Nos. 14-3312, 14-3322

In the United States Court of Appeals for the Seventh Circuit

RHONDA EZELL, WILLIAM HESPEN, JOSEPH BROWN, ACTION TARGET, INC., SECOND AMENDMENT FOUNDATION, INC., AND ILLINOIS STATE RIFLE ASSOCIATION,

Plaintiffs-Appellees/
Cross-Appellants,

v.

CITY OF CHICAGO,

Defendant-Appellant/
Cross-Appellee

Appeal from a Judgment of the United States District Court
for the Northern District of Illinois
The Hon. Virginia M. Kendall, District Judge
District Court No. 10-CV-5135

APPELLEES/CROSS-APPELLANTS' BRIEF

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-3312, 14-3322

Short Caption: Rhonda Ezell, et al. v. City of Chicago

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Rhonda Ezell, William Hespen, Joseph I. Brown, Action Target, Inc., Second Amendment Foundation, Inc.,

Action Target, Inc., 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:

Gura & Possessky, PLLC

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

None.

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

Action Target, Inc.: BB&T/ATI Investment, LLC; Second Amend. Foundation, Inc., None; ISRA, None.

Attorney's Signature: s/ Alan Gura Date: 3/16/2015

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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APPELLEES/CROSS-APPELLANTS' BRIEF

JURISDICTIONAL STATEMENT

Defendant-Appellant/Cross-Appellee City of Chicago's jurisdictional summary is true and correct.

STATEMENT OF ISSUES

1. Consistent with Second Amendment rights, has Chicago established a strong public-interest justification for:
   - restricting gun ranges to manufacturing districts;
   - prohibiting gun ranges from being located within 100 feet of each other; and
   - prohibiting gun ranges from being located within 500 feet of residential districts, schools, day-care facilities, parks, places of worship, alcohol retailers, "children's activities facilities," libraries, museums, and hospitals,

   such that there is a close fit between these regulations and strong, actually achieved public interests?
2. Does an ordinance prohibiting all individuals under 18 years old from accessing gun ranges violate the First Amendment rights to teach and acquire proficiency in the use of arms?

3. Does an ordinance prohibiting all individuals under 18 years old from accessing gun ranges violate the Second Amendment rights to operate and access gun ranges?

STATEMENT OF THE CASE

As this Court prepared to overturn Chicago's "thumbing of the municipal nose at the Supreme Court," *Ezell* v. *City of Chicago*, 651 F.3d 684, 712 (7th Cir. 2011) (Rovner, J., concurring in the judgment) ("*Ezell I*"), the City crafted a reprise performance. Immediately after this Court ordered that Chicago's explicitly-stated gun range prohibition be enjoined, the City replaced that provision with a range ordinance so repressive that it could not reasonably have been viewed as anything other than a measure of complete resistance. Extreme restrictions on gun range ownership, location, construction, design, and operation guaranteed that Chicago would remain free of gun ranges.

Nearly four years later, Chicago still lacks gun ranges, although the issues have been greatly narrowed. Under significant litigation pressure, the City repealed many of its least defensible restrictions. The District Court struck down others not addressed by Chicago's

appeal, and upheld some that Plaintiffs do not further challenge given the context of what restrictions remain. But three provisions are at issue before this Court.

Chicago appeals from the decision striking down its provision confining gun ranges to manufacturing districts, while Plaintiffs appeal from the decision sustaining two laws: a restriction prohibiting gun ranges from being located within 500 feet of numerous types of properties and within 100 feet of each other; and a rule prohibiting range access by individuals under eighteen years of age.

Plaintiffs do not contend that gun ranges are exempted from zoning, or that children enjoy the same rights to access and use firearms as are enjoyed by responsible, law-abiding adults. But cities carry a heavy burden to justify, with actual evidence, the propriety of zoning laws that severely curtail and even possibly extinguish the exercise of fundamental rights. And however else Chicago might restrict minor's access to firearms—without question, a proper subject of regulation—it cannot entirely forbid, under the First and Second Amendments, the longstanding American tradition of teaching firearms proficiency and safety to at least older minors, or bar minors from all range premises.

1. *The July 6, 2011 Range Ordinance.*

On July 6, 2011, after this Court decided *Ezell I*, Chicago replaced its range prohibition with another unprecedented gun range ordinance. Supp. App. ("SA") 1-18. Although most of this ordinance is not at issue, fully understanding the motives animating the contested provisions requires examination of their original context.

Chicago charged $4,000 to apply for the two-year range license, since reduced to $2,000. Chi. Mun. Code § 4-5-010 (2011). All managers, employees, and "applicants," the latter term encompassing all persons whose disclosure Chicago required—individuals, partners of partnerships, LLC managers and/or members, corporate officers and directors, and range *attorneys*, accountants, consultants, expediters, promoters, and lobbyists—needed to be fingerprinted, and obtain both a Chicago Firearms Permit ("CFP") and an Illinois Firearms Owners Identification ("FOID") card. Chi. Mun. Code §§ 4-151-010, 4-151-030 (2011). Since FOID cards are available only to Illinois residents, this

provision effectively barred out-of-state ownership, or assistance to gun ranges from out-of-state providers, including attorneys.[1]

Detailed logs of most visitors to the range property (not just the range facility itself) were to be kept for a year. Chi. Mun. Code §§ 4-151-010, 4-151-100(n) (2011). Operating hours were restricted. Chi. Mun. Code § 4-151-090 (2011). People under 18 were prohibited from all premises, Chi. Mun. Code § 4-151-100(d), and patrons lacking a CFP and FOID card could not shoot unless they were present for the one-hour training course then required to obtain a CFP, Chi. Mun. Code § 4-151-100(g)(1) (2011). This effectively barred out-of-state patrons (who couldn't get a FOID card) and many Illinoisans residing outside Chicago, who would probably not undertake to obtain a CFP just to use a Chicago range).

Ranges could not sell firearms. Chi. Mun. Code § 8-20-100 (2011). Nor could ranges rent or loan firearms, except for use during the one-

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[1] "Out-of-state lawyers may—and often do—represent persons who raise unpopular federal claims. In some cases, representation by nonresident counsel may be the only means available for the vindication of federal rights." *Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274, 281 (1985) (citation omitted).

hour CFP class. Chi. Mun. Code § 4-151-170 (2011). Patrons were thus barred from sampling different firearms without first purchasing and registering them. Ranges could sell ammunition, which could not leave the premises. *Id.* Patrons could thus not fire and replace older ammunition. Firearms and ammunition were to be stored in the same (expensive) manner as explosive or hazardous materials. Chi. Mun. Code § 13-96-1190(c)(2)(d) (2011).

The ordinance contained an array of construction and maintenance standards that, suffice it to say, were unusual, cost-prohibitive, often impractical, conflicting, and at times violated industry safety standards. Ranges were zoned exclusively as special uses within manufacturing districts, Chi. Mun. Code § 17-5-0207 (2011), but were the only uses within such districts subject to noise controls, Chi. Mun. Code § 13-96-1200(b)(2) (2011). Moreover, gun ranges could not be located within 1000 feet of each other, or myriad other uses, Chi. Mun. Code § 4-151-120 (2011), although this was relaxed to 500 feet, with that requirement later dropped to 100 feet for neighboring gun ranges, and recodified as Chi. Mun. Code § 17-9-0120.

Assuming some hypothetical gun range could run this gauntlet, the Police Commissioner would nevertheless enjoy unbridled discretion to deny a new or renewal range license application if the license "would have a deleterious impact on the health, safety and welfare of the community in which the shooting rage facility is or will be located." Chi. Mun. Code § 4-151-030(f) (2011). Moreover, a "deleterious impact" would presumptively exist "whenever there have been a substantial number of arrests within 500 feet of the applicant's premises . . . ." *Id.*[2]

Before examining the factual record developed in litigating the challenged ordinances, some of the basic relevant facts previously established in this case merit review. "Gun ranges exist in virtually every major American city, in numerous settings: in strip malls, next to restaurants, gyms, and department stores, in the basements of private homes, and even on the seventeenth floor of Chicago's Federal Reserve Bank building." Appellants' Br., No. 10-3525, at 8 (citing App. 35-36, 86-88).

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[2]The term "substantial" is vague, and there were no requirements that the arrests be connected to the gun range, or even lawful.

> Gun ranges open to the public have historically been located throughout Chicago. App. 34. Today, Chicago's map is dotted with gun ranges, albeit ones open only to police and private security operators. App. 80-82, 118-120.

Id. Chicago's police, government, and private security gun ranges are

> located in residential and commercial neighborhoods, among homes, schools, churches, parks, government buildings, and businesses of every description. *Id.*; App. 106-108. City officials are unaware of complaints about these gun ranges, which they believe have no negative impact on their surroundings. App. 102, 108-09, 121.

Id. at 8-9.

