IN THE UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 17-2998

KEVIN W. CULP, et al.,
Plaintiffs/Appellants,

v.

KWAME RAOUL,
in his official capacity as Attorney General of the State of Illinois, et al.,
Defendants/Appellees.

Appeal from the United States District Court
Central District of Illinois
No. 3:14-cv-3320, Sue E. Myerscough, Judge

BRIEF OF *AMICI CURIAE* STATES OF MISSOURI, ALABAMA, ARKANSAS, ARIZONA, GEORGIA, INDIANA, KANSAS, LOUISIANA, MISSISSIPPI GOVERNOR PHIL BRYANT, NEBRASKA, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, AND WEST VIRGINIA

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INTRODUCTION

Americans do not lose their constitutional rights when they cross state lines. The right to free speech, for example, has no geographic boundaries. Under the Constitution, all "law-abiding, responsible citizens" have a right to use arms in defense not just of hearth and home, but also for self-defense outside the home. *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012). The panel, however, upheld an Illinois statute depriving Missourians (and residents of most *amici* states) of this right whenever they cross the border into Illinois, simply because Illinois says it cannot be certain that they are "law-abiding, responsible citizens"—while giving them no process to show otherwise. The panel opinion conflicts with prior opinions of this Court addressing both categorical bans and public-carry bans, and each split merits rehearing en banc.

First, the panel opinion conflicts with prior opinions from this Court requiring a categorical or individualized showing that persons are not responsible, law-abiding citizens. *See Kanter v. Barr*, 919 F.3d 437, 442 (7th Cir. 2019); *United States v. Williams*, 616 F.3d 685, 691 (7th Cir. 2010); *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc). *Kanter* held that a prior felony conviction creates a legislative presumption that such individuals are not responsible, law-abiding

citizens entitled to Second Amendment rights. 919 F.3d at 442. Without this categorical finding, there must be some individualized process to show that a person is not a responsible, law-abiding citizen. *Skoien*, 614 F.3d at 641. Illinois's categorical disqualification on public carry in Illinois by any Missourian (or any resident of most other States), simply because such out-of-state residents *might* be a felon or *might* be mentally ill, cannot be squared with this rule. Illinois not only has no basis for presuming that Missourians are not entitled to exercise their Second Amendment rights, it offers them no opportunity to prove otherwise.

Second, the panel opinion conflicts with this Court's opinion in *Moore*, which struck down a similar ban on public carry by Illinoisans only a few years ago. *Moore*, 702 F.3d at 935. The Second Amendment applies equally to out-of-state residents and Illinoisans, even within the State of Illinois. The panel opinion distinguishes *Moore* because Illinois finds it administratively burdensome to determine whether non-residents have "substantial criminal and mental health histories" and to verify "ongoing compliance." Slip Op. at 2. But *Moore* says that bans on public carry require an even "stronger" public-safety showing than in *Skoien* and *Kanter*. 702 F.3d at 940, 942. Illinois's administrative burdens fall far short. As in *Moore*, Illinois's generalized reliance on "public safety" does not justify its

"sweeping ban." Because it had ample room to "limit the right to carry a gun to responsible persons rather than to ban public carriage altogether." *Id.*

STATEMENT OF INTEREST OF *AMICI*

Missouri, Alabama, Arkansas, Arizona, Georgia, Indiana, Kansas, Louisiana, Mississippi Governor Phil Bryant, Nebraska, Ohio, South Carolina, South Dakota, Texas, Utah, and West Virginia seek to protect their citizens' rights. Missourians frequently travel to Illinois, including many from St. Louis and elsewhere who commute to work in Illinois on a daily basis. Thus, Missouri has a keen interest in the uniform application of constitutional rights across state lines. The same is true of the State *amici*: some border Illinois, and all have residents who travel to Illinois.

