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# Amended Brief Amici Curiae of Professors Nicholas J. Johnson, David B. Kopel, and Michael P. O'Shea in Support of Defendant-Appellant, People v. Aguilar, No. 112116, Illinois Supreme Court

Michael P. O'Shea, *Oklahoma City University School of Law*

NO. 112116

IN THE SUPREME COURT OF ILLINOIS

**PEOPLE OF THE STATE OF ILLINOIS**,

Plaintiff-Appellee,

vs.

**ALBERTO AGUILAR**,

Defendant-Appellant.

Appeal from the Appellate Court of Illinois, First Judicial District No. 1-09-0840

There heard on Appeal from the Circuit Court of Cook County, Illinois No. 08 CR 12069.

Hon. Charles P. Burns, Judge Presiding.

# AMENDED BRIEF FOR AMICI CURIAE PROFESSORS NICHOLAS J. JOHNSON, DAVID B. KOPEL, AND MICHAEL P. O'SHEA IN SUPPORT OF DEFENDANT-APPELLANT

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## INTEREST AND OBJECTIVE OF THE AMICI CURIAE

*Amici* are Second Amendment scholars whose past and present work has focused closely on the constitutional right to keep and bear arms and the Supreme Court's recent landmark decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 130 S.Ct. 3020 (2010).[1]

Each amicus has devoted scholarly attention to the long history of the individual right to bear arms in the states and in state courts.[2] In the decades before the *Heller* decision in 2008, most lower federal courts wrongly interpreted the Second Amendment as giving no protection to the personal ownership or use of firearms. *Heller*, 554 U.S. at 621-624 & n.24. Accordingly, the best source of precedential guidance in interpreting the individual right recognized in *Heller* and *McDonald* lies in the last two centuries of state court decisions applying state and federal guarantees of the

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[1] *Amici* are co-authors of the first law school text on firearms law and the Second Amendment right to keep and bear arms, NICHOLAS J. JOHNSON, DAVID B. KOPEL, MICHAEL P. O'SHEA, AND GEORGE A. MOCSARY, FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY (forthcoming 2012).

[2] *See, e.g.*, Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 BROOKLYN L. REV. 715 (2005); David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113 (2010); David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. REV. 1359; Michael P. O'Shea, *The Right to Defensive Arms in* District of Columbia v. Heller, 111 W. VA. L. REV. 349, 370-72, 377-79 (2009).

right to bear arms for self-defense. This tradition featured prominently in *Heller* and *McDonald*, yet has been ignored by some post-*Heller* courts, which have erroneously concluded that the Second Amendment right disappears outside the home. As this brief will show, the American judicial tradition contradicts that house-bound view of the right. It supports substantial protection for the public carrying of handguns for self-defense.

By presenting key sources from the tradition, *amici* seek to assist this Court in interpreting and applying *Heller* and *McDonald* and giving effect to the fundamental right to keep and bear arms for the purpose of self-defense.

## ARGUMENT

### Introduction

The landmark decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 130 S.Ct. 3020 (2010), "held" that the Second Amendment[3] "protects the right to keep and bear arms for the purpose of self-defense...." *McDonald*, 130 S.Ct. at 3026 (plurality opinion) (emphasis added); *accord id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment). The United States Supreme Court interpreted the right to bear arms as an "individual right to ... carry weapons in case of confrontation." *Heller*, 554 U.S. at 591. The right is fundamental and is fully

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[3] "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

binding on the States. *McDonald*, 130 S.Ct. at 3036, 3058-59.

However, in the aftermath of *Heller* and *McDonald*, some courts have rendered restrictive decisions holding that the Second Amendment right confers no protection outside the walls of an individual's home, largely because the particular laws held unconstitutional by the Supreme Court involved the possession and use of handguns for self-defense in the home. *See, e.g., Williams v. State*, 10 A.3d 1167, 1177 (Md. 2011), *cert. denied*, 2011 WL 4530130 (U.S. Oct. 3, 2011); *People v. Dawson*, 403 Ill. App. 3d 499, 508, 934 N.E.2d 598 (1st Dist. 2010).

