No. 112026
IN THE
SUPREME COURT OF ILLINOIS

MATHEW D. WILSON; TROY EDHLUND; and JOSEPH MESSINEO,	)	**Appeal from the Appellate Court of Illinois,**
	)	**First Judicial District; No. 08-1202**
Plaintiffs-Petitioners,	)	
v.	)	**There on appeal from the Circuit Court of Cook County, Illinois, County**
	)	**Department,**
COOK COUNTY, a public body and corporate, *et al.*,	)	**Chancery Division; No. 07 CH 04848**
	)	
Defendants-Respondents.	)	**The Honorable Mary K. Rochford, Judge Presiding**

BRIEF OF *AMICUS CURIAE* NATIONAL SHOOTING SPORTS FOUNDATION, INC. IN SUPPORT OF PLAINTIFFS

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POINTS AND AUTHORITIES

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The *amicus curiae* is the National Shooting Sports Foundation, Inc. ("NSSF"), the trade association for the firearms, ammunition, and hunting and shooting sports industry. Formed in 1961, the NSSF is a Connecticut non-profit tax-exempt corporation with a membership of approximately 6,000 federally licensed firearms manufacturers, distributors and retailers; companies manufacturing, distributing and selling shooting and hunting related goods and services; sportsmen's organizations; public and private shooting ranges; gun clubs; publishers and individuals. As of July 2011, 66 NSSF members resided in Cook County and numerous others market and sell their products to residents of the County.

The NSSF's mission is to promote, protect and preserve hunting and the shooting sports by providing trusted leadership in addressing industry challenges; advancing participation in and understanding of hunting and shooting sports; reaffirming and strengthening its members' commitment to the safe and responsible sale and use of their products; and promoting a political environment that is supportive of America's traditional hunting and shooting heritage and Second Amendment freedoms.

The NSSF's interest in this case derives principally from the fact that their federally licensed firearms manufacturer, distributor and retail dealer members provide lawful commerce in firearms and make exercise of an individual's constitutional right to keep and bear arms possible. Federal firearms licensees are required to comply with the requirements of state and local laws applicable to the conduct of their businesses in addition to the statutory and regulatory requirements imposed under federal law. Local governmental prohibitions on the manufacture, sale and ownership of categories of firearms impose hardships on the licensed business activities of NSSF members,

particularly when those prohibitions differ so drastically from the federal regulatory scheme and from other state and municipal jurisdictions in which they do business.

The Cook County ordinance prohibiting the manufacture, sale and ownership of modern sporting rifles - a category of firearms that are commonly used by law-abiding citizens for lawful and constitutionally protected purposes – imposes unjustifiable hardships on the NSSF's members and infringes on the constitutional rights of the citizens of Cook County and elsewhere. The ordinance also exacts economic costs in Illinois. Companies in Illinois that manufacture, distribute and sell firearms, ammunition and hunting equipment, including modern sporting rifles, employ nearly 3,000 people and generate nearly 3,000 additional jobs in ancillary industries. In 2010 alone, the firearms and ammunition industry was responsible for as much as $798 million in total economic activity in Illinois. The industry and its employees pay over $55 million in state taxes each year.

The NSSF submits this brief in support of the plaintiffs and urges this Court to reverse the decision of the Appellate Court.

ARGUMENT

1. The Modern Sporting Rifles That Are Banned in Cook County Have the Same Basic Functional Features As Traditional Semi-Automatic Rifles.

The Blair Holt Assault Weapons Ban (Cook County Ordinance No. 06-O-50 (November 14, 2006), (hereafter "the Ordinance") prohibits the manufacture, sale, ownership and possession of a category of firearms that are commonly owned and used by law-abiding citizens across the country for lawful purposes, including target shooting, collecting and self-defense. Pejoratively and wrongly described in the Ordinance as "assault weapons", many of the banned firearms are simply semi-automatic rifles that fire

at no greater rate and are no more dangerous than other semi-automatic rifles that are not banned. Each of the banned firearms is designed to fire just one round fed from a detachable magazine with each pull of the trigger. Although some of the banned rifles have features found on rifles used by the military, those features are largely cosmetic and do not affect how the rifles function, including the rate at which the rifles can be fired. These rifles are modern sporting rifles, and they are manufactured and used for all of the same lawful purposes as are the pistols, revolvers, shotguns and other rifles that can be lawfully owned and used in Cook County. They are not machine guns or automatic weapons, and they do not "spray-fire" bullets.