Yet it remains the case that Chicago lacks publicly-available gun ranges. Through September 24, 2012, the City's Commissioner of Business Affairs and Consumer Protection, Rosemary Krimbel, was unaware of anyone applying to open a commercial gun range. SA 59, l. 6-17; SA 60, l. 13-15. It is within judicial notice that no such ranges exist in Chicago today.

2. *The Zoning Ordinances*

"Zoning is, I would say, always the first thing that gets dealt with," testified Krimbel. SA 61, l. 6-7. "Because if the zoning doesn't pass, nothing else matters." *Id.* l. 11-12. Chicago restricts gun ranges as special uses in manufacturing districts, Chi. Mun. Code § 17-5-0207;

and requires that they be located at least 100 feet from each other, as well as at least 500 feet from residential zones, schools, day-care facilities, places of worship, alcohol retailers, children's activity facilities, museums, libraries, and hospitals, Chi. Mun. Code § 17-9-0120.

a. Chicago's Zoning Rationales.

Patricia Scudiero, Chicago's Zoning Administrator and the Managing Deputy Commissioner for the Bureau of Planning and Zoning, SA 72, l.4-6, testified that neither she nor anyone from her department had researched how other cities zone gun ranges, nor did she know anything in that regard. She had never visited, investigated or researched gun ranges for zoning purposes. SA 74, l. 7-75, l. 10; SA 95, l. 2-12.

Explaining why gun ranges should be relegated to manufacturing zones, Scudiero offered:

> Guns are involved in firing ranges. Ammunition is involved in firing ranges. There is transportation of guns and ammunition involved with firing ranges and certainly it could be conceived as an impact on the health, safety and welfare of individuals surrounding that. Therefore, the use is considered high impact. And . . . like other uses that are high impact, the M district affords sort of a distance away from the residential communities in most areas of the city.

SA 73, l. 7-23.

Asked whether she was "aware of any empirical evidence that firing ranges actually have that impact or is that speculative on your part," Scudiero answered, "I know of no data." SA 74, l. 3-6.

"No data" was also Scudiero's repeated response when asked for the City's empirical basis underlying the distancing requirements. Distancing gun ranges from each other was justified by concerns that

> two ranges [would] have combustible materials on site within proximity of one another. There could also be an impact for the gathering of criminal activity near places that guns and ammunition are being transported, as a safety measure. I think that pretty much sums it up.

SA 80, l. 8-13. But asked for any empirical evidence supporting the combustion concern, Scudiero responded, "I'm aware of no data." SA 80, l. 22-SA 81, l. 2. "I am not aware of any data." SA 81, l. 18. The combustion concern was speculative. SA 81, l. 19-22.[3] As for the concern

[3]Scudiero alluded to the Chicago Fire Department having concerns in this regard, SA 81, l. 7-14. However, she was Chicago's designated witness under Fed. R. Civ. P. 30(b)(6) for "[t]he bases for enacting CMC Section 4-151-120," SA 71, l. 21-22; SA 83, l. 5-8, where the distancing requirements were then codified.

that range proximity to each other would increase crime, "I'm aware of no data." SA 82, l. 3-8. This, too, was speculative. SA 82, l. 9-14.

Chicago's purpose in distancing gun ranges from residential zones "is much the same but it also goes to purpose number one of the zoning code which is to the health, safety and welfare of the residents." SA 83, l. 15-18. This interest raised Chicago's concern for "any situation where there could be a criminal activity gathering, movement of guns and ammunition, a residential district should be kept the farthest away from those premises." SA 84, l. 2-5. But as this concern was identical to that underlying the rule from distancing ranges from each other, Scudiero offered the same answer as to actual relevant empirical evidence. "I'm aware of no data." SA 84, l. 7-16. Indeed, the concerns underlying the residential distancing requirements were as speculative as those underlying the intra-range distancing requirement. SA 84, l. 17-SA 85, l. 1.

Scudiero offered somewhat different rationales underlying the distancing requirements from various listed land uses. SA 85, l. 20-SA 86, l. 1. An additional concern underlying this provision was the possible assembly of many people. SA 86, l. 2-14. However, the

perceived harms to be ameliorated by this provision—criminal activity and spontaneous combustion—were the same. SA 85, l. 13-SA 87, l. 8.

Since the "combustion" risk was alleged to be posed by the close proximity of two gun ranges, Plaintiffs inquired as to how the various uses to be distanced 500 feet from gun ranges implicated a combustion risk. Scudiero offered, "One of the issues with [subsection] (C) is liquor. So certainly if there is alcohol near a range there is the possibility of some combustible situation there." SA 87, l. 9-20.

In other words, a gun range could spontaneously combust, and cause the secondary explosion of a nearby store filled with flammable liquor.

But the combustion prospects of gun ranges by themselves, independent of catalyzing the destruction of nearby properties, also underlay Chicago's concern.

> [I]t is also the firing range itself. There could be the possibility of any number of things, a gun being discharged improperly or something happening at the range that could cause some sort of implosion of sorts and the 500-foot distance from those places of assembly creates a buffer to keep those areas far enough away from any activity that could be harmful.

SA 87, l. 21-SA 88, l. 3.

As for any empirical basis justifying these concerns, "I know of no data." SA 88, l. 11. The prospective harms are speculative. SA 88, l. 12-16. Likewise, with respect to concerns regarding criminal activity within 500 feet of the listed uses, "I'm not aware of any data." SA 88, l. 18-SA 89, l. 1. These concerns, too, are speculative. SA 89, l. 2-6.

Chicago also lacked data justifying its choice of 500 feet, as opposed to some other offsetting distance. "I'm not aware of any empirical data." SA 93, l. 18-19. Scudiero confirmed that no data existed supporting any distancing requirement. "I'm not aware of any data." SA 93, l. 21-SA 94, l. 7. "I'm not aware of any." SA 94, l. 14-23. No neighbors have complained about existing police, government, and private security ranges. SA 96, l. 11-SA 97, l. 23.

As to whether Chicago would shutter an existing firing range were one of the incompatible uses to move within 500 of it, that, too, was a matter of speculation. SA 90, l. 12-SA 91, l. 5.

Chicago offered an additional witness, police Lieutenant Kevin Johnson, on the subject of gun ranges' alleged relationship to crime. Johnson believes that gun ranges inherently "increase the possibility of theft, burglary, or robbery, or harm to the public," because they involve

the presence of firearms and ammunition. SA 102, l. 20-SA 103, l. 16. But Johnson had no data to support that personal, hypothetical opinion. SA 103, l. 17-23.

Johnson's concern for the inherent dangers of ammunition are not tied to ranges' ammunition sales. "[T]he potential for crime or the potential of being a victim of crime still exists. It still remains whether that ammunition was purchased at the range or they brought it there." SA 104, l. 14-18; SA 105, l. 14-24. Johnson clarified that his concern for the alleged hazards of ammunition are unrelated to the range patrons' criminal tendencies, but extended to the prospects that range patrons carrying ammunition would be victimized. SA 104, l. 19-24; SA 106, l. 11-20. Johnson was unaware of any studies, empirical data, or research into the alleged problem of ammunition being stolen from gun range patrons to be later used in crime, SA 105, l. 1-5, and indeed, was unaware of any such incidents anywhere, SA 105, l. 6-13.

Johnson testified that governmental purpose of distancing ranges from each other was "to prevent the possibility of theft, robbery, [and] shooting incidents as a result of weapons being either stored or transported to or from such location." SA 107, l. 18-24. But Johnson

later admitted that the distancing requirement does not serve that purpose. He simply objects to multiple gun ranges being open, accepting the characterization of his views as, "double the ranges, double the risk." SA 108, l. 4-20. The risk is the same regardless of whether two ranges are 500, 250 or 1000 feet apart; the distance between the ranges does not matter. SA 109, l. 9-SA 110, l. 10. Johnson is unaware of any actual data, studies, research, or statistics relating to proximity among gun ranges. SA 110, l. 13-21. "I'm not aware of any data." SA 110, l. 17.

Johnson offered the same testimony in describing the requirement distancing gun ranges from residential districts. The governmental purpose is addressed to reducing

> Theft, robbery, burglary. Someone attempting some type of theft from the store or from the gun range or one of the patrons at the gun range. Weapons are stolen, weapons are used. There's a presence of weapons and ammunition, which is an inherent public safety issue. And there's a potential for theft or loss.

SA 111, l. 11-17. But Johnson perceived the harm as emanating from the very existence of gun ranges, not their distance from residential districts. Asked the same question many different ways, his response was unvarying: a range's distance from residential zones was

irrelevant. SA 111, l.18-SA 114, l.7. And as with the requirement distancing gun ranges from each other, Johnson was aware of no empirical evidence supporting the distancing of gun ranges from residential zones. SA 114, l. 8-16.

Johnson's testimony with respect to the distancing requirement between gun ranges and various other land uses did not differ much. The public safety concerns for this provision were the same as those for the others, SA 115, l. 5-11, but Johnson was unaware of any empirical data, research, or studies linking the presence of ranges within 500 feet of the listed uses to increased hazards, a matter of his personal speculation, SA 115, l. 12-21.