A divided panel of the court below adopted the same view, and therefore upheld the complete ban on public handgun carrying imposed by Illinois's aggravated unlawful use of a weapon (AUUW) statute, 720 ILCS 5/24-1.6(a) (2008). *People v. Aguilar*, 408 Ill. App. 3d 136, 148, 934 N.E.2d 598 (1st Dist. 2011) ("The Supreme Court's decisions do not define the fundamental right to bear arms to include the activity barred by the [Illinois] AUUW statute," *i.e.*, carrying a handgun outside the home); *but see id.* at 152-55 (Neville, J., dissenting) (concluding that the Second Amendment right to bear arms is not confined to the home, and that the Illinois AUUW statute, which prohibits the right's exercise in public, is unconstitutional).

Other courts have hesitated even to consider whether the Second Amendment right exists outside the home, expressing the belief that the application of the right to bear arms to public carrying is "a vast *terra*

*incognita*" devoid of guidance. *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011), *cert. denied*, 2011 WL 2516854 (Nov. 28, 2011).

Amici will show that these courts are mistaken about what *Heller* held, and mistaken in the belief that there is a lack of legal guidance for post-*Heller* courts addressing restrictions on the carrying of arms. To the contrary, there is a long tradition in American state courts of applying the right recognized in *Heller*—the individual right to bear arms for self-defense—to prohibitions of defensive weapons carrying. The post-*Heller* lower court decisions that confine the Second Amendment to the walls of the home overlook this tradition, but *Heller* and *McDonald* drew upon it and affirmed it. Historically, courts applying the right to bear arms for self-defense have regularly concluded that the right's scope includes handgun carrying outside the home, and they have struck down laws that, like Illinois's AUUW statute, ban the public carrying of a constitutionally protected weapon for self-defense. The same result should follow here.

## I. THE SUPREME COURT HAS HELD THAT THE SECOND AMENDMENT PROTECTS A FUNDAMENTAL "RIGHT TO ... BEAR ARMS FOR THE PURPOSE OF SELF-DEFENSE."

Post-*Heller* decisions that confine the Second Amendment to the home often assert that the *Heller* Court "limited its holding to the question presented—'[t]hat the second amendment right to bear arms protected the right to possess a commonly used firearm, a handgun, in the home for self-defense purposes.' " *Aguilar*, 408 Ill.App.3d at 147, 944 N.E.2d 816, quoting

*Dawson*, 403 Ill.App.3d at 508, 934 N.E.2d 598.

That is demonstrably incorrect. The Supreme Court identified *Heller*'s holdings in the very first sentence of the *McDonald* opinion: "[I]n *District of Columbia v. Heller*, 554 U.S. 570 (2008), we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, and we struck down a District of Columbia law that banned the possession of handguns in the home." *McDonald v. Chicago*, 130 S.Ct. 3020, 3026 (2010) (plurality opinion).

As the carefully separated clauses of that sentence instruct lower courts, *Heller* had two major holdings, not just one: it reached both a broad holding and a narrow one.

First, the Supreme Court reached a broad holding about the type of individual right that the Second Amendment protects. It "*held* that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense," *id.* (emphasis added). A solid majority of the Court has reached, and then reaffirmed, this holding. *See id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment) ("*Heller* ... *held* that the Second Amendment protects an individual right to keep and bear arms for the purpose of self-defense....") (emphasis added). The Supreme Court thus explicitly instructs lower courts that this conclusion is a holding and not dictum. The majority opinion below, like the *Dawson* opinion, completely overlooked this critical aspect of *Heller* and *McDonald*.

In reaching this broad holding, the Supreme Court considered several competing ways of understanding the right to arms, each of which could claim some (though differing) degrees of support from case law and history. The Court accepted one understanding and rejected the others. Of course, *Heller* rejected the extremely narrow right urged by the dissenting Justices, under which the right would impose no limits at all on "regulat[ing] civilian uses of weapons." *Heller*, 554 U.S. at 680 (Stevens, J., dissenting); *see id.* at 599-600 & n.17 (opinion of the Court). But it also rejected a second view, popular with some late nineteenth century courts, which scholars have called the "hybrid" view of the right to arms. *See, e.g.*, David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559, 618 (1986). On this view, the right to "keep arms" protected an individual right to own guns, but the right to "bear arms" protected only the use of arms "for the military purpose of banding together to oppose tyranny." *Heller*, 554 U.S. at 613, discussing *Aymette v. State*, 21 Tenn. 154 (1840). Thus, under the hybrid view, the carrying of arms for self-defense was not deemed an important part of the right. In this respect, the hybrid view occupied "a sort of middle position" between the self defense-based view adopted in *Heller* and a purely militia-based view. *Heller, id.* The Supreme Court explicitly rejected the hybrid view, calling it an "odd reading of the right" to keep and bear arms, and declined to adopt it. *Id.*

