No. 127201

IN THE

Supreme Court of Illinois

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellant,

v.

VIVIAN CLAUDINE BROWN,
Defendant-Appellee.

On Appeal from the
Circuit Court of the Second Judicial Circuit,
White County, Illinois, No. 2017CM60.
The Honorable T. Scott Webb, Judge Presiding.

BRIEF OF AMICI CURIAE STATE'S ATTORNEY STEWART J. UMHOLTZ, PROFESSORS OF SECOND AMENDMENT LAW, INDEPENDENCE INSTITUTE, FIREARMS POLICY FOUNDATION, AND FIREARMS POLICY COALITION IN SUPPORT OF DEFENDANT-APPELLEE

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INTEREST OF THE AMICI CURIAE

State's Attorney Stewart J. Umholtz (State's Attorney, Tazewell County) is a Past-President of the Illinois State's Attorney Association, has served as State's Attorney since 1995, and was an Assistant State's Attorney for a decade before that. Mr. Umholtz is highly familiar with the prosecution of weapons law violations in Illinois, including FOID prosecutions. Because prosecutors, like all law enforcement, depend on the trust and cooperation of the community, Mr. Umholtz is concerned about the overcriminalization of peaceable citizens. He is further concerned that criminalization of the peaceable exercise of constitutional rights in the home makes individuals afraid of law enforcement, and more reluctant to step forward to assist law enforcement as witnesses.

***Amici* professors** are law professors who teach and write on the Second Amendment: Royce Barondes (Missouri), Robert Cottrol (George Washington), Nicholas Johnson (Fordham), Joseph Muha (Akron), and Gregory Wallace (Campbell). As described in the Appendix, the professors were cited by the Supreme Court in *McDonald v. City of Chicago*, are often cited by lower courts, and include authors of the first law school textbook on the Second Amendment as well as many other books and law review articles on the subject.

Independence Institute is a nonpartisan public policy research organization founded on the eternal truths of the Declaration of Independence. The Institute's amicus briefs and scholarship were cited in Second Amendment cases by Justice Breyer in *District of Columbia v. Heller*; Justices Alito and Stevens in *McDonald v. Chicago*, Justice Alito in *New York State Rifle & Pistol Association v. City of New York*, and Justice Thomas in *Rogers v. Grewel.* The Institute's work on other topics was cited by Justice Alito in *Espinoza v. Montana Dept. of Revenue* and *Town of Greece v. Galloway*; Justice Thomas in *Adoptive Couple v. Baby Girl* and *Upstate Citizens for Equality v. United States*; by Justice Scalia in *N.L.R.B. v. Noel Canning* and *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*; and by Justice Kennedy in *Arizona v. Tribal Council of Arizona.*

Firearms Policy Foundation (FPF) is a nonprofit organization dedicated to preserving the rights and liberties protected by the Constitution. FPF focuses on research, education, and legal efforts to inform the public about the importance of constitutional rights—why they were enshrined in the Constitution and their continuing significance. FPF is determined to ensure that the freedoms guaranteed by the Constitution are secured for future generations.

Firearms Policy Coalition (FPC) is a nonprofit organization devoted to advancing individual liberty and defending constitutional rights. FPC accomplishes its mission through legislative and grassroots advocacy, legal and historical research, litigation, education, and outreach programs. FPC's legislative and grassroots advocacy programs promote constitutionally based public policy. Its historical research aims to discover the Founders' intent and the Constitution's original meaning. And its legal research and advocacy aim to ensure that constitutional rights maintain their original scope.

SUMMARY OF ARGUMENT

The Supreme Court's test for Second Amendment challenges focuses on the Amendment's text, using history and tradition to inform its original meaning. Here, the text straightforwardly applies: the Second Amendment expressly guarantees the right of a peaceable citizen like Ms. Brown to "keep" arms.

Historical inquiry confirms this. From the earliest colonial days through the Second Amendment's ratification, long gun possession in the home was mandated by colonies and states in hundreds of acts. While militia participation was typically required for able-bodied males between 16 and 60, several colonies had broader possession mandates. These mandates often applied regardless of sex; for example, some covered heads of households, recipients of land grants, persons living self-sufficiently, and taxable persons.

In contrast, no colony or state restricted long gun possession in the home by free peaceable citizens. From the early colonial period through Reconstruction, every known law that required a license to keep a firearm in the home was expressly racist. Thus, the text, history, and tradition test invalidates the criminalization of mere possession of a long gun in the home.

