No. 127201

In the
Supreme Court of Illinois

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

v.

VIVIAN CLAUDINE BROWN,

Defendant-Appellee.

Appeal from the Circuit Court of the Second Judicial Circuit,
White County, Illinois
No. 17 CM 60
The Honorable **T. Scott Webb**, Judge Presiding

RESPONSE BRIEF OF DEFENDANT-APPELLEE

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E-FILED
11/18/2021 8:51 PM
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INTRODUCTION

Though the scope of the Second Amendment has been the subject of much litigation since the Supreme Court's ruling in *District of Columbia v. Heller*, 554 U.S. 570 (2008), one thing that cannot be challenged is that law-abiding persons have a fundamental Second Amendment right to keep and bear arms in their homes for self-defense.

Vivian Brown was arrested for having a common .22 bolt-action rifle in her bedroom for self-defense without possessing a FOID card. The State claims, without evidence, that intruding into the sanctity of Brown's home, and hampering her ability to exercise her Second Amendment right to self-defense with a long gun, somehow increases public safety, but the law does nothing of the sort. In fact, the statute potentially harms Brown, leaving her without the means to armed self-defense while simultaneously turning her into a criminal.

Brown abhors gun crimes as much as any law-abiding person, and indeed is only looking to prevent it within her home, but the State's claimed justifications for the infringements cannot validate a statute that, as applied to Brown, does not serve a governmental interest and criminalizes her efforts to protect her home and exercise her core fundamental Second Amendment rights. The circuit court should be affirmed.

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ISSUES PRESENTED

Was the circuit court correct in ruling that requiring Defendant Vivian Brown, who was eligible to possess a FOID card and who wanted to possess a long gun in her home for self-defense, to obtain a FOID card with the payment of a fee and submission of a photograph violated Brown's rights under the Second Amendment to the United States Constitution?

STANDARD OF REVIEW

Brown assents to the State's recitation of the standard of review.

JURISDICTION

Brown assents to the State's statement regarding jurisdiction.

STATUTES INVOLVED

Brown agrees that the statutory provisions of the FOID Card Act (430 ILCS 65/1, *et seq.*) cited by the State have been recited correctly.

STATEMENT OF FACTS[1]

1. On March 18, 2017, Vivian Claudine Brown, a person who is at least 21 years of age, resided in Carmi, White County, Illinois, and occupied a residence therein as her home (C.20).

2. On March 18, 2017, Brown did not have a Firearm Owner's Identification Card ("FOID card") issued pursuant to the FOID Card Act, nor had she ever had a FOID card revoked (C.20).

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[1] Brown will cite to materials in the State's Appendix as "A.," and materials in the Common Law Record as "C."

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3. On March 18, 2017, Brown did not have any criminal record and was otherwise eligible to have and possess a firearm and be issued a FOID card pursuant to the FOID Card Act (C.17).

4. On March 18, 2017, at approximately 1:47 P.M., the White County Sheriff's Department ("Sheriff's Department") received a call from Brown's husband, Scott Brown, who alleged that Brown was shooting a gun inside her Carmi, White County residence (C.21).

5. When the Sheriff's Department personnel arrived at Brown's home, they found a single shot, bolt action, .22 caliber Remington rifle beside Brown's bed which she had for protection. After conducting an investigation, the Sheriff's Department found no evidence that the rifle (or any other gun) had been fired in the residence. Further, Brown denied firing a gun and other occupants of the residence denied hearing a gunshot (C.21).

6. The Sheriff's Department made a report of the incident and forwarded it to the White County State's Attorney (C.21).

Procedural History

7. The White County State's Attorney filed a criminal Information charging Brown with Possession of Firearm without Requisite Firearm Owner's I.D. Card, a class A misdemeanor, in violation of 430 ILCS 65/2(a)(1). The specific charge reads as follows:

> That on March 18th, 2017, in White County, Vivian Claudine Brown, committed the offense of Possession of Firearm without Requisite Firearm Owner's I.D. Card in that said defendant, knowingly possessed a firearm,

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> within the State of Illinois, without having in her possession a Firearm Owner's identification card previously issued in her name by the Department of State Police under the provisions of the Firearm Owners Identification Card Act in violation of 430 ILCS 65/2(a)(1).

C.11.

8. On February 14, 2018, the circuit court held the requirements of 430 ILCS 65/4(a)(1) (license application requirement), 430 ILCS 65/4(a-20) (photograph requirement), and 430 ILCS 65/5 (licensing fee requirement), as applied to Brown, violated her rights to self-defense with a firearm under the Second Amendment to the United States Constitution and Article I, § 22 of the Illinois Constitution (C.28).

9. The State intervened and on March 19, 2018, filed a Motion to Reconsider the finding that the challenged statutes violated the Second Amendment (C.36).

10. On October 16, 2018, the circuit court denied the State's Motion to Reconsider. In its Order, the circuit court stated additional reasons why the statutes violated Brown's rights under both the federal and State Constitutions (C.69).