Q For 120A and B you said the distance doesn't matter; it's the mere existence of the firing range that causes the concern?

A Correct.

Q I'm asking is 120C any different?

A No, no different.

SA 116, l. 10-15. "I'll say in my personal opinion, the further the better," but as to whether 500 feet is a better or worse distance than any other, "I don't know of any study or empirical data to support that."

SA 117, l. 10-16.

Indeed, Johnson testified that gun ranges would raise the same public safety concerns regardless of where in Chicago they were located, SA 118, l. 5-18, though he speculated, without the benefit of any data, that ammunition sales would be more harmful near "a residential school care." SA 119, l.4-SA 120, l. 4. Johnson was unaware of a single incident in which a gun range's location impacted public safety. SA 120, l.5-12.

b. Plaintiffs' Zoning Evidence

Plaintiffs presented testimony of two nationally-recognized gun range experts, Lorin Kramer and Jack Giordano. SA 27-31. Kramer, a licensed architect, has designed shooting range facilities in 28 states. SA 27. Giordano, a former law enforcement officer for the Port Authority of New York and New Jersey (where his duties included Range Safety Officer), is an EPA Certified Lead Inspector/Lead Risk Assessor, working as a shooting range safety and health specialist. SA 29.

Kramer and Giordano "are unaware of any jurisdiction, other than the City of Chicago, that institutes" the zoning requirements at issue.

SA 26. In other jurisdictions, gun ranges are considered a commercial use, and are often attached to gun retailers. SA 127, l. 3-9; SA 144, l. 21-SA 145, l.7; SA 22. Because gun ranges do not as such impact neighboring property uses, Chicago's distancing requirements appear punitive. SA 22; SA 142, l. 10-12. Gun ranges do not constitute a blight or other detriment to the community. SA 145, l. 12-15.

Kramer is unaware of any location where crime increased due to the presence of a gun range. SA 130, l. 22-SA 131, l. 2. He testified that to a reasonable degree of certainty, a firing range can exist in Chicago without negatively impacting public health or safety, and indeed, that a range could positively impact public safety in Chicago. SA 132, l. 19-SA 133, l. 11. That would hold true whether the range were located in a manufacturing zone or a commercial zone. SA 133, l. 12-SA 134, l. 1. Giordano agreed that removing the challenged ordinances would not increase crime around the range. SA 146, l. 23-SA 147, l. 2.

c. The Impact of Chicago's Range Zoning Regulations.

As of September 28, 2012, 3,386 acres, or 2.2% of the City's 148,161 acres could be used for a range. SA 158, l. 22-SA 159, l. 7. This amount of land is divided among approximately 1,900 parcels. SA 160,

l. 24-SA 161, l. 7. However, it is unclear how many of these are commercially available, SA 162, l. 8-12, or if any are practical for range use, SA 163, l. 2-8; SA 164, l. 24-SA 165, l. 4; SA 98, l. 24-SA 100, l.11.

Since July 6, 2011, perhaps three to ten individuals contacted Chicago zoning authorities in furtherance of an interest in opening a gun range. SA 76, l. 6-SA 77, l. 16. Zoning officials rejected all callers' proposed addresses owing to either the manufacturing zone restriction or the distance restrictions. SA 78, l. 21-SA 79, l. 18.

It would be difficult to identify a practical range location given Chicago's constraints. SA 138, l. 2-SA 139, l. 1. Range owners often avoid locating in manufacturing districts. SA 140, l. 12-SA 141, l. 5. Ranges operate in areas containing retail traffic, instead of in manufacturing zones, as they do not manufacture anything. SA 127, l. 10-16. Manufacturing districts also tend not to include arterial streets, on which ranges would be visible to passing traffic. SA 127, l. 17-SA 128, l. 3. Lack of visibility can hurt a range's profitability. SA 129, l. 11-21.

The zoning requirements have frustrated at least two of Action Target's serious potential customers. Deon Robuck, a successful South

Side entrepreneur, wanted to open a range in Chicago. To that end, he met with Action Target's Chris Hart, and conducted a prolonged correspondence. R. 233-5, at 199-213. Robuck complained about the distancing requirements, SA 149, l. 18-SA 150, l. 3, and as recounted by Chicago's counsel in reviewing the correspondence with Hart, Robuck had difficulty identifying a location. SA 151, l.14-SA 152, l. 13.[4]

Paul Kuczmierczyk founded Boomstick, Inc., in 2009, with the hope of opening a shooting range and firearms retailer in the northern Chicago area. SA 38, l. 7-15. After incorporating, Kuczmierczyk attended the Shooting, Hunting, and Outdoor Trade ("SHOT") Show in Las Vegas to investigate inventory and range equipment, and attend the "SHOT University" offered by the National Shooting Sports Foundation ("NSSF"). SA 39, l. 12-SA 40, l. 4. Kuczmierczyk met with Action Target personnel at SHOT, and visited a range Action Target had constructed. SA 40, l. 5-SA 41, l. 24.

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[4]Robuck at one point found a location that fit the ordinance. But "the owners are not as receptive to the idea" of a gun range "because it poses a challenge maybe to what the City wants." SA 154, l. 4-10. Plaintiffs recall that the deposition techniques Chicago applied to Accurate Perforating, the industrial lot where they first sought to place a mobile range, caused the cancellation of that lease.

Kuczmiercyzk received a quote from Action Target for both a 10 lane stationary range and a 10 lane tactical range. SA 44, l. 5-SA 46, l. 15. He wanted to put two stationary ranges and one tactical range under the same roof. SA 47, l. 3-11. Kuczmiercyzk estimated he would spend just under $12 million to build and stock the range. SA 48, l. 15-21.

But Kuczmiercyzk stopped looking after he realized there were very few, if any, places that would fit within the distance requirements. As he is a real estate broker, Kuczmiercyzk was able to search the Multiple Listing Service for industrial properties on the North Side, where he would locate his range, near where people live, but all possible locations were too close to restricting uses. Kuczmiercyzk also considered vacant lots, but none were large enough for his project. SA 49, l. 1-SA 51, l. 19.

Kuczmiercyzk, who was inspired to open a gun range by the Supreme Court's decisions in *District of Columbia v. Heller* and *McDonald v. Chicago*, SA 42, l. 7-18, would consider opening a range in Chicago were this lawsuit successful in removing Chicago's present zoning obstacles. SA 52, l. 22-SA 53, l. 17.

3. *The Age Prohibition*

> No person under the age of 18 shall be permitted in the shooting range facility. The licensee shall require every shooting range patron to provide a driver's license or other government-issued identification showing the person's name, date of birth, and photograph.

Chi. Mun. Code § 4-151-100(d).[5]

a. Chicago's Age Prohibition Rationale.

Commissioner Krimbel did not understand the prohibition of people under 18 from a "shooting range facility" to extend to the entire facility. SA 62, l. 20-SA 64, l. 16. "I think that's a pretty onerous way to read this." SA 64, l. 2. Asked for the governmental purpose in barring people under 18 years old from using firearms at a firing range, Krimbel testified,

> I'm going to have a harder time with that one, but I'm presume [sic] it's because they do not want children and guns in the same place. They don't want children running around while guns are being fired.

SA 64, l. 20-24.

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[5]""Shooting range facility' means a public or private shooting range and the premises on which the shooting range is located and includes all the buildings, structures, parking areas, and other associated improvements located on the premises." Chi. Mun. Code § 4-151-010.

The specific problem Krimbel identified was that of small children running unsupervised. She hypothecated the danger posed when someone is shooting while a single parent nearby tries to control a three-year-old and a five-year-old interested in "running around." SA 64, l. 22-SA 65, l. 3. "I could see that that would be dangerous for the children to be in a shooting range unless there's someone who's supervising them so that they can't be harmed." SA 65, l. 4-7.

Krimbel admitted,

> I will give you this: I believe [§ 4-151-100(d)] is inartfully drafted because it seem clear to me that the purpose of it is to not have kids running around unsupervised.

SA 65, l. 7-10.

Krimbel added that the City "might want to draft that a little bit differently," because it is a "good place" to "start teaching your kid around sometime around the age 14, 15 how to fire a rifle if you're going to go hunting." SA 65, l. 13-15. "In fact, my own son took a shooting class when he was 12, so I'm well aware of the fact it's okay to teach a young person how to shoot a gun property [sic]." SA 65, l. 22-SA 66, l. 1. Krimbel confirmed that she lacked any empirical evidence justifying or providing a basis for the age ban. SA 67, l. 21-SA 68, l. 2.

b. Plaintiffs' Age Prohibition Evidence.