Instead, *Heller* likened the Second Amendment to state constitutional

provisions that protected "the right of the people to 'bear arms in defence of themselves and the State'" or "the even more individualistic phrasing that each citizen has the 'right to bear arms in defense of himself and the State.'" *Id.* at 602.[4]

The Court relied upon these self-defense based state constitutional provisions as support for its analogous interpretation of the Second Amendment. "That of the nine state constitutional protections for the right to bear arms enacted immediately after 1789 at least seven unequivocally protected an individual citizen's right to self-defense is strong evidence that that is how the founding generation conceived of the right." *Id.* at 603; *cf. id.* (describing early state constitutional arms rights provisions as "Second Amendment analogues").

*McDonald v. Chicago* reinforced the connection between early state constitutional guarantees of bearing arms in self-defense and the Second

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[4] *See id.* at 585 n.8, citing PA. DECLARATION OF RIGHTS § 13 (1776) ("That the people have a right to bear arms for the defence of themselves and the state ... "); VT. DECLARATION OF RIGHTS § 15 ("That the people have a right to bear arms for the defence of themselves and the State ..."); KY. CONST. art. XII, cl. 23 (1792) ("That the right of the citizens to bear arms in defence of themselves and the State shall not be questioned"); OHIO CONST., Art. VIII, § 20 (1802) ("That the people have a right to bear arms for the defence of themselves and the State...."); IND. CONST., Art. I, § 20 (1816) ("That the people have a right to bear arms for the defense of themselves and the State ... "); MISS. CONST., Art. I, § 23 (1817) ("Every citizen has a right to bear arms, in defence of himself and the State"); CONN. CONST., Art. I, § 17 (1818) ("Every citizen has a right to bear arms in defence of himself and the state"); ALA. CONST., Art. I, § 23 (1819) ("Every citizen has a right to bear arms in defence of himself and the State"); MO. CONST., Art. XIII, § 3 (1820) ("[T]hat [the people's] right to bear arms in defence of themselves and of the State cannot be questioned.").

Amendment. To support its holding that the right protected by the Second Amendment is a fundamental right that is fully binding on the states, the Court observed that, when the Fourteenth Amendment was ratified in 1868, "[q]uite a few ... state constitutional guarantees ... explicitly protected the right to keep and bear arms as an individual right to self-defense." 130 S.Ct. at 3042 (opinion of the Court).

*Heller*'s second, narrow holding followed from its first, broad one. The Court applied the right to keep and bear arms for the purpose of self-defense to the specific District of Columbia enactments before it—a prohibition on handguns and a prohibition on operable firearms in the home—and held that both were unconstitutional. 554 U.S. at 628-35. *Heller*'s reason for striking down the handgun ban was that, by banning "the quintessential self-defense weapon," the District of Columbia had impermissibly burdened "the inherent right of self-defense [that] has been central to the Second Amendment right." *Id.* at 628-29. The ban on loaded firearms was struck down because it made it "impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional." *Id.* at 630.

Thus, it is perfectly accurate to say that the Supreme Court held in *Heller* and *McDonald* "that the [S]econd [A]mendment ... protected the right to possess ... a handgun in the home for self-defense purposes," *Aguilar*, 408 Ill.App.3d at 147, 944 N.E.2d 816, quoting *Dawson*, 403 Ill.App.3d at 508, 934 N.E.2d 598. But it is a *non sequitur* to conclude that, therefore, a law

governing firearms use or possession outside the home is immune to Second Amendment challenge. There was also a broader holding in *Heller*, and it is the one at issue in the present case.

First Amendment law provides a very recent analogy. About a decade ago, lower courts began to confront arguments that restrictions on violent video games violated the First Amendment's Free Speech Clause. They did not simply reject this argument in light of the absence of Supreme Court free speech precedent dealing with video games. Instead, they applied existing doctrine to different facts, and concluded that the courts were bound to protect against censorship in this novel context as well. *See Interactive Digital Software Ass'n v. St. Louis County, Mo.*, 329 F.3d 954, 957 (8th Cir. 2003) (striking down municipal ban on violent video games as violative of Free Speech Clause) ("The mere fact that [speech] appears in a novel medium is of no legal consequence."); *Am. Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001) (Posner, J.). And those lower courts were right. *Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729 (June 27, 2011) (agreeing that violent video games are protected speech under the First Amendment).

