbia* ("*Heller III*"), the D.C. Circuit struck down a requirement for the triennial re-registration of firearms because less burdensome alternatives already existed. 801 F.3d 264, 277–78 (D.C. Cir. 2015). Although re-registration could be used to check whether the owner had become a prohibited person, "District officials and experts conceded that background checks could be conducted at any time without causing the registrations to expire." *Id.* at 277 (brackets omitted).

The District argued that re-registration would help "to maintain the accuracy of the registration database." *Id.* at 278. But the already-existing "requirement that gun owners report relevant changes in their information" was substantially less burdensome. *Id.*

Next, the District argued that re-registration would help to "determine when firearms have been lost or stolen." *Id.* But the already-existing law requiring the immediate report of the loss or theft of a firearm was substantially less burdensome. *Id.* So because substantially less

burdensome alternatives existed, re-registration failed intermediate scrutiny.

The Ninth Circuit considered a substantially less burdensome alternative to San Francisco's ban on hollow-point ammunition sales in *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014). The ban was upheld because Jackson's proposed alternative of prohibiting the possession of such bullets in public but allowing their purchase for home defense was actually *more* burdensome—since the sales ban still allowed for possession anywhere. *Id.* at 969–70.

The Tenth Circuit upheld a firearm ban for persons subject to domestic violence restraining orders only after determining that there was not "a severable subcategory of persons as to whom the statute is unconstitutional." *United States v. Reese*, 627 F.3d 792, 803 (10th Cir. 2010). In other words, there was not a substantially less burdensome alternative that would prevent a severable subcategory of persons from being unnecessarily burdened.

In another case, the Tenth Circuit upheld a firearm ban on United States Postal Service property. *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121 (10th Cir. 2015). The majority and the dissent disagreed as to the

feasibility of a substantially less burdensome alternative. The dissent argued that USPS could issue permits allowing firearms in its parking lots. But the majority concluded that "an alternative system involving piecemeal exceptions and individual waivers would be wasteful and administratively unworkable." *Id.* at 1128.

The Third Circuit reversed the dismissal of a Second Amendment challenge to shooting range restrictions because the district court "perform[ed] no analysis of alternatives." *Drummond v. Robinson Twp.*, 9 F.4th 217, 231 (3d Cir. 2021). The Third Circuit held that the Township "cannot forego an entire 'range of alternatives' without developing 'a meaningful record . . . that those options would fail to alleviate the problems meant to be addressed." *Id.* at 232 (quoting *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370–71 (3d Cir. 2016)). "If considered judgment or experience has exposed less-burdensome alternatives as unreasonable," the court continued, "that is for the Township to show." *Id.*

Appellants provided several substantially less burdensome alternatives that the government failed to consider, and the government has not provided any examples of alternatives that it did consider.

Appellants' Br. at 47–50. The restrictions therefore fail any standard of heightened scrutiny.

CONCLUSION

Illinois's restrictions destroy the Millers' right to keep operable firearms for self-defense in the home. The restrictions cannot be historically justified and cannot satisfy heightened scrutiny. The restrictions should be held unconstitutional, and the district court's decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Circuit Rule 29 because this brief contains 3,272 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14-point, proportionally spaced Century Schoolbook font.

/s/ *Joseph G.S. Greenlee*
Counsel of Record

CERTIFICATE OF SERVICE

I certify that on May 11, 2022, I served the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

/s/ *Joseph G.S. Greenlee*
Counsel of Record