Plaintiffs' experts are unaware of any jurisdiction, other than the City of Chicago, that institutes" this age requirement. SA 26. As Plaintiffs' experts reported, "Shooting ranges are commonly used by children over the age of six, with a parent or guardian's permission. All youth shooting programs would effectively be prohibited by the age requirement." SA 22; SA 136, l. 17-19 ("it would preclude someone, say a minor under the age of 18, if you want to call that a minor, from learning to shoot").

Testified Kramer, "It is common to have youth programs: Boy Scouts, junior rifle clubs, those sorts of things, and you've excluded all of those from – that age group from being able to use the facility." SA 125, l. 5-8. For example, Boy Scout groups rent range facilities to learn shooting, in order to earn merit badges for marksmanship. SA 137, l. 1-13.

This prohibition also precludes families with underage minors from entering any portion of a range's premises, including the parking lot. SA 22. As Giordano pointed out, "It would preclude people with children from coming into the retail store because that's considered

part of the facility." SA 136, l. 19-22. The ordinance also prohibits ranges from being serviced, in any capacity, by workers under 18. SA 22; SA 125, l. 10-20.

c. The Impact of Chicago's Age Prohibition.

Plaintiff Joseph I. Brown teaches the Junior League Club from the American Legion range in Morton Grove. His typical class is comprised of sixteen students ranging in age from 13 to 20. He would teach youth proper shooting and safety procedures in Chicago were a range available in the city. SA 34, l. 22-SA 36, l. 23.

The age prohibition would economically impact gun ranges, SA 126, l. 1-4, including Action Target customers such as Paul Kuczmiercyzk. His "main goal" in founding Boomstick "is to educate . . . the public about firearms and their safe use and the recreational opportunities that they can offer to people." SA 43, l. 14-18. As part of his business plan, Kuczmiercyzk wrote of his intent to "offer programs for youth participation and education hosting events such as 'First Shots' sponsored by the NSSF, as well as inviting the Boy Scouts of America and other youth groups." SA 54, 3-17. "I believe that children —younger people, people who have no experience, should be exposed to

[shooting]." SA 54, l. 23-24.

> Q. Why is that?
>
> A. It's America. It's part of our traditions since we began. I was not exposed to shooting as a child. It's now one of my favorite pastimes. I just want to spread that to other people.

SA 55, l. 1-6. Youth shooting "is definitely part of the profitability"

plan, but when Kuczmiercyzk

> first dreamed up Boomstick, it wasn't just profits, profits, profits. It was I know that it took me until I was 20 years old to fire a firearm and really enjoyed it. To expose just more people in Chicago. The reason I didn't have any experience with firearms, because I grew up in Chicago. You're just force fed guns are bad, guns are evil, only bad people have guns, guns don't do anything good, guns can't be fun. Fun might be the wrong word here, but....

SA 55, l. 14-24.

> Q. So that paragraph, that portion about youth participation, education, and so on, that's something that's important to you?
>
> A. It is. . . . .

SA 56, l. 1-4.

4. *Procedural History*.

Upon enacting its new ordinance, Chicago moved to dismiss the case as moot. The lower court denied that motion and allowed Plaintiffs leave to amend the complaint. Dkt. 121, 122. The court, however,

declined to preliminarily enjoin the new ordinance. Dkt. 130, 131. Plaintiffs would amend their complaint a second time, Dkt. 200, and Chicago kept evolving its range regulations. Following substantial discovery, Chicago narrowed the issues remaining for summary judgment by repealing many of the disputed provisions. Dkt. 278.

5. *The District Court's Decision*.

On September 29, 2014, the district court granted in part and denied in part both summary judgment motions. Def. App. ("DA") A1-A34. The court rejected as irrelevant Chicago's argument that Plaintiffs had not demonstrated that the ordinance severely burdened their rights, DA A13-A14, but did "not apply a uniform level of scrutiny across the board" as "some of the provisions entail[ed] a greater burden on Second Amendment rights than others." DA A14.

As "the zoning ordinances . . . severely limit locations where firing ranges can be located," and zoning officials had rejected all range inquiries, the court held that "the restrictions taken together are still closer to a 'serious encroachment on the right to maintain proficiency in firearm use' than to a 'law that merely regulate[s]' Second Amendment

activity.'" DA A15 (quoting *Ezell I*, 651 F.3d at 708).

> Accordingly, to carry its burden, the City must establish something near a "close fit" between the zoning restrictions and the actual public interests it serves, and prove that the public's interests are strong enough to justify a substantial "encumbrance on individual Second Amendment rights."

Id. (quoting *Ezell I*, 651 F.3d at 708-09).

Applying this test, the district court found that "the City has not sufficiently substantiated a connection between" its purported crime-reduction and environmental interests, and the ordinance confining gun ranges to manufacturing districts. DA A16. The City's witnesses "admitted that they had no data or empirical evidence that any criminal impact would occur due to the presence of a firing range or that it would be lessened by placing ranges in manufacturing districts," had no knowledge of other cities' approach to zoning gun ranges, and "provided no rationale tending to demonstrate that placement within a manufacturing district would preclude theft or reduce criminal impact," *id.* (citations omitted). "The City's general proposition that firing ranges may pose a danger does not justify restricting ranges only to

manufacturing districts without evidence that such a restriction would lessen that danger." *Id.*

"Regarding the City's issues with the environmental effects of ranges through lead residue disbursement, fires, or explosions, it produced no evidence to establish that these are realistic concerns." DA A17. And while Plaintiffs provided evidence that gun ranges are often zoned in commercial districts, "the City failed to present sufficient evidence that firing ranges are uniquely suited to manufacturing districts." DA 17. The District Court thus struck down Chi. Mun. Code § 17-5-0207's requirement that gun ranges be located only in manufacturing districts with special use approval. *Id.*

The court did not separately address the rule distancing gun ranges at least 100 feet from each other. Chi. Mun. Code § 17-9-0120-A. But it did determine that this provision's requirement distancing gun ranges at least 500 feet from residential zones, schools, day-care facilities, places of worship, alcohol retailers, children's activity facilities, museums, libraries, and hospitals was akin to a "sensitive place" restriction. DA 18. The court then claimed that the distance rule

"places a meaningfully lesser burden on the exercise" of Second Amendment rights than does the manufacturing zone restriction, "and is accordingly more easily justified." *Id.*

> Because this provision seeks to protect the same important interests listed above [preventing theft of guns and limiting the impact of lead residue, fires, and explosions] and is less burdensome on individual Second Amendment rights, there need not be a perfect fit between the City's means and its ends.

DA 18. Moreover, the district court opined that the provision "does not strip the Plaintiffs of reasonable locations to operate a firing range." *Id.* (citation omitted). The court thus upheld Chi. Mun. Code § 17-9-0120.

The court applied intermediate scrutiny in weighing Chicago's provision prohibiting persons under 18 years old from visiting ranges. This law "'merely regulate[s]' the affairs of firing ranges and place[s], at most, a minor burden on the Second Amendment rights of the 'the entire law-abiding adult population of [Chicago].'" DA 25 (quoting *Moore* v. *Madigan*, 702 F.3d 931, 940 (7th Cir. 2012)). "The City's purpose behind the provision is to protect minors from the potential dangers of lead exposure and firearm accidents." *Id.* The court reasoned that this prohibition would not cost firing ranges much business, and

deferred to Chicago's asserted conclusion that indoor ranges are more dangerous, with respect to the potential for lead poisoning, than outdoor ranges. *Id.* The Court held that minors lacked Second Amendment rights. DA 25-26.

The district court likewise rejected Plaintiffs' claims that barring patrons under 18 years of age from gun ranges violates the First Amendment right to teach and obtain firearms proficiency. "[T]here is no dispute that the right to hear and learn are protected by the First Amendment," DA 32 (citation omitted), but "because the remaining regulations do not ban firing ranges within Chicago, they have no impact on gun education." *Id.*

The parties timely noticed their respective appeals on October 20 and 21, 2014. Dkt. 285, 291.

SUMMARY OF ARGUMENT

This Court need not revisit Chicago's arguments for treating the Second Amendment as a second-class right, through the lens of a weak "undue burden" or similar, rational-basis style test. This Court's rejection of that argument has been the law of the case since 2011.

Chicago would like to apply a weak, deferential "test" because as the record plainly reveals, it has no legitimate interest in enforcing any of the challenged provisions. As recounted supra, Chicago also failed to develop any actual evidence that might indicate how the challenged provisions serve its alleged interests. Chicago's witnesses admitted that the zoning rules were based on speculation, without any sort study, and criticized the age prohibition as "pretty onerous," overbroad, and written in such a manner warranting correction.

This is not a close case.

Applying now-settled law, if not the "common sense" that Chicago desires, this Court should affirm the District Court's judgment striking down the manufacturing zoning restriction, and reverse the District Court's judgment upholding the distancing requirements and age prohibition.