The task before this Court, and other courts hearing post-*Heller* challenges to prohibitory measures such as the AUUW statute, is the application of *Heller*'s broad holding to a different set of facts. It is to determine whether a complete ban on the public carrying of the

quintessential self-defense weapon is consistent or inconsistent with the fundamental, individual "right to ... bear arms for the purpose of self-defense" that Illinoisans, like all Americans, possess. *McDonald*, 130 S.Ct. at 3026, 3059.

Such application and development of constitutional doctrine is an important function of state supreme courts and lower federal courts, and is vital to the integrity of the judicial process. The United States Supreme Court has emphasized "the benefit it receives from permitting several [lower courts] to explore a difficult question before" the Supreme Court takes it up. *United States v. Mendoza*, 464 U.S. 154, 160 (1984); see *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) (affirming the value of "allowing difficult issues to mature through full consideration by the courts of appeals"); *United States v. Masciandaro*, 638 F.3d 458, 468 n.* (4th Cir. 2011) (opinion of Niemeyer, J.), *cert. denied*, 2011 WL 2516854 (Nov. 28, 2011) (concluding that lower courts' "application of the broader Second Amendment right discussed in *Heller* to factual settings arising outside the home" will further this process). No such benefits could accrue if lower courts confined Supreme Court decisions to their facts, and thereby neglected the Court's authority to reach legal holdings of wider applicability.

Fortunately, in this case, the factual context is not really a novel one at all. Ample guidance, in the form of precedent, is available to this Court. As *amici* will now detail, the type of individual right recognized in *Heller* has a

historical pedigree. There is a long American judicial tradition of applying the right to bear arms to laws governing the carrying of weapons, reaching back to the early nineteenth century. One of the most strongly attested features of the tradition is the invalidity of statutes that, like the AUUW statute, prohibit the public carrying of a constitutionally protected arm.

## II. THE RIGHT TO BEAR ARMS FOR SELF-DEFENSE TRADITIONALLY PROTECTS CARRYING HANDGUNS AND OTHER DEFENSIVE WEAPONS OUTSIDE THE HOME.

Over the past two centuries, courts applying the right to bear arms for self-defense under state and federal constitutions have repeatedly affirmed that the right includes the carrying of arms in public. The right can be regulated to an extent, such as by requiring that defensive weapons be carried openly rather than concealed. However, the right cannot be destroyed by prohibiting public carry. *See Heller*, 554 U.S. at 612-13, 626.

### A. The Nineteenth Century

The Supreme Court's originalist analysis in *Heller* and *McDonald* suggests that the early nineteenth century is a particularly valuable historical period for determining the scope of the Second Amendment right to bear arms. The Court showed this in *Heller* by devoting eight full pages of the United States Reports to examining sources from this historical period—more than any other era. *Heller*, 554 U.S. at 605-14 (discussing the antebellum period); *McDonald*, 130 S.Ct. at 3037-38 (same); *see also Ezell v. City of Chicago*, 2011 WL 2623511, *12 (7th Cir. July 6, 2011) (analyzing the

scope of the right to keep and bear arms by inquiring "how the right was understood when the Fourteenth Amendment was ratified" in 1868).

Courts in this period frequently interpreted the Second Amendment or its state constitutional counterparts as protecting an individual right to bear arms for self-defense. When they did so, they also held that the right protected public weapon carrying. For example:

* No precedent, historic or modern, was relied upon more strongly in *Heller* than the Georgia Supreme Court's decision in *Nunn v. State*, 1 Ga. 243 (1846). The United States Supreme Court cited *Nunn* as "perfectly captur[ing]" the relation between the Second Amendment's two clauses, *Heller*, 554 U.S. at 612. It cited *Nunn* as an example of the permissible level of regulation of the right to arms. *Id.* at 626. And it cited *Nunn* as an example of the willingness of courts to strike down laws that infringe that right. *Id.* at 629. *Nunn* made clear that "bear arms" means "carrying weapons," and it held that a state law that prohibited carrying handguns openly for self-defense violated the Second Amendment:

> [S]o far as the act ... seeks to suppress the practice of carrying certain weapons *secretly*, ... it is valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms. But ... so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void*....