11. On November 5, 2018, the State appealed directly to this Court as per Sup. Ct. Rule 302(a) (C.73).

12. This Court concluded the lower court's ruling that "section 2(a)(1) of the FOID Card Act is unconstitutional as applied was not necessary to its resolution of this case" and vacated the circuit court's judgment. *People*

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v. Brown, 2020 IL 124100, ¶ 36. This Court ordered "that the October 16, 2018, judgment order dismissing defendant's information be vacated and then modified to exclude the ruling that section 2(a)(1) is unconstitutional. The modified order is thereupon to be reentered." *Id.* at ¶ 36. Justice Karmeier, joined by Justice Theis, dissented.

13. On remand, the circuit court entered a modified order dismissing the information against Brown "on [its] statutory analysis of impossibility of compliance." C113.

14. On June 15, 2020, Brown filed a motion to reconsider, arguing that the "trial court's Modified Order herein is legally erroneous, and forces the defendant to take a position not of her own choosing, one that she will lose on appeal and one which will unnecessarily delay (perhaps by years) the ultimate disposition of this case." C142, 146.

15. On June 4, 2020 (as modified on June 15, 2020), the circuit court vacated the modified order, and reinstated the information. C150.

16. On June 19, 2020, Brown renewed her motion alleging that the FOID Card Act is unconstitutional, arguing that:

> The FOID card Act requires individuals to pay a fee and obtain a license to enjoy a right that is protected by the Constitution, even in the individual's own home. Even if the fee is nominal (*i.e.*, $10.00) the entire process suppresses a fundamental right that is recognized to be enjoyed in the most private of areas, such as the home. No other fundamental right as guaranteed by the Bill of Rights requires a fee and/or a license to exercise.

C.166, 169.

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17. On April 26, 2001, the circuit court declared 430 ILCS 65/2(a)(1) and 430 ILCS 65/5 unconstitutional as applied to Brown. A.7; C.202. Specifically, the court reasoned, the "FOID Card Act is NOT substantially related to an important government interest as applied to the Defendant in this case." *Id.* Moreover, the court held, "*any* fee associated with exercising the core fundamental Constitutional right of armed self-defense within the confines of one's home violates the Second Amendment." C217-18 (emphasis in original).

18. On April 28, 2020, the State timely appealed directly to this Court as per Sup. Ct. Rule 302(a) A.4; C.219.

ARGUMENT

The circuit court was correct that the FOID card requirement impermissibly infringes on Brown's Second Amendment rights to bear long arms in her own home for self-defense.

A. The FOID licensing scheme and resulting fees, as applied to Brown, infringe upon core protected Second Amendment activity.

The Second Amendment to the United States Constitution provides as follows:

> 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.

The Second Amendment protects the right to keep and bear arms for the purpose of self-defense and is fully applicable against the States. *McDonald v. City of Chicago*, 561 U.S. 742, 749 (2010).

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McDonald, quoting *Heller*, stated as follows:

> Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is 'the central component' of the Second Amendment right . . . (stating that the 'inherent right of self-defense of self, family, and property is most acute' in the home. . .).

McDonald, 561 U.S. at 767.

In *Heller*, the Supreme Court held:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government--even the Third Branch of Government--the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.

Heller, 554 U.S. at 634-35.

Indeed, the *Heller* Court stated that the Second Amendment itself "is the very product of an interest balancing by the people . . . [a]nd whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635.

"*Heller* established that the scope of the Second Amendment right—and thus the constitutionality of gun bans and regulations—is determined by reference to text, history, and tradition." *Heller v. District of Columbia*

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(*Heller II*), 670 F.3d 1244, 1272-73 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

"A requirement of newer vintage is not, however, presumed to be valid." *Heller II*, 670 F.3d at 1253. *Heller II* noted that only registration of handguns was longstanding. *Id.* at 1253. Registration requirements for long guns are novel, not historic. *Id.* at 1255. And the *Heller II* Court found that requirements that amount to registering the gun owner as opposed to the gun are novel, not historic and long-standing. *Id.* Whether an interest-balancing means-end scrutiny analysis is used or not, the FOID licensing regime is not grounded in text, history, and tradition, and therefore is "not consistent with the Second Amendment individual right." *Id.* at 1285.

While the State argues that a FOID card challenge fails at the first step, clearly the requirements of the FOID Card Act, as they restrict the core fundamental right as stated in *Heller*, infringe on Second Amendment activity:

> The requirements that are not longstanding, which include, . . . all the requirements as applied to long guns, also affect the Second Amendment right because they are not *de minimis*. All of these requirements, . . . , make it considerably more difficult for a person lawfully to acquire and keep a firearm, including a handgun, for the purpose of self-defense in the home — the "core lawful purpose" protected by the Second Amendment.

Heller II, 670 F.3d at 1255 (citing *Heller*, 554 U.S. at 630).