If heightened scrutiny is employed, strict scrutiny is appropriate because (1) the law applies in the home, where the right of self-defense is elevated

above all governmental interests; (2) the law burdens law-abiding citizens like Ms. Brown; (3) FOID card applications regularly take over half-a-year to process, leaving applicants unarmed and vulnerable in the meantime; and (4) no other state imposes a more severe burden on firearm possession in the home.

Even if intermediate scrutiny is employed, the FOID law should be held unconstitutional. The State failed to carry its evidentiary burden—relying on limited studies about the "potential" effectiveness of license-to-purchase (not license-to-possess) laws rather than its own experience with its 54-year-old FOID law—and the State failed to consider substantially less burdensome alternatives. Additionally, the State and its amici failed to rebut evidence presented in this case proving that permit-to-purchase laws have no statistically significant effect on homicides and do not reduce total suicide.

ARGUMENT

I. This Court should apply the Supreme Court's text, history, and tradition test for Second Amendment challenges.

The Supreme Court in *District of Columbia v. Heller* conducted a textual analysis of the Second Amendment. 554 U.S. 570 (2008). The *Heller* rule that has been most quoted by lower courts—including in many cases unrelated to firearms—is: "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Id.* at 634–35. "*Heller* makes it clear that ["the Second Amendment right to keep and bear arms"] is 'deeply rooted in this Nation's history and tradition.'" *McDonald v. City of Chicago*, 561 U.S. 742, 767–68 (2010).[1] In short, "*Heller* focused almost exclusively on the original public meaning of the Second Amendment, consulting the text and relevant historical materials to determine how the Amendment was understood at the time of ratification." *Ezell v. City of*

[1] Text, history, and tradition comprised most of the opinion. Part I (pages 574–76) of *Heller* summarized the facts of the case. Part II.A presented a 24-page (576–600) textual analysis, informed by English and American history that defined the Second Amendment's operative and prefatory clauses and their relationship. Parts II.B–D were a 19-page (600–19) historical analysis: II.B explored state constitutions in the founding-era; II.C analyzed the drafting history of the Second Amendment; and II.D "address[ed] how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century." Heller, 554 U.S. at 605. II.E (619–26) focused mostly on Supreme Court precedents. Part III (626–28) identified traditional restrictions on the right. Part IV (628–36) addressed the ordinances at issue.

Chicago, 651 F.3d 684, 700–01 (7th Cir. 2011) ("*Ezell I*"). *Heller* expressly stated that its holding was based on "our adoption of the original understanding of the Second Amendment." 554 U.S. at 625 (emphasis added).

In *McDonald v. City of Chicago*, Justice Scalia joined the opinion of the Court, and he also wrote separately to defend the Court's "historically focused method" in Second Amendment cases. 561 U.S. at 804 (2010) (Scalia, J., concurring). He argued that the historical method is "the best means available" and "demonstrably much better than" interest-balancing tests, because it is "much less subjective, and intrudes much less upon the democratic process." *Id.*

Indeed, "[t]he Supreme Court has at every turn rejected the use of interest balancing in adjudicating Second Amendment cases." *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 702–03 (6th Cir. 2016) (en banc) (Batchelder, J., concurring in most of the judgment). "[T]he [*Heller*] Court expressly dismissed Justice Breyer's *Turner Broadcasting* intermediate scrutiny approach and went on to demonstrate how courts should consider Second Amendment bans and regulations—by analysis of text, history, and tradition." *Heller v. District of Columbia*, 670 F.3d 1244, 1277–78 (D.C. Cir. 2011) ("*Heller II*") (Kavanaugh, J., dissenting) (citations omitted). The Court rejected interest-balancing again in *McDonald*:

> Justice BREYER is incorrect that incorporation will require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise. As we have noted, while his opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion.

561 U.S. at 790–91; *see also id.* at 785 ("we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing") (citing *Heller*, 554 U.S. at 633–35).