Modern sporting rifles are manufactured for civilian, not military use. They evolved from military service rifles just as many other commonly used sporting rifles have evolved over the past century.[1] The traditional bolt-action rifle, used by hunters for generations, is the direct descendant of the battlefield rifle used in World War I. It represented a step forward in handling, reliability and accuracy. Not long after the U.S. military used a semi-automatic rifle for the first time in World War II, a wide range of semi-automatic hunting rifles and shotguns gained widespread popularity among civilians. Modern sporting rifles share many of the cosmetic features of the M-16 rifle first used in the Vietnam War. They also have other features that have made them popular for sporting uses, including reduced recoil and balanced ergonomic design. The modern sporting rifle is simply a modern state-of-the-art rifle just as its more traditional brethren were generations ago.

[1] www.nssf.org/MSR/history.cfm

2. The Appellate Court Erred By Finding That Cook County's Ban On the Ownership and Possession of Modern Sporting Rifles Does Not Implicate the Core Second Amendment Right to Keep and Bear Arms.

In *United States v. Heller*, 554 U.S. 570 (2008), the United States Supreme Court held that the District of Columbia's ban on handgun possession violated an individual's right to keep and bear arms under the Second Amendment to the United States Constitution. The Court concluded that "the central component of the right" is the right of self-defense and specifically a citizen's right to defend his home "where defense of self, family and property is most acute." *Id*. at 599-600, 628. "Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to keep and use for protection of one's home and family, would fail constitutional muster.' " *Id*. at 628-29 (citation omitted). An individual's right to keep and bear arms extends to ownership of firearms that are in common use by law-abiding citizens for lawful purposes, including self defense. *Id.* at 635-36.

The Second Amendment does not only protect personal ownership of the types of firearms that were commonly owned by citizens when the Second Amendment was ratified. "Just like the First Amendment protects modern forms of communication, … and the Fourth Amendment applies to modern forms of search … the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id*. at 581 (citations omitted). Thus, if a type of firearm is commonly owned today by law-abiding citizens for lawful purposes,

including self-defense, there is a Second Amendment right to own and lawfully use that firearm.[2]

The Appellate Court's *de novo* review of the trial court's ruling on the sufficiency of the plaintiffs' First Amended Complaint, and its analysis of whether the Ordinance implicates a core Second Amendment right, fell substantially short of the mark. The court did not conduct an independent review of historical precedent, current data on firearms ownership or rely on any other source of information to inform its decision on whether the banned firearms are commonly used today by law-abiding citizens for lawful purposes. Instead, the Appellate Court accepted and relied only on prefatory clauses that were made part of the Ordinance in 1993. Only one of the prefatory clauses relied on can claim any relevance to the question of whether the modern sporting rifles banned under the Ordinance are commonly owned by law-abiding citizens for lawful purposes: the claim that the banned firearms are not used for "any legitimate sporting purpose." *Wilson v. Cook County*, 407 Ill. App. 3d 759, 771-72 (1st. Dist. 2011). With one exception, the balance of the prefatory clauses referenced by the Appellate Court in its opinion relate to

[2]By definition "unusual weapons" or "those weapons not typically possessed by law-abiding citizens for lawful purposes" are excluded from those that are constitutionally protected under the categorical test articulated in *Heller*. 554 U.S. at 627, 625. A short-barreled shotgun was used by the Court as an example of a firearm that is not typically possessed by law-abiding citizens. *Id.* at 625. Short-barreled shotguns are not commonly owned by law-abiding citizens because federal law expressly prohibits federally licensed importers, manufacturers, dealers and collectors from selling them except as specifically authorized by the United States Attorney General. 18 U.S.C. §922(b)(4). Machine guns – defined as "any weapon which shoots … automatically more than one shot, without manual reloading, by a single function of the trigger" – fall under the same provision. 26 U.S.C. §5845(b). In contrast, there is no federal restriction on the manufacture and sale of modern sporting rifles, and they are commonly owned by law-abiding citizens across the country.

"guns in general" and the social costs associated with gun crimes in general. *Id.* at 771 (e.g. "there were more federally licensed gun dealers in Cook County than gas stations").