This Court held in *Wilson v. Cook County*, 2012 IL 112026 (2012):

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> The threshold question we must consider is whether the challenged law imposes a burden on conduct falling within the scope of the second amendment guarantee. That inquiry involves a textual and historical inquiry to determine whether the conduct was understood to be within the scope of the right at the time of ratification. *Heller*, 554 U.S. at 634-35; *McDonald*, 561 U.S. at ___, 130 S. Ct. at 3047. If the government can establish that the challenged law regulates activity falling outside the scope of the second amendment right, then the regulated activity is categorically unprotected. *Ezell*, 651 F.3d at 702-03.
>
> However, "if the historical evidence is inconclusive or suggests that the regulated activity is not categorically unprotected—then there must be a second inquiry into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights."

Wilson, 2012 IL 112026 at PP41-42; *See also Ezell v. City of Chicago*, 846 F.3d 888, 892 (7th Cir. 2017) (*Ezell II*).

As shown in the *amicus* brief from the Professors of Second Amendment Law, Firearms Policy Coalition, Firearms Policy Foundation, and Independence Institute, at the time of the framing, every ratifying state required males of militia age, typically from 16 to 60, to keep firearms and ammunition. *See* David Kopel & Joseph Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. ILL. U. L.J. 495, 533–89 (2019); *see also* Professors' *amicus* brief at p.7. In contrast, there were *almost no* laws requiring one to first possess a license in order to have a long gun in her home, and the few that did were expressly racist in nature, such as Virginia's 1723 statute which required "all negros, mullattos, or indians" on plantations

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to get a license in order to possess a firearm. Professors' *amicus* brief at p.11. In fact, those few laws were so racially oppressive they led to the Second Freedman's Bureau Act of 1866, the Civil Rights Act of 1866, and the Fourteenth Amendment itself. Professors' *amicus* brief at p.16.

This is why the best the State can muster is old statutes which allowed for the confiscation of guns upon commission of certain wrongdoings, such as "failure to swear a loyalty oath to the government" and "improper storage of firearms." Appellant's Brief at pp.9-10. However, *none* of this has to do with the concept of a licensing requirement for home possession of long guns for self-defense. This case is not about firearm registration, firearm purchases, concealed firearms, or handguns. The latter two are why the State's citation to *Berron v. Ill. Concealed Carry Licensing Review Bd.*, 825 F.3d 843 (7th Cir. 2016) is misplaced. The State's other citations are just as ill-fitting, as further discussed in the *Amicus* Brief of Guns Save Life.

The State even recognizes that licensing schemes were not widely employed before the twentieth century (the FOID Act itself was enacted only in 1967). Appellant's Brief at p.11. Instead, the State draws inapt comparisons to irrelevant topics, such as the public carriage of a handgun by someone under 21 years of age in *People v. Henderson*, 2013 IL App (1st) 113294, PP 16, 29-30, for which there are at least three reasons why the case has no applicability here.

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Further, this Court recently held that the step one inquiry is to be all-but-bypassed, and ruled that

> we agree with the approach taken by other courts that assume some level of scrutiny must apply to *Heller*'s 'presumptively lawful' regulations." . . . Accordingly, our analysis moves to the second step."

People v. Chairez, 2018 IL 121417, P30 (internal citations omitted).

The State cites to *Commonwealth v. McGowan*, 982 N.E.2d 495, 501 (Mass. 2013), but the State's citation leaves out the most important part, and therefore misleads this Court. *McGowan* involved a firearm storage requirement not at issue in this case, and the *McGowan* court stated: "We have consistently held, **without applying any level of heightened scrutiny**, that the decisions in *Heller* and *McDonald* did not invalidate laws that require a person to have a firearm identification card to possess a firearm in one's home or place of business, and to have a license to carry in order to possess a firearm elsewhere." *McGowan*, 982 N.E.2d at 501. Because *McGowan* freely admits that the Massachusetts precedents did not apply the now-required heightened scrutiny in its analyses of licensing issues, *McGowan* is worthless to this Court.

Therefore, not only is there no reason to depart from the approach as held in *Chairez*, here the infringed-upon right is even closer to the core of the Second Amendment right as discussed in *Heller*; in fact, it *is* the core right itself. The State cites to the one other state with such a regulation and a smattering of unrelated regulations in an attempt to prove the contrary, but

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the circuit court was correct when it held that "based upon the lack of textual and historical evidence that unlicensed, law-abiding citizens within the private confines of their own home represented a group of people that the government sought to disarm at the time of the ratification of the 14th Amendment to the Constitution, the Court finds that Defendant is among those protected by the Second Amendment." (C.233)

B. The FOID licensing scheme and resulting fees, as applied to Brown, fails to meet the required heightened scrutiny.

1. Strict or near-strict scrutiny applies.

Moving forward, the Court looks at step two of the analysis described in *Wilson*, 2012 IL 112026, P41, namely, applying "the appropriate level of heightened means-ends scrutiny and consider[ing] the strength of the government's justification for restricting or regulating the exercise of second amendment rights. *Id.* (citing *Ezell v. City of Chicago*, 651 F.3d 684, 701-04 (7th Cir. 2011)). *See also Chairez*, 2018 IL 121417, P21.