1 Ga. at 251. A later decision reaffirmed *Nunn*'s holding that public carrying of handguns was constitutionally protected. *Stockdale v. State*, 32 Ga. 225, 227 (1861) (applying *Nunn* to reverse a conviction for openly wearing a

handgun before witnesses).

* The Alabama Supreme Court held that the right to bear arms for self-defense protected pistol carrying in *State v. Reid*, 1 Ala. 612 (1840), cited in *Heller*, 554 U.S. at 585 n.9, 629. It upheld a prohibition on concealed carry in public as a regulation of "the manner in which arms shall be borne," since open carry was still allowed. However, the court stressed that the right to carry handguns could not be prohibited:

> A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional.

*Reid*, 1 Ala. at 616-17. A statute that bans all public carry of a protected weapon, such as the Illinois AUUW statute, exemplifies a measure that "amounts to a destruction of the right," as *Reid* puts it, and so is invalid.

* The Louisiana Supreme Court held that a state law banning concealed carry of weapons, but allowing them to be carried openly, did not violate the Second Amendment, because it "interfere[d] with no man's right to carry arms ... in full open view, which places men upon an equality. This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary ...." *State v. Chandler*, 5 La. Ann. 489, 489-90 (1850), cited in *Heller*, 554 U.S. at 613, 626.

* The Texas Supreme Court concluded that the right to bear arms for self-defense protected a citizen's right to carry even a dangerous edged

weapon. *Cockrum v. State*, 24 Tex. 394 (1859). The *abuse* of the right could be criminally punished, the court held, but such sanctions would be unconstitutional if they rose to a level that either "deter[red] the citizen from [the] lawful exercise" of his right to carry the arm, or "prohibit[ed]" the exercise of the right to carry the weapon outright. *Id.* at 402-03.

In the later nineteenth century, some courts moved away from the defense-based right, and instead adopted the hybrid view, under which the right to bear arms served primarily civic and military purposes, not self-defense. As a result, the right to carry arms received less protection. *E.g.*, *Hill v. State*, 52 Ga. 472, 480 (1874) (holding that public carrying of handguns could be harshly regulated because in the court's view, the only purpose of the right to bear arms "was to secure to the state a well regulated militia. The simple right to carry arms upon the person ... would not answer the declared purpose in view. Skill and familiarity in the use of arms was the thing sought for."). However, as explained above, *Heller* considered and rejected this view of the right to bear arms. 554 U.S. at 613-14. Instead, *Heller* came down emphatically in favor of the self-defense-based view. *Id.* at 599 (self-defense is the "*central component*" of the right to bear arms). Precedents following the hybrid view are thus of limited relevance to the post-*Heller* Second Amendment.

Nonetheless, it is a striking fact—indicative of the extreme character of measures like the Illinois AUUW statute—that even courts that denied

self-defense as a central purpose of the right to bear arms *still* struck down, on multiple occasions, statutes that banned the public carrying of handguns. *Andrews v. State,* 50 Tenn. 165, 187 (1871) (striking down a ban on handgun carrying as violative of the Tennessee right to bear arms for the common defense; noting, *inter alia*, that the statute would not allow a citizen to "take ... [a handgun] into the street to shoot a rabid dog that threatened his child."), cited in *Heller*, 554 U.S. at 608, 614, 629; *Wilson v. State*, 33 Ark. 557, 560 (1878) (striking down a law that prohibited carrying a handgun "as a weapon," except on one's own premises or on a journey; deeming the statute "an unwarranted restriction upon ... [the] constitutional right to keep and bear arms"); *Glasscock v. City of Chattanooga*, 11 S.W.2d 678 (Tenn. 1928) (striking down a ban on public handgun carrying).

### B. The Twentieth and Early Twenty-First Centuries

The tendency of modern state constitutional development has been to clarify and strengthen protections for the right to keep and bear arms for self-defense. Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 BROOKLYN L. REV. 715, 735-44 (2005). Today, thirty state constitutions expressly protect the individual right to bear arms for self-defense. Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191 (2006). The most recent provision was added by an overwhelming popular vote in 2010. KAN. CONST. BILL OF RIGHTS § 4 (2010) ("A person has the right to keep and bear

arms for the defense of self, family, home, and state, for lawful hunting and recreational use, and for any other lawful purpose."); see Jan Biles, *Kansans back two amendments*, TOPEKA CAPITAL-JOURNAL, Nov. 2, 2010 (reporting that voters approved this provision by a margin of over seven to one).