The Second Amendment right "belongs to all Americans." *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008). That right extends to self-defense outside the home. *Moore*, 702 F.3d at 935. But for most out-of-state residents, it stops at the Illinois border. Illinois's refusal to acknowledge constitutional rights should not be sanctioned under the banner of administrative burdens. "[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 554 U.S. at 636. The Second Amendment is not a "second-class right." *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality op.).

STATEMENT OF THE CASE

Illinois law prohibits any person from carrying a firearm in public in Illinois without an Illinois concealed-carry license. 720 ILCS 5/24-1.6(a) (defining the crime of "aggravated unlawful use of a weapon" to include the open carry of a firearm); 430 ILCS 66/10 (governing concealed carry licenses). Illinois bars nonresidents from even applying for a license unless they live in a state with firearm laws "substantially similar" to Illinois's. 430 ILCS 66/40. Whether a State's laws are "substantially similar" is determined by the Illinois State Police from surveys Illinois purports to send to all other states. Only Arkansas, Mississippi, Texas, and Virginia currently qualify. Residents of the other 45 States—including every State bordering Illinois—have *no* avenue to exercise public-carry in Illinois.

As outlined in their en banc petition, Plaintiffs include residents of Indiana, Missouri, Wisconsin, Colorado, Iowa, and Pennsylvania. Each has a concealed carry license in their home state. Many work in Illinois. Three Plaintiffs are licensed Illinois concealed-carry instructors, including a Missouri resident, an Indiana resident, and Kevin Culp, currently stationed in Ohio. They all sought injunctive relief allowing them to apply for a concealed-carry license in Illinois, but the district court denied relief, and the panel affirmed.

ARGUMENT

I. The panel opinion conflicts with the prior decisions of this Court holding that a State must justify categorical bans on the exercise of Second Amendment rights, even bans much narrower than the one here.

"Illinois categorically denies the residents of . . . 45 states the ability to exercise the fundamental right to carry a firearm in public in Illinois." Slip Op. at 25 (Manion, J., dissenting). By upholding this law, the panel opinion split from this Court's prior cases considering other categorical bans.

The Second Amendment, like the First Amendment, already "reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *United States v. Stevens*, 559 U.S. 460, 470 (2010). This means that state legislatures do not have "freewheeling authority" to declare new categorical exemptions based on their judgment that some form of protected activity "is not worth it." *Id*. at 470-72. To be sure, "some categorical disqualifications are permissible." *Skoien*, 614 F.3d at 641 (discussing *Stevens*, 559 U.S. at 470). "To be permissible, however, . . . categorical exclusions must satisfy 'some form of strong showing.'" *Williams*, 616 F.3d at 691 (quoting *Skoien*, 614 F.3d at 641).

Under this Court's cases, that "strong showing" requires Illinois to provide

supporting "data" and "evidence" showing that the categorical ban is substantially related to an important state objective. *Kanter*, 919 F.3d at 448; *Moore*, 702 F.3d at 940 (showing it is "vital to public safety"). In *Skoien*, that meant showing that domestic-abuse misdemeanants commit acts similar to violent felonies; that firearms are often an instrument of domestic abuse; and that "the recidivism rate is high" among domestic-abuse misdemeanants. 614 F.3d at 643-44. In *Kanter*, that meant showing nonviolent felons presented a high recidivism risk for future violent crime. 919 F.3d at 448. Past crimes, in sum, established a "presumption that [such individuals] fell outside the category of 'law-abiding, responsible citizens.'" *Kanter*, 919 F.3d at 446.