ARGUMENT

I. LAW OF THE CASE BARS CHICAGO'S "UNDUE BURDEN" CLAIMS.

Perhaps recognizing that it has not gone far enough in repealing range restrictions that fail Second Amendment scrutiny, Chicago asks this Court to revisit *Ezell I*. "While this court . . . declined to adopt a

test with a threshold inquiry into whether a regulation substantially burdens Second Amendment activity," Appellant's Br. 16 (citing *Ezell I*, 651 F.3d at 704 n.12; *id.* at 707), "we urge the court to reconsider that holding and to apply that test here," Appellant's Br. 16; *id.* at 18.

It is well-past time for Chicago to seek *Ezell I*'s rehearing. Fed. R. App. P. 35(c), 40(a)(1) (fourteen days). "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." *Sierra Club* v. *Khanjee Holding (US) Inc.*, 655 F.3d 699, 704 (7th Cir. 2011) (citing *Creek* v. *Vill. of Westhaven*, 144 F.3d 441, 446 (7th Cir. 1998)). "[T]he *same issue* presented a second time in the *same case* in the *same court* should lead to the *same result*." *LaShawn A.* v. *Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc).

This Court must follow the law of the case unless "justice . . . requires a contrary result," *e.g.*, "where the law as announced is clearly erroneous, and establishes a practice which is contrary to the best interests of society, and works a manifest injustice in the particular case." *Creek*, 144 F.3d at 446 (citations omitted).

> The Supreme Court has instructed the lower courts to be "loathe" to reconsider issues already decided "in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice."

LaShawn A., 87 F.3d at 1393 (quoting *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988)) (internal quotation omitted).

"The case under consideration is not one of those rare occasions." *Creek*, 144 F.3d at 446. As Plaintiffs noted last time, this Court sitting en banc has already passed on the "undue burden" test. See Brief of Brady Center, as *Amicus Curiae*, *United States v. Skoien*, No. 08-3770. It appears that apart from the Second Circuit, all other circuits to consider the question require some form of heightened scrutiny when conducting means-ends review in Second Amendment cases. "[T]he [Supreme] Court would apply some form of heightened constitutional scrutiny if a historical evaluation did not end the matter." *United States* v. *Chester*, 628 F.3d 673, 680 (4th Cir. 2010). "*Heller* clearly does reject any kind of 'rational basis' or reasonableness test," *Heller* v. *District of Columbia*, 670 F.3d 1244, 1256 (D.C. Cir. 2011), leaving the choice as "between strict and intermediate scrutiny," *id.* at 1257; see also *Tyler* v. *Hillsdale County Sheriff's Dep't*, 775 F.3d 308, 326 (6th

Cir. 2014) (strict or intermediate scrutiny); *Nat'l Rifle Ass'n of Am., Inc.* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185 (5th Cir. 2012) (same).

Contrary to Chicago's claims, this list includes the Ninth Circuit. See *Jackson* v. *City & Cnty. of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014) ("if a challenged law . . . does not place a substantial burden on the Second Amendment right, we may apply intermediate scrutiny"); *id.* at 965; *United States* v. *Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013) ("some sort of heightened scrutiny must apply").

And in any event, as the district court found, the restrictions here are not insubstantial. All inquiries into constructing Chicago gun ranges have failed owing to zoning restrictions. And if there exist any rights to teach minors shooting, or any right of minors to learn shooting, Chicago's unique age prohibition flatly destroys these rights. Even if this Court could revisit *Ezell I*—and it cannot—it would be pointless to apply an "undue burden" test, either as a threshold or substantive mechanism for resolving this case. The question is not what the city or a judge may think of a fundamental right or the

burdens imposed on its exercise, but whether the city can justify that burden. If gun ranges are truly disastrous, posing a constant unmitigated risk of spontaneous explosion while spewing toxic waste and drawing criminals into surrounding neighborhoods, Chicago should not have to worry about the standard of review. Plaintiffs otherwise incorporate by reference all that they have already argued on the topic before, but trust that Chicago has exhausted its chances to make the same claims.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT CHICAGO HAS FAILED TO MEET ITS BURDEN IN SEEKING TO CONFINE GUN RANGES AS SPECIAL MANUFACTURING DISTRICT USES.

> [T]he zoning power is not infinite and unchallengeable; "it must be exercised within constitutional limits." Accordingly, it is subject to judicial review; and as is most often the case, the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed.

Schad v. *Mt. Ephraim*, 452 U.S. 61, 68 (1981) (quotation and citation omitted). "[A]s is true of other ordinances, when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest." *Id.* (footnote omitted).

Chicago's gun range zoning restrictions impact the Second Amendment right to keep and bear arms, which "implies a corresponding right to acquire and maintain proficiency in their use." *Ezell I*, 651 F.3d at 704. There being no dispute that Chicago's disputed ordinance implicates Second Amendment rights, this Court would ordinarily require Chicago to justify its restrictions under some form of heightened scrutiny. *Id.* at 701.

> [A] severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end. [But] laws restricting activity lying closer to the margins of the Second Amendment right, laws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified. How much more easily depends on the relative severity of the burden and its proximity to the core of the right.

Id. at 708. However, the Court need not apply a "second step" level of means-ends scrutiny where the regulation amounts to a complete destruction of the right. "Put simply, a law that destroys (rather than merely burdens) a right central to the Second Amendment must be struck down." *Peruta* v. *Cnty. of San Diego*, 742 F.3d 1144, 1167 (9th Cir. 2014).

As First Amendment doctrine informs the Second Amendment's application, *Ezell I*, 651 F.3d at 706-07, it is useful to note how zoning fares when governments claim that First Amendment-protected uses must be restrictively zoned for their alleged harm.

> [T]he test for the constitutionality under the First Amendment of a dispersal ordinance relating to adult businesses remains that prescribed in *Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986). We have encapsulated that test recently as follows: First, we must determine whether the regulation is a complete ban on protected expression. *Renton*, 475 U.S. at 46. Second, we must determine whether the county's purpose in enacting the provision is the amelioration of secondary effects. *Id.* at 47. If so, it is subject to intermediate scrutiny, and we must ask whether the provision is designed to serve a substantial government interest, and whether reasonable alternative avenues of communication remain available. *Id.*

Alameda Books, Inc. v. *City of Los Angeles*, 631 F.3d 1031, 1040 (9th Cir. 2011) (parallel citations omitted); see *R.V.S., L.L.C.* v. *City of Rockford*, 361 F.3d 402 (7th Cir. 2004). Considering the extreme zoning burden Chicago levels on ranges—in practice, a complete destruction of the ability to open a range—the relevant test (if one is even required) would be strict scrutiny, or at least, "more rigorous" than intermediate "if not quite 'strict scrutiny.'" *Ezell I*, 651 F.3d at 708.

The District Court correctly determined that "although the zoning ordinances no longer exile firing ranges to outside of City limits, they still severely limit locations where firing ranges can be located." DA A15. As of September, 2012, only 2.2% of the land in Chicago, SA 158-59, or 10.6% of the land zoned for business, commercial, and manufacturing uses, DA A15, was theoretically available for gun ranges.

Of course, as the District Court found, *id.*, "[t]he constitution does not mandate that any minimum percentage of land be made available for" gun ranges, only that gun ranges have a "reasonable opportunity" to locate. *North Ave. Novelties* v. *City of Chicago*, 88 F.3d 441, 445 (7th Cir. 1996); cf. *Horina* v. *City of Granite City*, 538 F.3d 624, 635 (7th Cir. 2008) (an alternative channel "must be more than 'merely theoretically available'—'it must be realistic as well'") (quotation omitted). "Requiring a 'reasonable opportunity' in each region can, and most likely does, result in vastly different acreage percentages." *North Ave.*, 88 F.3d at 445. But just as "those differences in no way imply that the regions with lower percentages are acting unconstitutionally," *id.*,

neither would differences imply that regions with higher percentages are acting constitutionally. And there are vast differences between what might be reasonably required to operate an adult use as opposed to a gun range.

Accordingly, Chicago's reliance on the fact that *North Avenue* upheld its scheme leaving 270 acres for adult uses, and arguments about the acreage available for adult uses in Renton, Washington, Appellant's Br. 21, are irrelevant. Mixing firing ranges and book shelves is an apples-to-oranges exercise, as demonstrated by the parties' extended litigation over gun range construction standards that have no application to adult bookstores. While just about any parcel of land might support a book store, a "reasonable opportunity" to operate a gun range may require different types of locations. And while adult uses may not rely on retail traffic in much the same way as do gun ranges, the evidence here establishes that gun ranges are reluctant to locate in industrial areas because those areas are often not feasible.[6]

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[6]Chicago allows adult uses in commercial districts C1, C2, C3, see Chi. Mun. Code § 17-3-0207(P); downtown districts DC, DX, and DS, see Chi. Mun. Code § 17-4-0207(P); as well as manufacturing districts M1, M2, M3, see Chi. Mun. Code § 17-5-0207(I). And Chicago's list of

Indeed, as Commissioner Scudiero admitted, Chicago turned away every zoning inquiry concerning prospective gun ranges. At least two of Action Target's customers, Deon Robuck and Paul Kuczmierczyk, found the zoning restrictions heavily burdensome or preclusive. Chicago pointed to perhaps 1,900 theoretically available parcels, but it could not identify a single parcel *realistically* feasible for a gun range.[7] Thus, if *North Avenue* is instructive on any point, it is hardly helpful to Chicago. In *North Avenue*, this Court found that adult use operators had a "reasonable opportunity" to exercise their rights on evidence showing 35 operative adult uses in the city, "numerous" available sites when the business opened, and "between 22 and 56 locations . . . available for new adult uses." *North Ave.*, 88 F.3d at 445. The

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uses to be distanced from adult uses is much shorter than that applied to ranges. Adult uses must stay 1000 feet from each other, residential districts, pre-existing schools and religious establishments; and out of planned manufacturing districts. Chi. Mun. Code § 17-9-0101.