During the recent oral argument in *New York State Rifle and Pistol Association v. Bruen*, two of the Justices who joined the Court after *Heller* and *McDonald* showed support for the Court's originalist approach to Second Amendment cases. Justice Gorsuch lamented that some lower courts "have applied what might be described as a watered down version of immediate -- intermediate scrutiny." Transcript of Oral Argument at 53, *New York State Rifle & Pistol Association, Inc. v. Bruen* (2021) (No. 20-843). Justice Kavanaugh noted that "some courts have used intermediate scrutiny or strict scrutiny," which "are balancing tests" that "make it a policy judgment basically for the courts." *Id. Heller* expressly rejected judicial balancing: "The very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is really worth insisting upon." 554 U.S. at 634. Instead, as Justice Kavanaugh said, "we start [the analysis] with the text . . . and then historical practice can justify

certain kinds of regulations, but the baseline is always the right established in the text." *Bruen* Transcript, at 52.

In sum, "*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny." *Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting).

This case presents an opportunity to adopt the text-informed-by-history-and-tradition test. First, it is appropriate to apply the Supreme Court's test rather than a test that it has repeatedly disavowed. Second, the Supreme Court's test is truest to the purpose of a constitution, for "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Heller*, 554 U.S. at 634. Indeed, "[t]he Second Amendment . . . is the very *product* of an interest balancing by the people." *Id.* at 635 (emphasis in original).

II. The text, history, and tradition test invalidates the criminalization of mere possession of a long gun in the home.

As Justice Kavanaugh explained, the text, history, and tradition test looks first to the text, and then to history and tradition to inform the meaning of the text if necessary. *Bruen* Transcript, at 52. Here, the text straightforwardly applies: the Second Amendment expressly guarantees the

right to "keep" arms. U.S. Const. amend. II. Moreover, a historical inquiry shows that gun possession in the home is at the utmost core of the Second Amendment. Indeed, keeping long guns in the home was a paradigm of the exercise of the right.

A. In the colonial and founding eras, long gun possession in the home was common and required, and never prohibited.

Throughout the colonial and founding eras, statutes in every state mandated gun ownership for ordinary Americans.

Cumulatively, there were hundreds of legislative revisions of militia statutes. The many statutes created or retained a requirement that militiamen—typically, males from 16 to 60—keep firearms, ammunition, and edged weapons at home. *See* David B. Kopel & Joseph G.S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. ILL. U. L.J. 495, 533–89 (2019) (covering the militia laws of the 13 original States and their colonial predecessors, plus Vermont, New Haven Colony, and Plymouth Colony).

The Second Amendment became the law of the land after being ratified by ten states. At the time of ratification, every ratifying state required ordinary citizens to own firearms. *Id.* at 537–38 (New Jersey), 542–43 (Maryland), 547–48 (North Carolina), 550 (South Carolina), 554–55 (New Hampshire), 557–58 (Delaware), 562–63 (Pennsylvania), 567 (New York), 569 (Rhode Island), 573 (Vermont), 583 (Virginia). So did the other states. *Id.* at 585

(Massachusetts), 587 (Georgia), 589 (Connecticut). These 1791 state arms mandates were continuations of mandates that had existed in the colonies since their early days. The exception was Pennsylvania, which had no arms mandate until 1777.

Many statutes also mandated firearm ownership by women and non-militiamen. These often applied to everyone old enough to conduct particular activities, such as keeping house.

Maryland, in 1639, required "that every house keeper or housekeepers within this Province shall have ready continually upon all occasions within his her or their house for him or themselves and for every person within his her or their house able to bear armes one Serviceable fixed gunne," plus a sword, gunpowder, and other accessories. 1 PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND JANUARY 1637/8 - SEPTEMBER 1664, at 77 (William Hand Browne ed., 1883).

Virginia required arms to travel, attend church, work in the fields, and attend court. 1 William Waller Hening, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE 127 (1823) (1623 law requiring arms to travel); *id.* (1624, requiring arms to work in the field); *id.* (1624, requiring farmers to possess arms); *id.* at 173 (1632, travel); *id.* (1632, working in the field); *id.* (1632, men

to carry arms to church); *id.* at 263 (1643, "masters of every family" to carry arms to church); 2 *id.* at 333 (1676, attending church or court). More broadly, a 1639 law mandated that "ALL persons . . . be provided with arms and ammunition or be fined." 1 *id.* at 226.[2] Laws in 1659 and 1662 required all men capable of bearing arms to own a firearm. *Id.* at 525; 2 *id.* at 126. And a 1762 law required persons exempt from militia training to keep at home the same arms as militiamen. 4 *id.* at 534, 537. To the extent that women of any age farmed, traveled, or engaged in other listed activities, the arms mandates applied to them.