> Since *Heller*, many courts that have considered limits on possessing or carrying firearms have applied intermediate scrutiny to those regulations. *See*, *e.g.*, *Skoien*, 614 F.3d 638; *Kanter*, 919 F.3d at 447; *United States v. Redwood*, 2016 U.S. Dist. LEXIS 109735, 2016 WL 4398082, at *4 (N.D. Ill. Aug. 18, 2016); *see also Masciandaro*, 638 F.3d at 471; *GeorgiaCarry.org, Inc.*, 212 F. Supp. 3d at 1368. But the Seventh Circuit has made clear that this level of scrutiny is not fixed or static, but a sliding scale. *Illinois Ass'n of Firearms Retailers*, 961 F. Supp. 2d at 934. In determining how closely to examine the fit between a regulation and its purported goal—the government's chosen means and the ends it pursues—courts should consider whose rights the regulation affects and how severely the regulation burdens rights within or close to the core of the Second Amendment. **The more law-abiding**

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> **people it affects or the heavier the burden on a right close to the core, the stricter the scrutiny the regulation receives.**

Solomon v. Cook County Bd. of Comm'rs, 2021 U.S. Dist. LEXIS 173175, *53-54 (N.D. Ill. 2021) (emphasis added). *See also Ezell II*, 846 F.3d at 892 ("Severe burdens on the core right of armed defense require a very strong public-interest justification and a close means-end fit").

In *Heller II*, the D.C. Circuit applied intermediate scrutiny because it found "one of the District's registration requirements prevents an individual from possessing a firearm in his home or elsewhere, whether for self-defense or hunting, or any other lawful purpose." *Heller II*, 670 F.3d. at 1258. This case is the complete opposite. It *specifically* prevents Brown from possessing a firearm in her home for lawful purposes. Strict scrutiny, or at least the near-strict scrutiny applied in *Ezell*, 651 F.3d at 708, should apply.

2. The restrictions at issue fail to meet heightened scrutiny.

The State "cannot defend its regulatory scheme 'with shoddy data or reasoning. The [State]'s evidence must fairly support the [State]'s rationale for its ordinance.'" *Ezell II,* 846 F.3d at 896 (quoting *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002)). "'[T]here must be evidence' to support the [State]'s rationale for the challenged regulations; 'lawyers' talk is insufficient.'" *Ezell II,* 846 F.3d at 896 (quoting *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 463 (7th Cir. 2009)). Sheer speculation is "not nearly enough to satisfy its burden." *Ezell II,* 846 F.3d at 896. *See also Chairez*, 2018 IL 121417, P53.

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Even though "public safety" will always qualify as an important, if not compelling governmental interest, "[t]he State, however, cannot simply invoke these interests in a general manner and expect to satisfy its burden." *Chairez*, 2018 IL 121417, P52.

Just as in *Chairez, Heller II*, and *Ezell I & II*, the State has not shown any sort of "close fit" or "tight fit" or "substantial relationship" between the requirements and the purported interest of keeping firearms from felons and the mentally ill. Federal law already prohibits both (18 U.S.C. § 922(g)(1), (4))[2], and a law-abiding person keeping a long gun in her home for self-defense is not a danger to the public at all. It is far less intrusive to punish actual criminals than to create them through regulations, especially if they infringe on a fundamental right. The State claims it needs to know who Brown is, but if her long gun never leaves her home, and she is not disqualified from possessing said long gun, there is nothing for the State to "determine."

Moving the discussion from the State's speculation to the practical, the Madison County State's Attorney succinctly points out in the Brief of *Amicus Curiae* Madison County: "the FOID requirement is unhelpful to the core public safety interest regarding firearms: preventing lawless gun violence. In

[2] The National Instant Criminal Background Check System (NICS) lists individuals who are federally prohibited from being in possession of firearms, and Illinois can update the NICS system with individuals prohibited under state law. The NICS system is the database used to conduct background checks for firearm sales in the rest of the United States. With the Nlets national criminal background system,

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our office's experience, after a full survey of the previous five years of FOID prosecutions, FOID violations are few in number overall and make relatively little impact in combatting violent crime." Madison County *amicus* brief at p.1. Of course, a fuller explanation ensues in the remainder of its brief.

This Court should thus adopt of the reasoning of the *Heller II* Court as to this issue, when it stated:

> For example, the Committee Report asserts "studies show" that "laws restricting multiple purchases or sales of firearms are designed to reduce the number of guns entering the illegal market and to stem the flow of firearms between states," and that "handguns sold in multiple sales to the same individual purchaser are frequently used in crime." *Id.* at 10. The Report neither identifies the studies relied upon nor claims those studies showed the laws achieved their purpose, nor in any other way attempts to justify requiring a person who registered a pistol to wait 30 days to register another one. The record does include testimony that offers cursory rationales for some other requirements, such as safety training and demonstrating knowledge of gun laws, *see*, *e.g.*, Testimony of Cathy L. Lanier, Chief of Police, at 2 (Oct. 1, 2008), but the District fails to present any data or other evidence to substantiate its claim that these requirements can reasonably be expected to promote either of the important governmental interests it has invoked (perhaps because it was relying upon the asserted interests we have discounted as circular).

Heller II, 670 F.3d at 1258-1259.