By dismissing the First Amended Complaint, the trial court denied plaintiffs the opportunity to show that the prefatory clause claiming that the banned firearms are not used for legitimate purposes is both outdated and inaccurate. *See Yuretich v. Sole,* 259 Ill. App. 3d 311, 317 (1994)(A trial court should not grant a motion to dismiss where it reasonably appears that discovery might assist the party resisting the motion). Evidence supporting the common and lawful use of modern sporting rifles could have been developed from a variety of sources, but one such source is the Modern Sporting Rifle Comprehensive Consumer Report.[3] The study was sponsored by the NSSF and conducted by an independent survey company in order to learn more about contemporary ownership and use of modern sporting rifles. An internet based survey methodology was used to perform the study. More than 11,400 survey responses were received during a three month period in 2010. Safeguards were implemented to insure data accuracy, and ultimately a sample of 7,372 modern sporting rifle owners was selected. The confidence interval ranges from +/- 0.51 to +/- 1.16 percentage points at the 95% confidence level. Stated differently, if 50% of those in the survey sample reported that they fire their rifles at shooting ranges, 95 times out of 100 the real value lies within +/- 1.16 percentage points or between 48.84% and 51.16%.

Ownership of 19,019 modern sporting rifles was reflected in the study. Among the findings were that nearly half (44%) of modern sporting rifle owners are current or former military or law enforcement members. The majority of owners is married (73%)

[3] www.nssf.org/share/PDF/MSR_Consumer_Report%202010.pdf.

and has a college degree (59%). Approximately half of the owners surveyed (51%) were members at a local shooting range. A majority (60%) owned more than one modern sporting rifle. Nearly half (47%) purchased their first modern sporting rifle within the past five years. Approximately two-thirds (66%) of the owners surveyed purchased a modern sporting rifle during the past two years. The average amount of money spent on their most recent purchase was $1,083. Those sampled reported they were likely to very likely to purchase a new modern sporting rifle in the next 12 months. [4]

Recreational target shooting was reported as the number one reason for owning a modern sporting rifle (8.9 out of 10) followed closely by home defense (7.74 out of 10). Other reasons included varmint hunting, big game shooting and competition shooting. Nearly all (95%) of those surveyed used their modern sporting rifles during the previous 12 months. The average number of uses during the previous 12 months was 16.7. The most popular magazine used by the owners surveyed holds 30 rounds of ammunition and the vast majority use magazines that hold more than 10 rounds.

Cook County's justification for its ban on modern sporting rifles – they are not used for any legitimate sporting purpose – is plainly contradicted by actual evidence on

[4] The NSSF is not aware of any single authoritative source setting forth the number of modern sporting rifles currently owned in the United States. However, a very conservative estimate of more than 2 million AR-15 rifles alone, not counting the many other modern sporting rifle models, can be made based in part on annual firearm manufacturing and export reports provided to the Bureau of Alcohol, Tobacco & Firearms by domestic manufacturers (www.atf.gov/statistics/download/afmer/2010-interim-firearms-manufacturing-export-report.pdf) and firearm background checks data assembled by the Federal Bureau of Investigation (www.fbi.gov/about-us/cjis/nics/reports/2010-operations-report/2010-operations-report-pdf). *See Heller v. District of Columbia*, Case No. 1:08-cv-01289, Document 23-8, filed 7/31/2009, at www.pacer.gov. This estimate does not include all of the domestically-manufactured modern sporting rifles banned in Cook County or the substantial number of modern sporting rifles manufactured in other countries and imported into the United States.

their use. Modern sporting rifles are commonly owned by law-abiding citizens and used for lawful purposes. In 2009, an estimated 8.9 million people in the United States used just one type of modern sporting rifle - an AR-style rifle - in target or sport shooting activities.[5] Modern sporting rifles are not akin to "rocket launchers" and "machine guns" as Cook County argued in the court below, and there is no support for the County's unsubstantiated assertion in the appellate court that prohibiting law-abiding citizens from owning modern sporting rifles is necessary to prevent "armed mayhem." While handguns may be "the most preferred firearm in the nation to keep and use for protection of one's home and family", modern sporting rifles are certainly among the firearms commonly used for that purpose. *Heller*, 554 U.S. at 628-29. Under the categorical test articulated in *Heller,* Cook County's prohibition on the ownership and use of modern sporting rifles for lawful purposes implicates the core Second Amendment right to keep and bear arms. The appellate court erred in concluding that the Ordinance did not implicate that fundamental constitutional guarantee.

3. The Appellate Court Erred By Not Holding Cook County to Its Burden of Demonstrating Under a Heightened Level of Scrutiny That a Compelling Governmental Interest Justified Infringement of a Fundamental Constitutional Guarantee.