A 1632 Plymouth law required that "every freeman or other inhabitant of this colony provide for himselfe and each under him able to beare armes a sufficient musket and other serviceable peece." THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH 31 (William Brigham ed., 1836).

To promote immigration, North Carolina issued land grants starting in 1664—but only to settlers who were "armed with a good firelock or

[2] The statute was for "ALL persons except negroes." Such racial discrimination was later outlawed by the Fourteenth Amendment and the Civil Rights Act.

matchlock."[3] 1 AMERICA'S FOUNDING CHARTERS: PRIMARY DOCUMENTS OF COLONIAL AND REVOLUTIONARY ERA GOVERNANCE 210–11 (Jon Wakelyn ed., 2006) (Concessions and Agreements, Jan. 11, 1664). Additional land was provided for each person over 14 who kept the same arms. *Id.* In 1701, Virginia required recipients of land grants to keep someone between 16 and 60 armed on the land. 3 Hening, at 205.

New York in 1684 required that "all persons though freed from [militia] Training by the Law . . . be obliged to Keep Convenient armes and ammunition in Their houses as the Law directs to others." 1 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 161 (1896). Like other colonies, New York exempted certain persons from militia training based on occupational status (e.g., clergy, physicians), but even exempted persons had to keep arms. *Id.* at 49.

Starting in 1718, New Hampshire obliged every head of household to own firearms. 2 LAWS OF NEW HAMPSHIRE: PROVINCE PERIOD, 1702–1745, at 285 (1913). In 1776, New Hampshire required all males between 16 and 50 not in the militia to own firearms. 4 LAWS OF NEW HAMPSHIRE: REVOLUTIONARY PERIOD, 1776–1784, at 46 (1916). Then in 1780, New Hampshire required

[3] The "matchlock" and "firelock" were the two types of firearms of the era. The firelock was more advanced and was what we today call a "flintlock."

males under 70 who were exempt from militia training to keep militia arms at home, so that they could defend the community if attacked. *Id*. at 276.

Delaware required "every Freeholder and taxable Person" starting in 1741 to "provide himself with . . . One well fixed Musket or Firelock," and "to keep such Arms and Ammunition by him, during the Continuance of this Act." George H. Ryden, DELAWARE–THE FIRST STATE IN THE UNION 117 (1938).

Beginning in 1779, "every listed soldier and other householder" in Vermont had to "always be provided with, and have in constant readiness, a well fixed firelock . . . or other good fire-arms." VERMONT STATE PAPERS: BEING A COLLECTION OF RECORDS AND DOCUMENTS, CONNECTED WITH THE ASSUMPTION AND ESTABLISHMENT OF GOVERNMENT BY THE PEOPLE OF VERMONT 307 (William Slade ed., 1823) (emphasis added).

Additionally, the federal Uniform Militia Act of 1792 required that every militiaman "provide himself with a good musket or firelock . . . or with a good rifle." 1 Stat. 264 (1792).

B. There is no historical tradition of restricting in-home long gun possession.

In contrast to the many militia laws requiring long gun ownership in the home, and to the many other laws requiring or incenting long gun ownership among non-militiamen, few historical laws required a license to keep a long gun in the home. From the early colonial period through Reconstruction,

every known law that did require a license to keep a firearm in the home was expressly racist.

The first American law involving a license to own a firearm appears to be Virginia's 1723 statute requiring "all negros, mullattos, or indians" living on plantations to acquire a license if they wanted "to keep and use guns." 4 Hening, at 131.

In 1730, New York forbade any "slave to have or use any gun, pistol, sword, club or any other kind of weapon whatsoever, but in the presence or by the direction of his her or their Master or Mistress, and in their own ground." 24 DOCUMENTS OF THE ASSEMBLY OF THE STATE OF NEW YORK, PART II, at 687 (1895).

South Carolina in 1740 forbade "any slave, unless in the presence of some white person, to carry or make use of fire arms, or any offensive weapons whatsoever, unless such negro or slave shall have a ticket or license, in writing, from his master, mistress, or overseer . . . and that such license be renewed once every month." 7 David J. McCord, THE STATUTES AT LARGE OF SOUTH CAROLINA 404 (1840).