[7]It is also unclear just how meaningful the 1,900 parcel number may be in context. Chicago resisted disclosing the total number of parcels in the city, let alone offered the total number of non-city-owned parcels in commercial areas.

corresponding numbers here are zero, zero (no existing business is impacted), and zero.

Assuming that the zoning ordinances are not a complete destruction of the rights to operate and use gun ranges, the District Court was nonetheless correct in concluding that these provisions "are still closer to a 'serious encroachment on the right to maintain proficiency in firearm use' than to a 'law that merely regulate[s]' Second Amendment activity.'" DA A15 (quoting *Ezell I*, 651 F.3d at 708).

Measured against any appropriate level of means-ends scrutiny, the regulations fail. The District Court correctly summed up Chicago's failure to justify its manufacturing district restriction. The notions that gun ranges pose an unacceptable risk of explosion, or somehow foment crime in nearby areas, are far-fetched. Chicago had *no evidence* that these were realistic concerns, let alone any evidence tying these concerns to gun range's location in manufacturing districts or relative to other uses. In fact, Lt. Johnson *disclaimed* that a gun range's location had anything to do with his objection to gun ranges. There is

not even a rational basis to suppose that firearms stolen from a gun range would be immediately used in crime within a 500 foot radius.

Notably, neither of Chicago's designated witnesses on the zoning topic even mentioned lead disbursement as a concern. Cf. *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) (intermediate scrutiny "justification must be genuine, not hypothesized or invented post hoc in response to litigation"). The City's belated submission of a study demonstrating that improperly-maintained ranges *may* pollute the environment, Appellant's Br. 8-9, is irrelevant. The same might be said of any property uses commonly found (and regulated) throughout Chicago, *e.g.*, gas stations[8] and dry cleaners.[9]

But Chicago has not volunteered whether it has shut down or relocated any of its police ranges for fear of blowing up their surrounding neighborhoods, or poisoning the local population with lead.

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[8]Permitted as special uses in business, commercial, manufacturing, downtown and most PMD districts, by right in PMD 8 districts. Chi. Mun. Code §§ 17-3-0207(HH), 17-4-0207(HH), 17-5-0207(U), and 17-6-0403-F(U),

[9]Permitted by right in business and commercial districts. Chi. Mun. Code § 17-3-0207(UU).

Neither has the GSA removed the gun ranges from underneath this and other federal courthouses based on such concerns. Nor is there any evidence that other jurisdictions take this sort of approach toward gun ranges. Plaintiff's experts were unaware of any, and Chicago apparently never wanted to know.

In any event, when municipal witnesses repeatedly testify, over and over, "no data," "no data," "no data," and freely admit that all of their concerns are speculative, courts have no choice but to strike down laws seriously encroaching upon fundamental rights. In the speech context, this Court has explained that

> simply stating that an ordinance is designed to combat secondary effects is insufficient to survive intermediate scrutiny. The governmental interest of regulating secondary effects may only be upheld as substantial if a connection can be made between the negative effects and the regulated speech.

R.V.S., 361 F.3d at 408. The same reasoning should hold in Second Amendment cases.

> Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.

Schad, 452 U.S. at 69-70 (quotation omitted).

There is no "defensible conclusion that unusual problems are presented," *Schad*, 452 U.S. at 73, by firing ranges. This Court has already struck down one range prohibition when Chicago "produced no evidence to establish" that its purported concerns are "realistic." *Ezell I*, 651 F.3d at 709. Four years later, nothing has changed—aside from this Court's reaffirmation of this concept in *Moore*: "Illinois had to provide us with more than merely a rational basis for believing that its uniquely sweeping ban is justified by an increase in public safety. It has failed to meet this burden." *Moore*, 702 F.3d at 942.

Notwithstanding the law, and its complete lack of evidence, Chicago urges this Court to reverse the District Court and uphold its odd relegation of gun ranges to manufacturing districts. Chicago starts with vague generalities about the wholesomeness of its zoning goals; asserts, without any basis in fact and in total contravention of the record, that it has evidence supporting its restriction; and suggests that it need only show that its laws are supported by common sense.

To be sure, zoning laws are capable of being applied with good intent in a manner that benefits society without infringing individual rights, but Plaintiffs submit that Chicago's purpose and effect in enacting these laws was obviously punitive. In any event, Chicago's repeated assertions that it has "evidence" to support its laws is utterly detached from the reality of the record, as detailed *supra*. What evidence?

Not actual, empirical evidence—Chicago claims it needs none of that—"[e]vidence that 'fairly support[s] the municipality's rationale' for its ordinance is all that is required." Appellant's Br. 29 (citing *City of Los Angeles* v. *Alameda Books, Inc.*, 535 U.S. 425, 438 (2002). This is not a complete citation to *Alameda Books*. The complete passage:

> [A] municipality may rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest. *This is not to say that a municipality can get away with shoddy data or reasoning*. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Id. at 438-39 (citations omitted) (emphasis added); *R.V.S.*, 361 F.3d at 408.

"But there must be *evidence*. Lawyer's talk is insufficient." *Annex Books, Inc.* v. *City of Indianapolis*, 581 F.3d 460, 463 (7th Cir. 2009). "[T]he government must nevertheless proffer *something* showing that the restriction actually serves a government interest." *Horina*, 538 F.3d at 633-34. "[T]he municipality [must] present 'evidence that the restrictions actually have public benefits great enough to justify any curtailment of speech.'" *Ezell I*, 651 F.3d at 707 (quoting *Annex Books*, 581 F.3d at 462).

Again, what actual evidence exists that gun ranges cause crime, or spontaneously combust? Chicago's own designated witnesses agreed that their concerns were speculative. Criminal incidents and fires may have occurred at gun ranges, but that is true of all property uses. And what evidence links these concerns to Chicago's zoning requirements? Again, the City's witnesses had no idea. Lt. Johnson disclaimed the importance of location altogether. Commissioner Scudiero speculated wildly about gun ranges detonating liquor stores. The entirety of

modern American gun range experience, which sees gun ranges as a common commercial use perfectly compatible with other neighboring properties, stands against Chicago's position.

Chicago's attacks on Plaintiffs' experts as "lack[ing] relevant experience to opine on the adverse effects of shooting ranges on the surrounding community," Appellant's Br. 27, are specious. Kramer and Gioradano are nationally-recognized experts in their fields, who have designed and consulted on innumerable gun ranges throughout the United States. It does not matter that they have not, themselves, owned a gun range or selected a location for one. Their experience, which includes dealing with gun range zoning disputes, SA 122, l. 2-SA 124, l. 15, speaks for itself. Chicago's criticism of these experts is especially inappropriate considering its designated witness's near-complete ignorance of gun ranges (Lt. Johnson has at least used a gun range), its total lack of supporting empirical evidence, and its failure to designate relevant experts on these topics.[10]

[10]Chicago's expert, Phillip Cook, testified on the subject of why gun sales should be forbidden because guns allegedly cause crime. Alas, the City repealed its gun sales prohibition.

Chicago argues by analogy to the Supreme Court's description of certain longstanding prohibitions that are presumptively lawful under the Second Amendment, Appellant's Br. 30-31 (citing *District of Columbia* v. *Heller*, 554 U.S. 570, 626-27 & n.26 (2008)). Per Chicago, this language"is easily explained by substantial deference to common-sense laws," suggesting that its zoning laws should be treated likewise. Appellant's Br. 31. It is unclear whether Chicago claims that its zoning laws are themselves longstanding, an impossible argument considering that New York's first-in-the-nation municipal zoning ordinance dates only to 1916.[11] And surely, Chicago cannot claim that all (if any) of the areas from which it excludes gun ranges are "sensitive places," especially considering the fact that people enjoy the right to keep and carry guns in residential districts for self-defense.[12]

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[11]Amanda Erickson, *The Birth of Zoning Codes: A History*, The Atlantic (June 19, 2012), available at http://www.theatlanticcities.com/politics/2012/06/birth-zoning-codes-history/2275/ (last visited March 15, 2015).