Following *Heller*, the Court in *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010), held that an individual's Second Amendment right to keep and bear arms is a fundamental right that applies fully to the States, and struck down the City of Chicago's handgun ownership ban as unconstitutional. The Court specifically rejected the City's argument that the reasonableness of state and local gun laws should be considered in

[5] Sport Shooting Participation in the United States in 2009, (www.nssf.org/PDF/research/excerptNSSF-Shooting-Participation-Report.pdf)

evaluating whether Second Amendment rights have been infringed by those laws. And the Court rejected, as it did in *Heller*, an interest-balancing test whereby courts would make empirical judgments of the costs and benefits of restrictions on firearms ownership. *Id*. at 3046. "The very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is *really worth* insisting upon". *Id*. (citing *Heller*, 554 U.S. at 634); *see also Ezell v. City of Chicago*, no. 10-3525, 2011 WL 2623511 at *13 (7th Cir. July 6, 2011)("*Heller* and *McDonald* suggest that broadly prohibitory laws restricting the core Second Amendment right … are categorically unconstitutional").

Cook County had the burden in the trial court to demonstrate under a heightened level of scrutiny that its ban on the ownership of modern sporting rifles is either narrowly tailored to serve an important governmental interest or has a substantial relationship to that interest.[6] *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480-81 (1989); *see also Ezell* at *19 (the burden belonged to the City to justify its infringement of the core Second Amendment right). Cook County's prefatory clauses are not entitled to any deference. *Ezell* at *19 (A presumption of constitutionality and deference to legislative findings are out under *Heller* and *McDonald*). "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Heller*, 554 U.S. at 634-35. Cook County failed to satisfy its burden and neither the trial court nor the appellate court presented its own "independent judgment of the facts" bearing on

[6] Regardless of whether strict or intermediate scrutiny is applied to determine if the Cook County ordinance infringes plaintiffs' Second Amendment rights, Cook County failed to meet its burden to show that its ban on the ownership of modern sporting rifles serves its interest in protecting the public's welfare.

constitutional issue they were asked to decide. *Sable Communications of California, Inc. v. FCC,* 492 U.S. 115, 129 (1989)(deference to a legislative finding cannot limit judicial inquiry when fundamental constitutional rights are at stake); *but cf. U.S. v. Skoien,* 614 F.3d 638, 651-52 (7th Cir. 2010) (J. Sykes, dissenting) (when a court supplies empirical data itself and relieves the government of its burden to make a "strong showing" to justify stripping Second Amendment rights, the opportunity to review and subject outcome-determinative evidence to normal adversarial testing is lost).[7]

Cook County failed to make any showing in the trial court that the banned firearms are not commonly owned and used for legitimate purposes, and they cannot do so now. And whatever basis Cook County had for its prefatory clause that the banned firearms were "20 times more likely to be used in the commission of a crime", it was unknown by the trial court because it was not revealed by Cook County and could not be challenged by plaintiffs. In any event, the claim made in the prefatory clause is not supported by government data reflecting the use of firearms in crime in 1994 or today.

The National Crime Victimization Survey, conducted annually by the U.S. Census Bureau for the U.S. Department of Justice, Bureau of Justice Statistics, revealed

[7] The appellate court mistakenly relied on two cases from other jurisdictions in which "assault weapon" bans were upheld – *People v. James*, 174 Cal. App. 4th 662 (2009) and *Heller v. District of Columbia*, 698 F. Supp.2d 179 (D.C. Cir. 2010) ("*Heller II*"). Both cases are distinguishable. Both cases were decided before *McDonald* and the Second Amendment right to keep and bear arms was declared to be a fundamental constitutional guarantee that is fully applicable to state and local governments. Also, the trial courts in both *James* and *Heller II* drew on extensive records to support their decisions, unlike the trial court in this case. In *James*, the record had been developed in an earlier case that reached the California Supreme Court, which included legislative history, testimony before legislative committees and empirical information supplied by others. *Heller II* was decided at the summary judgment stage on an equally developed record. At minimum, this Court should reverse the appellate court's decision and remand this case to the trial court for further proceedings so that the constitutionality of the Ordinance can be addressed on a complete record.