A 1792 Virginia law provided that "negroes and mulattoes, bond or free, living at any frontier plantation, may be permitted to keep and use guns, powder, shot, and weapons offensive or defensive, by license from a Justice of

Peace of the County wherein such plantation lies, to be obtained upon the application of free negroes or mulattoes, or of the owners of such as are slaves." 1 Samuel Shepherd, THE STATUTES AT LARGE OF VIRGINIA 123 (1835)

To keep a firearm in the new Mississippi Territory in 1799, free African American householders had to apply for a 12-month license from "the commanding officers of legions." Slaves were also eligible for licenses, "on application of their owners, shewing sufficient cause . . . why such indulgence should be granted." 1799 Laws of the Miss. Terr. 118. Starting in 1822, justices of the peace became the licensing authority for slaves, and county courts became the licensing authority for free African Americans. 1822 Miss. Laws 179, 181–83, §§ 10, 12.

An 1806 Virginia law provided that "no free negro or mulatto shall be suffered to keep or carry any fire-lock of any kind, any military weapon, or any powder or lead, without first obtaining a license from the court of the county or corporation in which he resides." 3 Shepherd, at 274.

Mississippi adopted Virginia's 1806 licensing law for every "free negro or mulatto" in 1822. T.J. Fox & J.A. Van Hoesen, A DIGEST OF THE LAWS OF MISSISSIPPI 748 (1839). So did Missouri in 1835. THE REVISED STATUTES OF THE STATE OF MISSOURI: REVISED AND DIGESTED BY THE EIGHTH GENERAL ASSEMBLY 414 (WM. Campbell ed., 2d ed. 1840).

According to a similar Maryland law in 1831: "no free negro shall be suffered to keep or carry a firelock of any kind, any military weapon, or any powder or lead, without first obtaining a license from the court of the county or corporation in which he resides; which license shall be annually renewed . . . " 2 Clement Dorsey, THE GENERAL PUBLIC STATUTORY LAW AND PUBLIC LOCAL LAW OF THE STATE OF MARYLAND FROM THE YEAR 1692 TO 1839 INCLUSIVE 1071 (1840).

In 1832, Delaware made it unlawful for "free negros and free mulattoes to have, own, keep or possess any gun, pistol, sword or any warlike instrument," except that they could own a "gun or fowling piece" "upon application . . . to one of the justices of the peace," if the application was certified by "five or more respectable and judicious citizens" and showed "that the circumstances of his case justify his keeping and using a gun." 8 LAWS OF THE STATE OF DELAWARE 208 (1841). The police power was said to justify restrictions like "the prohibition of free negroes to own or have in possession fire arms or warlike instruments." *State v. Allmond*, 7 Del. 612, 641 (Gen. Sess. 1856).

An 1839 Arkansas law provided that "[a]ny gun or other offensive or defensive weapon found in the possession of a slave, without having the written permission of his master to carry the same, may be seized by any person." E.H. English, A DIGEST OF THE STATUTES OF ARKANSAS: EMBRACING

ALL LAWS OF A GENERAL AND PERMANENT CHARACTER, IN FORCE AT THE CLOSE OF THE SESSION OF THE GENERAL ASSEMBLY OF 1846, at 951 (1848).

North Carolina, in 1841, started requiring free persons of color to obtain a license from the Court of Pleas and Quarter Sessions to own or carry a gun. 1840–41 N.C. Laws 61–62, ch. 30. The North Carolina Supreme Court upheld the carry license in *State v. Newsom*, explaining that "free people of color have been among us, as a separate and distinct class, requiring, from necessity, in many cases, separate and distinct legislation." 27 N.C. 250, 252 (1844). Thus, it was left to "the control of the County Court, giving them the power to say, in the exercise of a sound discretion, who, of this class of persons, shall have a right to the licence, or whether any shall." *Id.* at 253.

That same year, Delaware required that justices of the peace charge twenty-five cents "[f]or licenses to negroes to keep a gun." 9 LAWS OF THE STATE OF DELAWARE 430 (1843).

After the Civil War, former Confederate states enacted Black Codes to keep African Americans in a condition of de facto servitude. Florida's first legislative session after the Confederate surrender prohibited "any negro, mulatto, or other person of color" from owning a gun without first obtaining a license from a probate judge based on "the recommendation of two respectable citizens." 1865 Laws of Fla. 25, 27, ch. 1,466, no. 3, § 12.