The FOID law was enacted in 1967, not long-standing at all, and the Professors' *amicus* brief discusses in depth how the studies upon which the State relies are all based on purchase laws and laws affecting handguns,

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NICS is used across the Nation to determine if someone is legally prohibited from possessing firearms.

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which have nothing to do with this case. Further, the State has not shown any actual benefit from the FOID law, which of course *is* the issue. Professors' *amicus* brief at p.33-34.

By offering nothing to support its supposed connection between requiring law abiding persons wishing to possess a long gun in their homes for self-defense to also possess a FOID card and the claimed governmental interest, rather just asking this Court to assume it is true, the State has failed to meet its burden under any heightened level of scrutiny. *See*, *e.g.,* *Chairez*, 2018 IL 121417, P.54 ("The lack of a valid explanation for how the law actually achieves its goal of protecting children and vulnerable populations from gun violence amounts to a failure by the State to justify the restriction on gun possession within 1000 feet of a public park").

The State cites to *Heller v. District of Columbia*, 801 F.3d 264 (D.C. Cir. 2015) (*Heller III*), but the regulations there were upheld because the plaintiff presented evidence to support them. *Id.* at 277. Here, as to the FOID requirement as applied to Brown, and just like all the restrictions in *Heller III* that were rejected (*Id.* at 277-280), there is no such evidence.

The infringements in this case are more egregious because the Supreme Court has repeatedly emphasized the importance of the sanctity of one's home. *See*, *e.g.*, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home -- that right takes on an added dimension."); *see also*

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Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (Goldberg, J., concurring) (“"Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life”); *See also Payton v. New York*, 445 U.S. 573, 585 (1980) (Fourth Amendment “appl[ies] to all invasions on the part of the government and its employes [sic] of the sanctity of a man’s home and the privacies of life.”)

The General Assembly has even acknowledged the overriding sanctity of the home, and has carved out a justification for one to use force “to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other’s unlawful entry into or attack upon a dwelling.” 720 ILCS 5/7-2(a). Further, the crime of Home Invasion is a class X felony (720 ILCS 5/19-6) and Criminal Trespass to a Residence is a class 4 felony when the person entering knows or has reason to know that someone is inside the residence (720 ILCS 5/19-4(b)(2)).

There is another reason why the State’s citation to *Heller III* is misplaced, as there the court, in considering various firearm registration requirements, held that “‘administrative ... provisions incidental to the underlying regime’ — which include reasonable fees associated with registration — are lawful insofar as the underlying regime is lawful.” *Id.* at 278 (citing *Heller II*, 670 F.3d at 1249, n.2. As described herein, the regime as applied to Brown is not lawful, so any associated fee is *per se* unreasonable.

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Further, "[a] state may not impose a charge for the enjoyment of a right granted by the Federal Constitution." *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943). This is also the law in Illinois: "[A] person cannot be compelled 'to purchase, through a license fee or a license tax, the privilege freely granted by the constitution.'" *Murdock*, 319 U.S. at 114 (quoting *Blue Island v. Kozul*, 379 Ill. 511, 519 (1942)).

The State cites to *National Awareness Found. v. Abrams*, 50 F. 3d 1159, 1165-67 (2d Cir. 1995), a First Amendment analogue involving a fee for professional fundraising telephone solicitors. It is well-established that commercial speech is judged by a standard more lenient to the government that other speech, such as political speech. *See*, *e.g.*, *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980)). Similarly, *Heller* listed regulations on the commercial sale of arms as presumptively lawful, while possession of a firearm for self-defense in the home is at the core of the right. Therefore, the State is mixing apples and oranges, and the case is inapposite.

Further, the State confuses the issue by selectively quoting the Bill of Rights (Appellant's Brief at p.20). While the First Amendment of course begins "Congress shall make no law," (U.S. Const., Amend. I) the Second Amendment states that "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const., Amend. II. But one hundred years of First Amendment jurisprudence, and the much-more-sparse historical

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jurisprudence regarding the Second Amendment, show the folly of simply looking at the text as if that was be-all, end-all. Both rights can be regulated within constitutional limits – the issue is that the criminal statute in this case goes beyond those limits. "[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 554 U.S. at 636.

A government entity "may enact regulations in the interest of public safety, health, welfare or convenience, within the limits permitted by law, but in every case this power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the freedom protected by the United States constitution and by the constitution of the State of Illinois." *Kozul*, 319 Ill. at 520. The power to tax is the power to control or suppress. *See Murdock*, 319 U.S. at 112.

By way of comparison, in *Tee & Bee v. City of W. Allis*, 936 F. Supp. 1479 (E.D. Wis., 1996), the town's licensing and permitting requirements for adult businesses served the purpose of ensuring that said business complied generally with the City's adult use ordinance. *Id.* at 1487. Here, there is no allegation that Brown has committed any crime, ever, much less of violence with a firearm (except the false allegation by her husband), so the infringement at issue does not serve to ensure compliance with anything except itself.

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Thus, Brown, who was merely exercising her right to keep a long gun in her own home for self-defense, cannot be made to purchase a card or obtain a license to exercise this fundamental right guaranteed by the Constitution.