[12]Post-*Moore*, many people are now lawfully carrying handguns throughout many areas of Chicago, well-within 500 feet of any of the gun range zoning impediments, and even inside many of the land uses that trigger gun range zoning restrictions. While licensed handgun carrying is not allowed in schools, it is allowed in school zones. 18

In any event, Chicago is wrong as a matter of law. First, *Heller*'s discussion of presumptively lawful longstanding laws is not a nod to "substantial deference to common-sense," an argument well-developed in Justice Breyer's dissent and strongly rejected by the majority; rather, the language acknowledges the right's historical scope. Second, appeals to "common sense" are highly suspect in this context.

> Although common sense does have its value when assessing the constitutionality of an ordinance or statute, it can all-too-easily be used to mask unsupported conjecture, which is, of course, *verboten* in the First Amendment context. That is why "the government has the burden of showing that there is evidence supporting its proffered justification" . . . .

Horina, 538 F.3d at 633 (citations omitted).

Plaintiffs would dispute that Chicago's laws comport with "common sense." But apart from not sustaining, with any evidence, its burden of showing that the zoning laws advance its legitimate goals, Chicago also fails to establish a proper fit. The impact of these laws, as Chicago surely intended, is severe. It is not mere coincidence that no gun ranges have opened in Chicago since July, 2011. The zoning rules contribute to the dearth of gun ranges.

U.S.C. § 922(q)(2)(B)(ii).

Finally, Chicago's reliance on two opinions from the Northern District of California, *Teixeira* v. *Cnty. of Alameda*, No. 12-CV-03288, 2013 U.S. Dist. LEXIS 128435 (N.D. Cal. Sept. 9, 2013) and *Hall* v. *Garcia*, No. 10-03799, 2011 U.S. Dist. LEXIS 34081 (N.D. Cal. March 17, 2011), are misplaced. *Teixeira* upheld a zoning action against a gun store on the erroneous theory that the Second Amendment does not secure an interest in acquiring firearms. If Chicago wanted to litigate that question here, it should have appealed from *Ill. Ass'n of Firearms Retailers* v. *City of Chicago*, 961 F. Supp. 2d 928 (N.D. Ill. 2014), or not mooted Plaintiffs' challenge to its law prohibiting gun ranges from selling firearms. *Hall* upheld the school zone law on grounds that the Second Amendment's core was limited to the home, see *Hall* at *14. Moreover, *Hall* involved very different conduct—carrying a firearm in public, rather than using a gun inside the premises of a gun range. *Hall* reasoned that the law did not impact the right to use a gun at home "or on any other private property," *id.*, a critical point of distinction here.

Chicago does not come close to justifying the restriction of gun ranges to manufacturing zones.

III. CHICAGO'S ZONING REGULATION DISTANCING GUN RANGES FROM VARIOUS USES VIOLATES THE SECOND AMENDMENT.

As suggested in both the District Court's opinion and Chicago's brief here, the law and evidence relating to Chicago's distancing of gun ranges from various land uses is largely the same as that related to the manufacturing district zoning ordinance. Notably, the same City witnesses offered the same rationale, and the same lack of evidence, in discussing both provisions. Chicago developed no evidence regarding the interaction between gun ranges and residential districts, schools, day-care facilities, parks, places of worship, alcohol retailers, "children's activities facilities," libraries, museums, or hospitals—the various land uses which, under the city's zoning ordinance, makes gun ranges difficult if not impossible to locate.

As gun ranges require re-licensing every two years, Plaintiffs are also concerned by Commissioner Scudiero's inability to commit to grandfathering ranges (in the unlikely event any would arise) against incompatible land uses that might move within 500 feet of their property. It is unlikely that anyone would invest in a gun range that could be shut down upon a liquor store's arrival a block away.

Yet the District Court reached a different result. It should not have.

The District Court's "sensitive use" rationale for upholding this provision cannot be correct. As noted *supra*, how can areas within 500 feet of a residential district be a "sensitive place," if people have a fundamental right to keep handguns at home? And again, people are now carrying loaded handguns, ready for self-defense, throughout the various areas from which the distance restrictions exclude gun ranges. If Chicago's concern here is, as Lt. Johnson testified, the mere presence of firearms and ammunition, that much is already pervasively allowed.

Moreover, *Heller* spoke of "longstanding prohibitions . . . forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Heller*, 554 U.S. at 626. "Carrying," as *Heller* stated, meant carrying a handgun for self-defense, as in the meaning of "bear arms." *Id.* at 584. The concerns raised by carrying handguns into schools or airports are quite different than those raised by utilizing an enclosed gun range.

Nor is Chi. Mun. Code § 17-9-0120 a "longstanding" law with 1791 or 1868 antecedents. *Moore*, 702 F.3d at 935; *Ezell I*, 651 F.3d at 703. No

zoning law could fit that description. While early fire suppression laws regulated the places where people could shoot, *Ezell I*, 651 F.3d at 706, these "do not support the proposition that target practice at a safely sited and properly equipped firing range enjoys no Second Amendment protection whatsoever," *Id.* And none of the early laws governing shooting related to modern, stable powder and modern, indoor gun ranges.[13] Today, recreational shooting is not an ultrahazardous activity. *Miller* v. *Civil Constructors*, 272 Ill. App. 3d 263, 270-71, 651 N.E.2d 239, 245 (Ill. Ct. App. 1995).

If the prohibited areas are "sensitive" in the sense that they are incompatible, for reasons of public safety, with a nearby gun range, then Chicago should have proven that with actual evidence. Cf. *New Albany DVD, LLC* v. *City of New Albany*, 581 F.3d 556, 560 (7th Cir. 2009) ("the City needs some evidence that thefts from passers by are a serious problem—and a more severe problem for outlets near churches than for outlets father away"). Its witnesses, however, did the opposite,

[13]Chicago might well be able to regulate the use of unstable powder inside a wooden structure.

disavowing the utility of this provision and terming the concerns underlying it as speculative.

If section 17-9-0120 does not work a complete destruction of the right at stake, then the District Court should have at least struck it down under the same rationale it utilized to strike down the manufacturing district ordinance. After all, there is absolutely no evidence of a credible governmental purpose, let alone evidence of how the law is related to achieving that purpose, and the law severely impacts Plaintiffs' rights.

The District Court, however, merely offered that this provision's impact was less severe than that of the manufacturing zone restriction, and thus reduced the level of scrutiny. It did not, however, conduct any analysis beyond that step. No level of scrutiny was actually applied.

Review being de novo, this error should be corrected. Chi. Mun. Code § 17-9-0120 is no more constitutional than is Chi. Mun. Code § 17-5-0207. It, too, should be enjoined.

IV. CHICAGO'S PROHIBITION BARRING INDIVIDUALS UNDER 18 YEARS OLD FROM ALL GUN RANGE PREMISES IS UNCONSTITUTIONAL.

Mark Kuczmiercyzk was onto something when he summed up his passion for youth shooting by testifying, "It's America. It's part of our traditions since we began." SA 55. One person who would doubtless understand the sentiment is *Heller*'s author, who in his younger days, carried his shooting-team rifle to high school on the New York City subway.[14] So would today's Boy Scouts. SA 54, 125, 137.

Some Chicago officials might disapprove, but Commissioner Krimbel would not be among them. She sent her 12-year-old son to a shooting class, and recommends the same for would-be hunters by age 14 or 15. Illinois sets aside youth hunting seasons for minors under 16.[15] Minors under 16 may obtain a hunting license, though all hunters born after 1980 must also present a safety certification. *Id.* at 8. And the United

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[14]Associated Press, "Young Scalia carried rifle while riding N.Y. subway," *Deseret News*, Feb. 27, 2006, available at: http://www.deseretnews.com/article/635187836/Young-Scalia-carried-rifle-while-riding-NY-subway.html?pg=all (last visited March 15, 2015).

[15]Ill. Dep't of Nat'l Resources, Illinois Digest of Hunting & Trapping Regulations 2014-15, at inside cover, available at http://www.dnr.illinois.gov/hunting/Documents/HuntTrapDigest.pdf (last visited March 15, 2015).

States Olympic Committee's National Governing Body for the shooting sports, USA Shooting, operates youth programs with separate junior divisions for ages 15-17, and 14 and below.[16]

This longstanding American tradition of teaching youth how to shoot has a constitutional dimension, rooted in the First and Second Amendments. Plaintiffs stress that they are *not* claiming that anyone under 18 has a constitutional right to access firearms absent close and complete supervision by a responsible adult, and even then, only for limited purposes. Chicago's total prohibition of all minors from all range premises, however, which also impacts the rights of adults, goes a few steps too far.

A. The First Amendment Guarantees A Right to Provide and Receive Instruction in the Use of Firearms at a Gun Range.

The First Amendment protects teaching and learning. See, *e.g.*, *Keyishian* v. *Bd. of Regents*, 385 U.S. 589, 603 (1967) (First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom"); *Sweezy* v. *New Hampshire*, 354 U.S. 234, 249-50 (1957)

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[16]USA Shooting, USA Shooting Youth Programs, http://www.usashooting.org/membership/youth-programs (last visited March 15, 2015).