Mississippi in 1865 prohibited any "freedman, free negro or mulatto" from keeping "fire-arms of any kind" unless "licensed so to do by the board of police." 1865 Miss. Laws 165, ch. 23, § 1.

The federal government acted against such laws, and against the searching of African American homes to confiscate arms. *McDonald*, 561 U.S. at 772 & n.20 (citing sources); *id.* at 846–47 (Thomas, J., concurring) (same). Congress passed the Second Freedmen's Bureau Act, which ensured to all persons the "full and equal benefit of all laws and proceedings for the security of person and estate including the constitutional right of bearing arms." 14 Stat. 173, 176–77 (1866). "The Civil Rights Act of 1866, 14 Stat. 27, which was considered at the same time as the Freedmen's Bureau Act, similarly sought to protect the right of all citizens to keep and bear arms." *McDonald*, 561 U.S. at 774. The Civil Rights Act of 1871, 17 Stat. 13, and most importantly, the Fourteenth Amendment, served the same purpose. *McDonald*, 561 U.S. at 776–78. *See*, *e.g.*, Clayton E. Cramer, Nicholas J. Johnson & George A. Mocsary, *"This Right Is Not Allowed by Governments That Are Afraid of the People": The Public Meaning of the Second Amendment When the Fourteenth Amendment Was Ratified*, 17 GEO. MASON L. REV. 823 (2010) (cited in *McDonald*, 561 U.S. at 773 n.21, 776 n.25, 780).

That was the end of state licensing laws for keeping arms, until 1893, when Florida made it "unlawful to carry or own a Winchester or other repeating rifle or without first taking out a license from the County Commissioners . . ." 1893 Fla. Laws 71, ch. 4147, § 1. Amended in 1901, the law required a license for someone "to have a pistol, Winchester rifle or other repeating rifle in his manual possession." 1901 Fla. Laws 1901, ch. 4928, § 1. Although neutrally worded—as it had to be after the enactment of the Fourteenth Amendment—the statute served a discriminatory purpose. As Florida Supreme Court Justice Rivers H. Buford later pointed out, "the Act was passed for the purpose of disarming the negro laborers" and "was never intended to be applied to the white population and in practice has never been so applied." *Watson v. Stone*, 148 Fla. 516, 524 (1941) (Buford, J., concurring specially). Justice Burford added that "there had never been, within my knowledge, any effort to enforce the provisions of this statute as to white people, because it has been generally conceded to be in contravention of the Constitution and non-enforceable if contested." *Id.*

Chicago enacted a handgun permit to purchase law in 1911. It did not apply to the simple possession of arms, nor to long guns. 1911 Chi. Code ch.

53 ("to purchase any pistol, revolver, derringer, bowie knife, dirk or other weapon of like character which can be concealed on the person").[4]

The law at issue in this case, the FOID statute, was enacted with the strong support of Chicago Mayor Richard J. Daley. *Senate Passes Gun Owner Bill*, CHI. TRIB., May 23, 1967. In 1966 Mayor Daley told President Lyndon Johnson: "[I]n the city we have control—but what the hell, in the suburbs that are—you go out to all around our suburbs and you got people out there, especially the non-white, are buying guns right and left." *Lyndon B. Johnson and Richard J. Daley on 19 July 1966*, Presidential Recordings Digital Edition, UNIVERSITY OF VIRGINIA.[5] Appellant analogizes the FOID application fee, which was $5 in 1967, to some earlier state taxes on firearms: "For example, Georgia, Mississippi, and North Carolina each imposed a fee or tax to possess a pistol, and authorities could seize citizens' firearms if they did not comply with the requirement. 1867 Miss. Laws 327; 1866 Ga. Laws 27, 27-28; 1858 N.C. Sess. Laws 28, 3536." Appellant's Br. at 12. In 1967, the $5

[4] This Court upheld the licensing law in *Biffer v. City of Chicago*, 278 Ill. 562, 570 (1917), based on the reasoning "that the sale of deadly weapons may be absolutely prohibited under the police power of the state" without violating the Second Amendment. Such reasoning is in conflict with *McDonald*, 561 U.S. 742, but in any event, the sale of firearms is not at issue here.

[5] https://prde.upress.virginia.edu/conversations/4006262.

fee was equivalent to $41.65 today.[6] It is easy to see how a fee of $41 could prevent some poor "non-whites" from being able legally to keep a firearm they already owned. Mississippi and Georgia in 1866 and 1867 suddenly faced a huge percentage of their population, the freedmen (formerly enslaved) who had the right to keep arms. The vast majority of the freedmen were poor. So a tax that might seem trivial today amounted to a difficult or insuperable barrier for legal possession of arms by many poor people.