At least 19 professionally conducted national surveys have specifically asked respondents whether they had used a gun for self-protection. Despite wide variation in the details of the surveys, all indicated huge numbers of defensive gun uses each year, ranging from 800,000 to 3.6 million (Kleck, Gary, *The Frequency of Defensive Gun Use*, Chapter 6 in Armed, edited by Gary Kleck and Don B. Kates. NY: Prometheus Books., pp. 214-229 (2001)). The most technically sound of the surveys indicated there were 2.5 million defensive gun uses in 1992 (Kleck, Gary and Gertz, Marc, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, J. of Criminal Law and Criminology, v.86, n.1, pp.150-187 (1995)).

That survey indicated that 36% of the defensive uses were carried out near but not in the defender's home and another 27% were carried out in locations that were neither near nor in the defender's home (*Id.* at 185). This leaves 37% of the defensive gun uses to have occurred in the defender’s home. Thus, anywhere from 296,000 to 1,332,000 defensive uses in 1992 occurred in the defender’s home, and anywhere from 288,000 to 1,296,000 defensive uses in 1992 occurred near the defender’s home.

Since crime rates are only about half as high today as in 1992, the number of defensive gun uses is probably likewise about half what it was

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back then - perhaps about 1.25 million. Nevertheless, the number of defensive uses is still enormous. As a point of reference, in 2014 about 466,110 crimes were committed with firearms, including both crimes reported to the police and crimes not reported (U.S. Bureau of Justice Statistics. 2016. *Criminal Victimization, 2014*. Revised September 29, 2015. Available online at http://www.bis.gov/content/pub/pdf/cvl 4.pdf, p.3). Defensive uses of guns by crime victims therefore appears to be about three times more common than crimes committed by offenders using guns.

Further, when people defend themselves with firearms, they are less likely to be injured or lose property than crime victims in otherwise similar circumstances who use other defensive strategies or who do not resist. Any position to the contrary is inconsistent with the best available research evidence.

Defensive gun use (DGU) is effective as well as frequent. The best available evidence on the effect of DGU on whether the victim is injured or loses property was generated in a series of analyses of data generated by the U.S. Census Bureau's National Crime Victimization Survey, which provides detailed information on self-protective actions about the largest available, nationally representative sample of crime victimization incidents that Gary Kleck conducted with a series of colleagues (Kleck, Gary. *Crime Control Through the Private Use of Armed Force*, Social Problems 35(l):1-21 (1988); Kleck, Gary, and Susan Sayles, *Rape and Resistance*, Social Problems

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37(2):149-162 (1990); Kleck, Gary, and Miriam DeLone, *Victim Resistance and Offender Weapon Effects In Robbery*, Journal of Quantitative Criminology 9(1):55-82 (1993); Tark, Jongyeon, and Gary Kleck. *Resisting Crime: The Effects of Victim Action on the Outcomes of Crimes.* Criminology, 42(4):861-909 (2004).

These studies uniformly indicate that crime victims who use guns in self-protection are less likely to be injured or lose property than otherwise similar crime victims who either used other self-defense strategies or did not resist at all. On the rare occasions that gun-using victims were injured, the injuries were inflicted on the victims before the victims used their guns defensively. Further, victims who defended themselves with guns tended to do so in more desperate circumstances, *i.e.* circumstances more threatening to the victim, than those who adopted other self-protection strategies. Gun users were more likely to be outnumbered, to be facing offenders with weapons, and to have already been injured before wielding the gun in self-defense. It is therefore all the more impressive that gun defenders managed to come out of the crimes with so little harm. As one measure of success in avoiding harm, the Tark and Kleck (2004) analysis found that only 2.4% of crime victims who used guns suffered any kind of injury after the defensive gun use, and less than 1% suffered any injury more serious than cuts and bruises (p. 878).

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Thus, there is substantial public benefit in allowing law-abiding citizens to possess firearms for self-defense purposes, a benefit that is all but eliminated without the State's imposition of a license and a fee. Without capitulating to those requirements, Brown is denied the right guaranteed in *Heller* to possess a long gun in her home for self-defense purposes.

The State's citations are not on point, and are relevant only to issues not presented in this case. For example, *People v. Mosley*, 2015 IL 115872 (2015), is not as the State represents. The *Mosley* Court did *not* find the FOID card requirement outside the scope of the Second Amendment, and thus failing at the first step of the two-part *Wilson* inquiry; rather, it was the restriction on "the possession of handguns by minors." *Mosley*, 2015 IL 115872 at P36. This is further explained by that Court's conclusion that "under the *Wilson* approach, neither subsection (a)(3)(C), nor subsection (a)(3)(I) violates the second amendment rights of defendant or other 18- to 20-year-old persons." *Mosley*, 2015 IL 115872 at P38. Further, *Mosley* was a public possession case involving the State's AUUW statute (720 ILCS 5/24-1.6), and did not involve long gun possession by law-abiding persons for self-defense in one's home.