Here, the panel majority did not find that Illinois had made a similar showing justifying its categorical ban on public carry by Missourians and other nonresidents. The panel identified a state interest "in preventing the public carrying of firearms by individuals with mental illness and felony criminal records." Slip Op. at 15. This state interest is already one step removed from that identified in *Kanter*, which held a state can keep firearms away from criminals because doing so advanced a substantial interest in "preventing gun violence by keeping firearms away from" those "expected to misuse them." *Kanter*, 919 F.3d at 448. Importantly, bans on

firearm possession by nonviolent felons and domestic-violence misdemeanants drew dissents in *Kanter* and *Skoien*, questioning whether such statutes are reasonably tailored to the state's public-safety interests as applied. *Kanter*, 919 F.3d at 466 (Barrett, J., dissenting) (noting that § 922(g)(1) encompasses everything from "mail fraud," to "selling pigs without a license in Massachusetts" to "redeeming large quantities of out-of-state bottle deposits in Michigan"); *Skoien*, 614 F.3d at 645 (Sykes, J., dissenting).

By contrast, this Illinois statute is hardly tailored at all. It bans all Missourians and most nonresidents regardless of their criminal or mental health history. *Skoien* and *Kanter* teach that the panel majority should have at least required Illinois to make a "substantial showing" that Missourians and other nonresidents are particularly likely to have mental illness or felony criminal records. Neither Illinois nor the panel majority made that showing (or could have done so). To the contrary, the panel majority repeatedly emphasized Illinois's *lack* of information about Missourians and other nonresidents. *E.g.*, Slip Op. at 4, 7, 15 (describing an "information deficit," "shortfall," or "gap"). An "information deficit," of course, is the opposite of the strong showing necessary to establish a presumptive forfeiture of constitutional rights.

The Court views categorical bans skeptically precisely because they take away constitutional rights without any individualized consideration. Absent justification for a categorical ban, Illinois must provide some process for "case-by-case exclusions of persons who have been shown to be untrustworthy with weapons." *Skoien*, 614 F.3d at 641 (suggesting this alternative); *Kanter*, 919 F.3d at 451 (Barrett, J., dissenting) (explaining that if there is not "data sufficient to show that disarming all nonviolent felons substantially advances" state interests, a State may instead demonstrate an individual's "proclivity for violence").

The panel majority acknowledges that some individualized process might be required here. Panel Op. at 16. It even says that a sworn declaration or a cost-shifting mechanism would let Illinois close its information gap at the application stage. *Id.* But, it says, Illinois has no "practical way of monitoring the ongoing fitness" of licensed individuals. *Id*. That again puts the burden on the wrong party. *See also, e.g.*, *Culp v. Madigan*, 840 F.3d 400, 403 (7th Cir. 2016) (requiring Plaintiffs to "offer" a "solution"). And the panel does not explain why ongoing sworn declarations or cost-shifting are not equally viable solutions to this monitoring problem. Panel Op. at 16. Quarterly updates, for example, would advance Illinois's purported interests more than the quarterly checks of national databases

that Illinois uses for substantially similar States, which can take "over a year" to update. *See* Slip Op. at 31 (Manion, J., dissenting).

II. The panel opinion also conflicts with this Court's prior decision striking down Illinois's prior ban on public carry and requiring a "stronger showing" for such broad bans.

The panel opinion also conflicts with this Court's decision in *Moore*, which struck down a similar ban on public carry by Illinoisans only a few years ago. *Moore*, 702 F.3d at 933.

As of 2012, Illinois was the *only* state to maintain a "flat ban on carrying ready-to-use guns outside the home." *Id.* at 940. Justifying a flat denial of "the gun rights of the entire law-abiding adult population of Illinois," this Court said, requires a much "*stronger showing*" from the government than the narrower bans at issue in *Skoien* and *Kanter*. *Id.* (emphasis added). *Moore* specifically rejected the kind of speculative arguments relied on by the panel majority here:

> A blanket prohibition on carrying gun in public prevents a person from defending himself anywhere except inside his home; and so substantial a curtailment of the right of armed self-defense requires a greater showing of justification than merely that the public *might* benefit on balance from such a curtailment, though there is no proof it would.

Id.