Throughout the last century, state courts continued to apply the right to bear arms to protect the public carrying of handguns and other weapons. As before, general prohibitions on public carrying remained the clearest example of a type of law that facially violates the right to bear arms for self-defense.

* The Idaho Supreme Court held that both the Second Amendment and the Idaho Constitution's "right to bear arms for ... security and defense" were violated by a state law that prohibited the carrying of handguns in urban areas. The court held that the legislature could regulate the exercise of the right by, for example, requiring handguns to be carried openly, but it had "no power to prohibit a citizen from bearing arms in any portion of the state," whether inside a city or not. *In re Brickey*, 70 P. 609, 609 (Idaho 1902); see IDAHO CONST. art. I, § 11 ("The people have the right to bear arms for their security and defense; but the Legislature shall regulate the exercise of this right by law.") (1889).

* The next year, the Vermont Supreme Court held that a municipal ban prohibiting the concealed carrying of a pistol without the (discretionary) permission of local officials violated the right of "[t]he people ... to bear arms

for the defense of themselves and the state," VT. CONST. ch. I, art. 16. *State v. Rosenthal*, 55 A. 610, 610 (Vt. 1903).

* A New Mexico appellate court likewise struck down a municipal ban on public handgun carrying as inconsistent with "the people['s] constitutionally guaranteed right to bear arms" for security and defense under the state constitution. *City of Las Vegas v. Moberg*, 485 P.2d 737, 738 (N.M. Ct. App. 1971). Again, although a particular mode of carry (concealed carrying) could be banned, handgun carrying as such could not. *Id.* at 738-39.

* In a series of decisions, the Oregon Supreme Court concluded that the right of "[t]he people ... to bear arms for the defence of themselves," OR. CONST. art. I, § 27, protected a right to possess and carry common defensive weapons, which could be regulated but not frustrated or destroyed. *State v. Kessler*, 614 P.2d 94, 97-98 (Or. 1980), cited in *Heller*, 554 U.S. at 625. Thus, the court struck down laws that prohibited the public possession of a billy club, *State v. Blocker*, 630 P.2d 824, 825-26 (Or. 1981), and the public possession of an edged weapon, *State v. Delgado*, 692 P.2d 610, 614 (Or. 1984) (switchblade knife).

* The West Virginia Supreme Court of Appeals held that a handgun carry permit statute that vested wide discretion in local officials to withhold the carrying permit violated "the right of a person to bear arms for defensive purposes"—virtually mirroring the description of the right recognized in

*Heller* and *McDonald*. *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139, 144 (W. Va. 1988); *see* W. VA. CONST. art. III, § 22 (1986) ("A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use."). The court suggested that a "shall issue" permitting scheme that allowed all adults who met objective criteria to obtain a permit to carry a handgun, would likely be constitutional, because it would regulate the right to carry arms without "frustrating" its exercise. *Id.* at 145, 147-48.

* The Indiana Supreme Court held that the "right [of the people] to bear arms for the defence of themselves" gave individuals a substantive right to obtain a handgun carrying permit according to objective criteria. *Kellogg v. City of Gary*, 562 N.E.2d 685, 694, 705 (Ind. 1990); IND. CONST. art. I, § 32. Local officials who withheld from citizens the opportunity to obtain a handgun carrying permit were held personally liable for this constitutional violation. *Id.* at 705-06.

In addition to these holdings, numerous modern cases have affirmed bans on the concealed carrying of handguns as consistent with the right to bear arms for self-defense, but have done so on the premise that open carrying was allowed. *E.g.*, *Klein v. Leis*, 795 N.W.2d 633, 637-38 (Ohio 2003); *Dano v. Collins*, 802 P.2d 1021, 1022 (Ariz. App. 1990) (holding that a statute requiring weapons to be carried openly was constitutional, because this regulation did not "frustrate the purpose" of the right to bear arms for

self-defense); *Holland v. Commonwealth*, 294 S.W.2d 83, 85 (Ky. 1956) (dictum); *State v. Woodward*, 74 P.2d 92, 95 (Idaho 1937); see also *State v. Hamdan*, 665 N.W.2d 785 (Wis. 2003) (holding that a ban on carrying a concealed handgun in one's place of business violated the right to bear arms for self-defense, and suggesting that individuals may have a right to carry concealed in other places under some circumstances).