People v. Taylor, 2013 IL App (1st) 110166 (1st Dist. 2013) also involved the AUUW statute requiring a FOID card to carry a firearm in public (720 ILCS 5/24-1.6(a)(1), (a)(3)(C), which is *not* the issue in this case.

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There is simply no issue of public safety when the firearm is never taken in public.

The cases outside Illinois which the State cites are likewise no help to its argument, and non-binding on this Court in any event. Though the State cites numerous cases involving licensing in other jurisdictions, in *Kwong v. Bloomberg*, 723 F.3d 160, 166 (2d Cir. 2013), the Second Circuit held that evidence presented to the District Court demonstrated that the $340 licensing fee was designed to defray (and did not exceed) the administrative costs associated with the licensing scheme. Here, the information the State provided regarding the fee demonstrates that, at best, 30% of it of goes towards FOID issues (the State Police Firearm Services Fund involves things other than the FOID system, *see* 20 ILCS 2605/2605-595).[3] Further, in *Murdock*, the Supreme Court struck down a license tax that was "not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question." 319 U.S. at 113-14.

Nor is this case about handguns, as was *Heller II*. 670 F.3d 1254. While *Heller II* discussed the history of registering handguns, it did not find the same long-standing tradition as to registering long guns, which is why it only found the handgun registration requirement constitutional. *Id.* at 1255. Similarly, in *Matter of Delgado v. Kelly*, 127 A.D.3d 644 (N.Y. App. Div. 2015), a home handgun/pistol licensing scheme was declared constitutional,

[3] Effective January 1, 2022, that increases to 50%.

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but that issue is not presented in this case. This is why the Anestis study (Appellant's Brief at p.26) cited by the State should be disregarded as irrelevant; the study specifically involves handgun use. Further, the Webster and Johns Hopkins studies (*Id.*), both of which discuss the purchasing of firearms, have nothing to do with this case.

McGowan, discussed more fully *infra*, referenced the licensing of firearm possession, but made clear from the facts of the case, plus other language explaining its rationale, that it was primarily discussing handguns. 982 N.E.2d at 501 ("'the basic requirement to register a handgun is longstanding in American law' and is presumptively lawful." (quoting *Heller II*, 670 F.3d at 1254)).

United States v. Skoien, 614 F.3d 938 (7th Cir. 2010) is also no help to the State. In *Skoien*, the defendant was convicted of possessing a firearm while being a convicted domestic abuser under 18 U.S.C. § 922(g)(9). He attempted to argue that domestic violence misdemeanants who had been law-abiding for a longtime should be able to have their right to possess firearms restored. However, the defendant had not been law-abiding for a long time; he had twice been convicted of domestic violence and illegally possessed firearms while on probation. *Id.* at 645. In noting that the defendant was not situated to make as an-applied challenge, the Court stated: "Whether a misdemeanant who has been law abiding for an extended period must be allowed to carry guns again, even if he cannot satisfy § 921(a)(33)(B)(ii), is a

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question not presented today." *Id.* Therefore, when the cases cited by the State are reviewed, they do not support the State's position.

The National Research Council (NRC) of the National Academies of Science reviewed the body of firearms literature, and concluded that the studies: (i) utterly failed to establish that gun ownership increased the risk of violence to the owner, (ii) were incapable of throwing light on "the impact of firearms on homicide or the utility of firearms for self-defense," and (iii) made conclusions "that owning firearms for personal protection is 'counterproductive' and that 'people should be strongly discouraged from keeping guns in the home' " that were simply "not tenable." FIREARMS AND VIOLENCE: A CRITICAL REVIEW 118-19 (Charles F. Wellford *et al.* eds., 2005) (citation omitted).

The Centers for Disease Control ("CDC") likewise found that the research was flawed and "inconsistent" and as a result there was "insufficient evidence" to conclude that firearms injury can be reduced either by "[b]ans on specified firearms or ammunition" or by requiring gun owners "to store . . . firearms locked . . . [or] unloaded" in the home. *See* Robert Hahn *et al.*, *First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Early Childhood Home Visitation and Firearms Laws*, 52 MORBIDITY & MORTALITY WEEKLY REP. 15, 17-18 (Oct. 3, 2003), available at www.cdc.gov/mmwr/PDF/rr/rr5214.pdf; Robert Hahn *et al.*, *Firearms Laws*

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and the Reduction of Violence: A Systematic Review, 28 AM. J. PREV. MED. 40, 49, 56 (2005).

Armed civilians, even though they greatly outnumber police officers, make far fewer mistakes with their firearms than do the police. Each year there are approximately thirty instances in which a civilian mistakenly shoots and kills an innocent individual who was not actually a burglar, mugger, or similar assailant—but "[o]ver the same period the police erroneously kill five to eleven times more innocent people." *See* Joyce Lee Malcolm, *Guns and Violence: The English Experience* 239 & n.71 (2002). Further, armed civilians are an asset to public safety: "Regardless of which counts of homicides by police are used, the results indicate that civilians legally kill far more felons than police officers do." *See* Gary Kleck, *Keeping, Carrying, and Shooting Guns for Self Protection*, in DON B. KATES, JR. & GARY KLECK, THE GREAT AMERICAN GUN DEBATE: ESSAYS ON FIREARMS & VIOLENCE 199 (1997).