In the Founding Era, North Carolina had imposed no arms disabilities on the free black population, and free people of color served in the militia. But an 1841 allowed them to possess only with a license from by a county court. *Newsom*, 27 N.C. at 251. The North Carolina legislature tightened the screws further with the 1858 tax, at least for the poorest.

Financial burdens that seem trivial to many people can be severe for others. Appellant cites approvingly an opinion upholding a $450 three-year fee in New York City. Such fees and taxes of course have disparate impact on poor people. This is as true in modern times as it was in 1858-67 in the South.

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[6] Bureau of Labor Statistics, *CPI Inflation Calculator*, https://www.bls.gov/data/inflation_calculator.htm (May 1967 to Oct. 2021).

C. The Twentieth Century.

Amicus Everytown for Gun Safety finds in the twentieth century some laws that are said to be "a historical tradition of imposing firearm licensing requirements on law-abiding citizens." Amicus Brief of Everytown for Gun Safety, at 8.

> These laws required a prospective firearms purchaser to obtain a permit from a municipal judge or sheriff, who had to determine that the prospective purchaser was not prohibited by law from possessing a firearm and was of good moral character. *See, e.g.*, 1913 Or. Laws at 497 § 2; Samuel A. Ettelson, Opinions of the Corporation Counsel and Assistants from May 1, 1915, to June 30, 1916, Page 458-459 (Vol. 7, 1916) (Chicago); 1918 Mont. Laws 2, at 6 § 3; 1919 Haw. Sess. Laws 166; 1919 N.C. Sess. Laws 397; 1921 Mo. Laws at 691 § 2; 1927 N.J. Laws at 742, 746 § 9; 1927 Mass. Acts 413; 1927 Mich. Pub. Acts 372, at 887-88 § 6.

Id. Of the seven state laws cited, two were soon repealed. 1921 Mont. Laws 114, ch. 109 § 5; 1925 Or. Laws 468, ch. 260 (affirming that persons need "no permit or license to purchase, own, possess or keep" handguns in their residences or place of business). The five state laws that lasted longer had permit-to-purchase rules for handguns. Of these five statutes, three also required a permit-to-purchase for particular types of long guns: North Carolina ("any pistol, so-called pump gun"); New Jersey (handguns and long guns shorter than 26 inches total); Michigan (handguns and long guns under

30 inches). North Carolina later repealed the statute's application to a pump action long guns. 1979 N.C. Sess. Laws 1230. Michigan repealed the permit to purchase for all sales by licensed firearms dealers. 2012 Mich. Pub. Acts 377. *See also* David B. Kopel, *Background Checks for Firearms Sales and Loans: Law, History, and Policy*, 53 HARV. J. ON LEGIS. 303, 340–55 (2016) (discussing all statutes cited in the Everytown block quote).

The 1967 Illinois law criminalized the mere possession of every handgun and every long gun in every home, unless the government granted authorization. There was no historical tradition for such a law in 1967, nor is there today. The Illinois statute remains eccentric, as will be discussed in Part III.D.

The 1967 bill was especially aberrant in its sweeping application to long guns. In the American gun-control tradition, long guns have generally been subjected to fewer restrictions than handguns, and virtually no restrictions in the home.[7] For example, the D.C. Circuit held that "the basic requirement to

[7] A notable exception is machine guns, which are strictly regulated. But the United States Supreme Court recognizes the difference between ordinary arms—like Ms. Brown's .22 bolt-action rifle—that fire "only one shot with each pull of the trigger," and "traditionally have been widely accepted as lawful possessions," versus machine guns, which have the "quasi-suspect character we attributed to owning hand grenades." *Staples v. United States*, 511 U.S. 600, 603 n.1, 611–12 (1994).

register a handgun is longstanding in American law," whereas long gun registration was "novel, not historic." *Heller II*, 670 F.3d at 1255.