In summary, this body of precedent shows that the right to bear arms for the purpose of self-defense—the right recognized by *Heller* and *McDonald* —is an established idea in American constitutional law. The case law tradition offers important guidance for courts applying the Second Amendment to restrictions on defensive weapons carrying.

Post-*Heller* courts that confine the Second Amendment to the walls of the home have ignored this body of precedent. Astonishingly, the decision below does not cite or examine *a single one* of the cases discussed above, including the ones explicitly relied upon in *Heller*. In fact, it does not examine *any* pre-*Heller* judicial opinions explicating the right to bear arms— except for the decision in *Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266 (Ill. 1984) (upholding a municipal ban on handguns), which was repudiated by *Heller* and *McDonald*.

The same grave omission undermines *Dawson*, as well as the Maryland decision relied upon by the court below, *Williams v. State*, 10 A.3d 1167 (Md. 2011) ), *cert. denied*, 2011 WL 4530130 (U.S. Oct. 3, 2011). None of

these opinions engages with historical evidence or with right to bear arms cases decided prior to 2008. That is an extraordinary way to respond to a pair of landmark decisions as drenched in history and tradition as were *Heller* and *McDonald*. This omission is sufficient in itself to raise a presumption that the application of the Second Amendment in these opinions has gone seriously astray.

* * *

Before *Heller* and *McDonald*, Illinois stood outside of the American constitutional mainstream of the right to bear arms for self-defense. The present Illinois Constitution includes the most restricted constitutional right to arms provision of any state. ILL. CONST. art. I, § 22 (1970) ("*Subject only to the police power*, the right of the people to keep and bear arms shall not be infringed.") (emphasis added); *cf. Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266, 278 (Ill. 1984) (upholding a municipal ban on handguns as consistent with this restricted right; holding that under the Illinois Constitution, the right to bear arms is subject to "substantial infringement" through the government's exercise of the police power). Thus, the United States Supreme Court's recognition of a fundamental constitutional right to bear arms has greatly increased the constitutional scrutiny that applies to prohibitory gun restrictions in Illinois. *Cf. Aguilar*, 408 Ill.App.3d at 149-50 ("agree[ing]" that "the Illinois Constitution appears to provide less protection than does the [S]econd [A]mendment.").

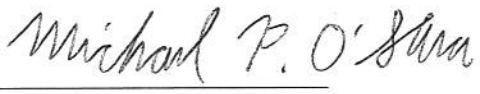
The AUUW statute's nullification of the ability of law-abiding citizens to carry handguns publicly for self-defense must now be measured against a different constitutional norm: Illinoisans enjoy a fundamental, individual right to "bear arms for the purpose of self-defense." *See McDonald*, 130 S.Ct. at 3026, 3059. Evaluating other, more limited regulations of weapons carrying for conformity with the Second Amendment may raise issues requiring sensitive analysis.[5] But the present case allows this Court the luxury of a straightforward decision. Because the AUUW statute categorically prohibits law-abiding Illinoisans from publicly carrying "the quintessential self-defense weapon," *Heller*, 554 U.S. at 629, it is unconstitutional.

[5] *Amici* express no opinion about the constitutionality of Mr. Aguilar's unsentenced, separate conviction for unlawful possession of a firearm by a person under 18 years of age. 720 ILCS 5/24-3.1.

## CONCLUSION

This Court should hold the AUUW statute facially violative of the Second Amendment right to bear arms, and reverse Mr. Aguilar's conviction for violating the statute.

Respectfully submitted,



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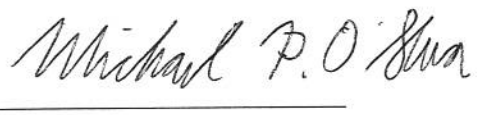
## CERTIFICATION OF COMPLIANCE

I certify that this brief conforms to the requirements of Illinois Supreme Court 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, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 22 pages.



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## CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on November 30, 2011, he delivered three copies of the foregoing Amended Brief for Amici Curiae to Federal Express in Oklahoma City, Oklahoma, fully prepaid and addressed, for delivery to each of the following:

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