(plurality) ("right to lecture . . . could not be seriously debated," and noting that "teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding").

In *Holder* v. *Humanitarian Law Project*, 561 U.S. 1 (2010), the Supreme Court considered whether Congress could ban, as material support for terrorist organizations, "plaintiffs' speech to [terrorist] groups [that] imparts a 'specific skill' or communicates advice derived from 'specialized knowledge.'" *Id.* at 27. Rejecting the government's arguments that such training and educational efforts were merely conduct with some communicative aspects, *id.* at 28, the Court nonetheless upheld, under strict scrutiny, a prohibition on the provision of material support "in the form of speech" to designated terrorist organizations, *id.*: "direct training" in "specific skill[s]" of advocacy, *id.* at 36-37; and "teach[ing]" how to "present claims" for relief, *id.* at 37.

Of course, teaching and learning, the conveyance and receipt of knowledge, are not limited to advocacy or expression. "Even dry information, devoid of advocacy, political relevance, or artistic expression, has been accorded First Amendment protection." *Universal*

City Studios, Inc. v. *Corley*, 273 F.3d 429, 446 (2d Cir. 2001) (citations omitted). And protected teaching includes demonstrative and experiential conduct, not strictly oral conversation. For example, "instructing children on the topics of geography and fiber arts is a form of speech protected under the First Amendment." *Goulart* v. *Meadows*, 345 F.3d 239, 248 (4th Cir. 2003).

As is the provision of hands-on gun training. *Edwards* v. *City of Goldsboro*, 178 F.3d 231 (4th Cir. 1999). In *Edwards*, a police officer asserted a valid First Amendment claim challenging his punishment for teaching a handgun safety class, completion of which was required for individuals wishing to obtain state permits to carry guns. "[T]he form of the [officer's] speech, presumably verbal as well as some written instruction accompanied by physical demonstrations . . . was entitled to protection." *Edwards*, 178 F.3d at 247. Indeed, because the speech concerned "a categorically public issue, the proper method of safely carrying a concealed handgun, knowledge of which is a prerequisite to obtaining a state permit . . . it occupies the highest rung of the hierarchy of First Amendment values." *Id.* (citation omitted). The class

at issue involved firing at a gun range. N.C. Gen. Stat. § 14-415.12(a)(4).

Even if gun training and range use were merely conduct, Chi. Mun. Code § 4-151-100(d)'s complete prohibition on the provision of shooting instruction to minors would nonetheless constitute a First Amendment violation. Because this provision undeniably burdens expression, it can only survive if it is

> within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. *O'Brien*, 391 U.S. 367, 377 (1968). The laws fail all four factors.

First, it is not within Chicago's constitutional power to ban all youth shooting activities, or to restrict all minors from all gun range premises. As discussed *infra*, doing so violates the Second Amendment. Second, Chicago has no valid interest in a law of this breadth and scope. As Krimbel testified, Chicago's interest is preventing small, unruly children from interfering with the safe operation of gun ranges.

At some point, the law's scope is so extreme that it cannot merely be said to be overbroad, but disconnected from the asserted governmental purpose. An age requirement of 18 is triple the normal standard.

Chicago might claim that its governmental interests are rooted only in safety, and are thus unrelated to the suppression of firearms education. Plaintiffs would disagree. Everything the City has done with respect to the regulation of firearms, including the byzantine July, 2011 range ordinance in which the age prohibition originated, has been calculated to destroy or discourage firearms use and ownership to the greatest possible extent. Preventing the next generation from developing a positive association with firearms would be an official priority. Kuczmiercyzk seeks to expose Chicago youth to the shooting sports precisely as a means of reforming local anti-gun attitudes.

But even if the City were to be credited in an assertion that it does not share such views, and is free of any untoward hostility to the shooting sports, Commissioner Krimbel sank § 4-151-100(d) under the fourth *O'Brien* factor. Krimbel resisted acknowledging the provision's "pretty onerous" scope. SA 64. She had "a harder time with"

the concept of barring all people under 18 from the firing range. *Id.* She even went so far as to testify that the section "is inartfully drafted . . . clear[ly beyond its] purpose," SA 65, and that the City "might want to draft that a little bit differently" as it impacted important youth educational programs. *Id.*

Plaintiffs agree with Chicago's official on these points.

B. The Second Amendment Guarantees A Right to Provide and Receive Instruction in the Use of Firearms at a Gun Range.

Historically, Americans might not have first thought of the First Amendment when considering instruction in the use of firearms. "[T]o bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms . . ." *Heller*, 554 U.S. at 617-18 (citation omitted); *Ezell I*, 651 F.3d at 704.

The Second Amendment interest in conveying firearms proficiency extended to the traditional instruction of youth in the use of arms:

> The Constitution secures the right of the people to keep and bear arms. No doubt, a citizen who keeps a gun or pistol under judicious

> precautions, practises in safe places the use of it, *and in due time teaches his sons to do the same*, exercises his individual right.

Heller, 554 U.S. at 619 (citation omitted) (emphasis added). *This is not to suggest that minors have full constitutional rights to arms—they do not*—although evidence exists supporting the existence of more generous Framing Era attitudes toward the subject of youth and guns than is common today. In 1785, for example, Thomas Jefferson advised his fifteen-year old nephew,

> As to the species of exercise, I advise the gun. While this gives a moderate exercise to the body, it gives boldness, enterprise, and independence to the mind. Games played with the ball, and others of that nature, are too violent for the body, and stamp no character on the mind. Let your gun therefore be the constant companion of your walks.

The Letters of Thomas Jefferson, *To Peter Carr*, Paris, Aug. 19, 1785, available at http://avalon.law.yale.edu/18th_century/let31.asp (last visited March 15, 2015).

Federal law did not impose age restrictions on firearms possession until 1968. *United States* v. *Rene E.*, 583 F.3d 8, 13 (1st Cir. 2009). And notably, the modern federal prohibition (enacted 1994) on juvenile possession of handguns and handgun ammunition contains an

exception for "target practice, hunting, or a course of instruction in the safe and lawful use of a handgun." 18 U.S.C. § 922(x)(3)(A)(i).

That federal law would allow for "instruction in the safe and lawful use" of handguns by minors, who are otherwise largely prohibited from having handguns, and who cannot purchase handguns in the regulated market until age 21, is fully consistent with the concept that while juveniles do not enjoy Second Amendment rights as that concept is understood to apply to adults, there is the right to provide them, and they have the right to receive, instruction that will prepare them to exercise those rights when they reach the proper age. When Joseph Brown teaches young shooters at his American Legion post, when Mark Kuczmiercyzk promotes youth shooting, and when Commissioner Kriebel sends her 12-year-old son to shooting classes, they are exercising Second Amendment rights, as are the recipients of their educational efforts.

Of course, not all minors have the maturity to receive firearms training. Some age restriction may well be appropriate, as would regulation of youth shooting activity. But Chicago's total ban on range access by anyone under 18 simply goes too far in extinguishing the

right to receive firearm instruction. As Commissioner Krimbel testified, the prohibition extends beyond legitimate regulatory concerns and should thus be redrafted.

The provision also violates the Second Amendment in other ways. As the evidence reveals, it deprives range owners of the services of underage workers wholly unrelated to firing guns, and it deters visits to gun ranges and their associated retail facilities by adults whose children can responsibly accompany them, and who might never set foot on the firing range. Commissioner Krimbel admitted that this aspect of the law is "onerous." Whatever the level of scrutiny might be, the fit between Chicago's distraction purpose and the provision's impact is poor.

CONCLUSION

The District Court's judgment striking down Chicago's restriction of zoning in manufacturing districts, Chi. Mun. Code § 17-5-0207, should be affirmed. But the judgment upholding Chi. Mun. Code § 17-9-0120, imposing distancing restrictions on gun ranges, and the age prohibition of Chi. Mun. Code § 4-151-100(d), should be reversed.

Dated: March 16, 2015

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Circuit Rule 30(d) Certification

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) are included within the Appellant's appendix and not reproduced here. All material required by Circuit Rule 30(b) are included in this Separate Appendix.

/s/ Alan Gura
Alan Gura

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B) because this brief contains 12,749 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(b), and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionately spaced typeface using WordPerfect X4 in 14 point Century Schoolbook font.

/s/ Alan Gura
Alan Gura
Attorney for Plaintiffs-Appellees/Cross-Appellants
Dated: March 16, 2015

CERTIFICATE OF SERVICE

On this, the 17th day of March, 2015, I electronically filed the attached Brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Participants in this appeal are registered CM/ECF users who will be served by the CM/ECF system on March 17, 2015.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 17th day of March, 2015.

/s/ Alan Gura
Alan Gura