that from 1993 through 2001, handguns were used in approximately 87% of violent crimes involving firearms. "Other firearms" made up the balance and include rifles and shotguns, and presumably some number of semi-automatics rifles of the type banned in Cook County.[8] Thus, handguns were used in crimes approximately eight times more often than all long guns combined. The most recent findings based on statistical data collected for the U.S. Department of Justice remain unchanged. Long guns, undifferentiated by type, accounted for just 12% of the firearms used in violent crimes in 2008 with handguns comprising the remainder.[9] If criminals' preference for a type of commonly owned firearm can serve as justification for prohibiting law-abiding citizens from owning the same type of firearm for lawful purposes, handguns ownership would not enjoy Second Amendment protection and the *Heller* decision would need to be revisited. In sum, Cook County has not and cannot demonstrate under the empirical facts that the Ordinance is narrowly tailored or bears a substantial relationship to its goal of protecting the public's welfare.

4. Cook County's Ban On the Ownership of Ammunition Magazines Holding More Than Ten Rounds Unconstitutionally Infringes the Core Second Amendment Right to Keep and Bear Arms.

One of the features that make modern sporting rifles so popular and commonly owned is their ability to hold more ammunition in their detachable magazines than traditional semi-automatic rifles, thus reducing the need for and time devoted to reloading. The most commonly used magazine used in modern sporting rifles holds 30

[8] See *Weapon Use and Violent Crime, National Crime Victimization Survey, 1993-2001,* Table 2 (September 2003) (www.bjs.usdoj.gov/content/pub/pdf/wuvc01.pdf).
[9] See *Criminal Victimization in the United States, 2008 Statistical Tables,* Table 66 (May 2011) (www.bjs.usdoj.gov/content/pub/pdf/cvus0804.pdf).

rounds of ammunition (*supra*, p. 7). Under the Ordinance, it is illegal to own a magazine capable of holding more than 10 rounds of ammunition.

Cook County's ban on magazines capable of holding more than ten rounds of ammunition impermissibly burdens the core Second Amendment right to own and use modern sporting rifles for lawful purposes, including target shooting, collecting and home defense. In *Ezell v. City of Chicago*, No.10-3525, 2011 WL 2623511 at *14 (7th Cir. July 6, 2011), the court recognized that the right to possess firearms for protection implies corresponding rights to make exercise of the right effective. In *Ezell*, the court directed the trial court to preliminarily enjoin the City of Chicago from enforcing an ordinance that banned the operation of shooting ranges within the City's boundaries. The court held that shooting range training is categorically protected by the Second Amendment under *Heller* and *McDonald*. *Id*. The court held that the City "had not come close" to demonstrating that the operation of shooting ranges creates genuine risks to public safety. Id. at *17. "The City produced no empirical evidence whatsoever and rested its entire defense of the range ban on speculation about accidents and theft." *Id.* at *18.

If use of modern sporting rifles is protected by the Second Amendment, use of the magazines that make the rifles effective for their constitutionally protected purpose should also be protected. Just as training was held in *Ezell* to be "an important corollary to the meaningful exercise of the core right to possess firearms for self-defense", ammunition magazines capable of holding more than 10 rounds are necessary to make ownership and use of modern sporting rifles effective. For target shooting, a magazine holding more than 10 rounds is desirable because it reduces the number of times needed

to stop and reload. Unquestionably target shooting at a shooting range is a lawful and entirely common use of a modern sporting rifle.

Cook County produced no evidence in the trial court demonstrating a close fit between its ban on ammunition magazines and a compelling governmental interest. Presumably, that interest is public safety, yet there was no showing that public safety is served by denying law-abiding citizens the right to own these magazines as a corollary to core Second Amendment right to self-defense. Cook County did not meet its burden of establishing a strong public interest justification for its ammunition magazine ban, and the trial and appellate courts erred by not requiring the County to do so.

CONCLUSION

Cook County's ban on the ownership of modern sporting rifles and their magazines implicates the core Second Amendment right to keep and bear arms. Both the trial and the appellate courts erred in not holding Cook County to its burden of demonstrating how a prohibition on the ownership of these commonly used firearms by law-abiding citizens serves its interest in protecting the public from crime. The decision of the appellate court should be reversed and enforcement of the Ordinance should be enjoined.

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance and certificate of service, and those matters to be appended to the brief under Rule 342(a) is 13 pages.

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CERTIFICATE OF SERVCE

I, James B. Vogts, certify that on August1, 2011 copies of this brief were served on counsel listed below in accordance with Illinois Supreme Court Rule 341.

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