However, in wrongfully continuing the theme that those who possess firearms must be dangerous criminals, regardless of how law-abiding, the State cites to *United States v. Yancey*, 621 F.3d 681, 683 (7th Cir. 2010) so that the State can smear Brown and insinuate that she is a "felon[ ], fugitive[ ], unlawful drug user[ ], and [ ] mentally ill," or simply "presumptively risky." Brown is a law-abiding FOID-eligible person who wishes to be able to exercise her right to possess a long gun in her home for self-defense purposes.

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A law-abiding person with a long gun that cannot be concealed, which is kept only in the home for lawful purposes, is not a dangerous criminal, and turning that person into a criminal does not further any public safety interest. The State has failed to meet its burden.

CONCLUSION

The FOID Card Act requires individuals to pay a fee and obtain a license to enjoy a right that is protected by the Constitution, even in one's own home. Even if the fee may be considered nominal, which is of course in the eye of the payor, the entire process suppresses a fundamental right that is recognized to be enjoyed in the most private of areas, such as the home. No other fundamental right as guaranteed by the Bill of Rights requires a fee and/or a license to exercise in one's home.

Further, the FOID regime puts law-abiding people at risk of injury and death. Because the Illinois State Police may take up to 30 days to process an application (430 ILCS 65/5(a))[4], people who find themselves in danger in their homes, whether from home-invading criminals or violent ex-domestic partners, in those times when a self-defense situation is called for, they will be unable to exercise their fundamental Second Amendment right, all for want of a license. *See* Guns Save Life *amicus* brief at pp.14 for a discussion of how the FOID card requirements actually endanger public safety. This is not

[4] It is well known the State has failed to meet its obligation. *See Marszalek v. Kelly*, 1:20 CV 4270 (N.D. Ill.) (pending case alleging Second Amendment violations in the State failing to process FOID applications within the statutorily-required 30 days).

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what the Framers intended, nor was it what the Illinois Legislature intended when it (then) broadened the right to bear arms for home self-defense purposes. The circuit court was correct in holding 430 ILCS 65/2 and 430 ILCS 65/5(a) unconstitutional as applied to Brown, and this Court should affirm the ruling of the circuit court.

In light of the above, the Defendant-Appellee, VIVIAN CLAUDINE BROWN, respectfully requests this Honorable Court to affirm the Orders of the circuit court that 430 ILCS 65(a)(2) and (5)(a), as-applied to her, unconstitutionally infringe on her Second Amendment rights, and affirm the dismissal of the case against her in White County.

Defendant-Appellee also requests any and all such further relief as this Court deems just and proper.

Dated: November 18, 2021

Respectfully submitted,

/s David G. Sigale
Attorney for Defendant-Appellee

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No. 127201

In the
Supreme Court of Illinois

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

v.

VIVIAN CLAUDINE BROWN,

Defendant-Appellee.

Appeal from the Circuit Court of the Second Judicial Circuit,
White County, Illinois
No. 17 CM 60
The Honorable **T. Scott Webb**, Judge Presiding

ILLINOIS SUPREME COURT RULE 341(c) CERTIFICATION OF COMPLIANCE

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ILLINOIS SUPREME COURT RULE 341(c) CERTIFICATION OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 7046 words.

/s/ David G. Sigale
David G. Sigale
Attorney for Defendant-Appellee

Signed and sworn under penalty of perjury
pursuant to 735 ILCS 5/1-109 this 18th day of November, 2021.

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No. 127201

In the
Supreme Court of Illinois

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

v.

VIVIAN CLAUDINE BROWN,

Defendant-Appellee.

Appeal from the Circuit Court of the Second Judicial Circuit,
White County, Illinois
No. 17 CM 60
The Honorable **T. Scott Webb**, Judge Presiding

NOTICE OF FILING OF RESPONSE BRIEF OF DEFENDANT-APPELLEE

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NOTICE OF FILING OF RESPONSE BRIEF OF DEFENDANT-APPELLEE

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You are hereby notified that this 18th day of November, 2021, the Defendant-Appellee has filed and served electronically, with the Clerk's Office of the Supreme Court of Illinois, her *Response Brief of Defendant-Appellee*, a copy of which accompanies this document.

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PROOF OF SERVICE

I, David G. Sigale, an attorney, state under oath and under penalty of perjury pursuant to Section 1-109 of the Illinois Code of Civil Procedure that the statements set forth are true and correct: that I delivered Defendant-Appellee's *Response Brief of Defendant-Appellee* and *Notice of Filing of Response Brief of Defendant-Appellee* to their intended recipients *via* electronic filing and e-mail from Wheaton, Illinois, on the 18th day of November, 2021.

/s/ David G. Sigale
LAW FIRM OF DAVID G. SIGALE, P.C.

Subscribed and sworn pursuant to 735 ILCS 5/1-109 that
the statements set forth herein are true and correct
this 18th day of November, 2021.

/s/ David G. Sigale
David G. Sigale

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