The Court held that Illinois had not come close to satisfying its burden because

it had "lots of options" short of "eliminat[ing] all possibility of armed self-defense in public." *Id*. It could, for instance, "limit the right . . . to responsible persons rather than to ban public carriage altogether." *Id*. Or it could require all applicants to establish competence in handling firearms. *Id.* at 941. Even a law like New York's, which at the time "place[d] the burden on the applicant to show that he needs a handgun to ward off dangerous persons," was more narrowly tailored than Illinois's. *Id.* In sum, Illinois "failed to meet its burden" to show that "its uniquely sweeping ban is justified by an increase in public safety." *Id*. at 942.

Moore and this case are strikingly similar. Both statutes create a "sweeping ban" on public carry in Illinois by "the entire law-abiding adult population" of one or more states. *Id.* at 940, 942. Both statutes have only narrow exceptions. *Comp.* 430 ILCS 66/40(e) *with Moore*, 702 F.3d at 934. The effect of the current statute, of course, is not quite as broad as that in *Moore*. Missourians and other nonresidents, after all, can at least exercise their Second Amendment rights outside of Illinois. But Missourians and other nonresidents have Second Amendment rights even in Illinois, which they now have no avenue to exercise. U.S. Const., art. 4 § 2; *Supreme Ct. of Va. v. Friedman*, 487 U.S. 59, 64-65 (1988) ("'a State must accord residents and nonresidents equal treatment'" with "'respect to those 'privileges' and

'immunities' bearing on the vitality of the Nation as a single entity'") (citation omitted); *Att'y Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (criticizing "any classification which serves to penalize" the right to travel).

The panel opinion distinguished *Moore* because Illinois finds it administratively burdensome to determine whether non-residents have "substantial criminal and mental health histories" and to verify "ongoing compliance." Slip Op. at 2. But *Moore*'s holding had no caveat for administrative burdens. If it did, Illinois would have won that case because it did not—at the time—have a system in place to license public-carry or conduct "a daily check of all resident licensees." Slip. Op. at 6. At any rate, public safety—not administrative ease—is the relevant state interest.

As in *Moore*, Illinois's generalized reliance on "public safety" does not justify its "sweeping ban." *Compare* Slip Op. at 4 (describing *Moore*) *with* Slip Op. at 14 (attempting to distinguish *Moore*). Illinois has "lots of options" to "limit the right to carry a gun to responsible persons rather than to ban public carriage altogether." *Moore*, 702 F.3d at 940. One option is reciprocity. For example, thirty-six states recognize a Missouri concealed carry permit; Illinois is one of the few exceptions. *See* "Concealed Carry Reciprocity," http://ago.mo.gov/criminal-division/public-

safety/concealed-carry- reciprocity (last accessed May 1, 2019). Indeed, Illinois treats a Missouri CCL as a sufficient predictor of law-abidingness for transporting a firearm on Illinois roads, *see* 430 ILCS 66/40(e), but pleads an "information shortfall" once a Missouri driver gets out of his or her car, Slip Op. at 7.

Another option is to place the burden of proof on the applicant. Illinois could have required applicants to produce information about their criminal and mental health history, Slip. Op. at 16, and update this information regularly. Or it could have used the FBI's National Instant Criminal Background Check System (NICS), which would comprehensively report any criminal history suggesting a violation of state or federal law.

The panel insists Illinois's "standards" are "identical for residents and nonresidents alike." Slip Op. at 5. That is much like "the trick the emperor Nero was said to engage in: posting edicts up on the pillars, so that they could not easily be read." Antonin Scalia, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (1997). Imposing identical standards, where one group of people has no opportunity whatsoever to satisfy those standards, is not equal treatment.

CONCLUSION

The Court should grant the Petition for Rehearing *en banc*.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a copy of the foregoing was served on all counsel of record through CM/ECF on May 3, 2019.

In addition, I certify that this brief contains 2,583 words in compliance with F.R.A.P. 29(b)(4) and complies with the other requirements of Rule 29 and the type-volume limitations in F.R.A.P. 32 because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Tomes New Roman font.

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