III. If the two-part test is employed, strict scrutiny should apply.

A. The burden is severe because it applies in the home where the core right of self-defense is most acute.

Heller held that self-defense is the Second Amendment's "core lawful purpose." 554 U.S. at 630. And "the home [is] where the need for defense of self, family, and property is most acute." *Id.* at 628. Thus, the Second Amendment "elevates above all other [governmental] interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635. *See also McDonald*, 561 U.S. at 780 ("the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home."); *Ezell I*, 651 F.3d at 689 ("*Heller* held that . . . the core component of [the Second Amendment] is the right to possess operable firearms . . . for self-defense, most notably in the home."). By requiring a FOID card to exercise "the core lawful purpose of self-defense" in her home, where the right is "most acute," the regulation burdens Ms. Brown's core Second Amendment right. *Heller*, 554 U.S. at 628, 630.

B. The burden is severe because it applies to a law-abiding citizen.

This Court and the Seventh Circuit have held that the most burdensome restrictions are those that apply to law-abiding adults. Restrictions that apply only to criminals, by comparison, are less severe and warrant only intermediate scrutiny. *See e.g., United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc) (intermediate scrutiny for a firearms ban for domestic violence misdemeanants); *United States v. Meza-Rodriguez*, 798 F.3d 664, 672–73 (7th Cir. 2015) (intermediate scrutiny for a firearms ban for unauthorized aliens); *United States v. Williams,* 616 F.3d 685, 692 (7th Cir. 2010) (intermediate scrutiny for a firearms ban for convicted felons); *United States v. Yancey,* 621 F.3d 681, 683 (7th Cir. 2010) (intermediate scrutiny for a firearms ban for unlawful users of controlled substances).

"Here, in contrast," Ms. Brown is among "the 'law-abiding, responsible citizens' whose Second Amendment rights are entitled to full solicitude under *Heller*." *Ezell I*, 651 F.3d at 708. Burdens on law-abiding citizens are substantially more severe. Thus, this Court deemed a restriction around public parks "a severe burden on the recognized second amendment right of self-defense," because it "affects the gun rights of the entire law-abiding population of Illinois." *People v. Chairez*, 2018 IL 121417, at ¶ 49.

Similarly, the Seventh Circuit applied "not quite 'strict scrutiny'" to a Chicago law banning firing ranges within city limits, because it was "a severe encroachment on the right of law-abiding, responsible Chicagoans." *Ezell v. City of Chicago*, 846 F.3d 888, 893 (7th Cir. 2017) ("*Ezell II*") (citing *Ezell I*, 651 F.3d at 708). And in considering a ban on carrying arms in public that applied to "the entire law-abiding adult population of Illinois," the Seventh Circuit explained that the State "would have to make a stronger showing in this case than the government did in *Skoien*," where it satisfied intermediate scrutiny. *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012).

C. FOID card applications regularly take over half-a-year to process, leaving applicants unarmed and vulnerable.

It regularly takes over half-a-year to process a FOID application. According to a recent audit by the State of Illinois's Auditor General, the average processing time was 205 days in July of 2021. Frank J. Mautino, *Management Audit of the Firearm Owner's Identification Card and Concealed Carry License Programs*, OFFICE OF THE AUDITOR GENERAL, Sep. 29, 2021, at 38.[8] The backlog in November of 2020 was 139,000 applications. *Id.* And "[f]or applications submitted in 2018, 13.2 percent of those applications took more

[8] https://www.auditor.illinois.gov/Audit-Reports/Performance-Special-Multi/Performance-Audits/2021_Releases/21-FOID-CCL-Programs-Mgmt-Audit-Full.pdf.

than 180 days *past* the statutory deadline." *Id.* at 30 (emphasis added). In fact, the FOID system grew so burdensome during the Covid-19 pandemic—in which there was a 167% increase in FOID card applications—that the Illinois State Police director called the FOID system "antiquated, outdated and inefficient," and called for help from lawmakers to handle the backlog of applications. Megan Hickey, *COVID-19 Pandemic Brings 167% Increase In FOID Card Applications, Growing Processing Delays; ISP Director Says System Needs Overhaul*, CBS CHICAGO, Dec. 9, 2020.[9]

For some people, the wait for a government permit is fatal. In 2015, a New Jerseyan named Carol Browne was fatally stabbed by her ex-boyfriend (against whom she had a restraining order) in her driveway while waiting over a month for the State to process her application to own a handgun. Adrian A. Mojica, *Woman Killed While Waiting for Gun Permit for Protection*, FOX17 (Nashville), June 7, 2015.[10]

Conversely, in September 1990, a mail carrier named Catherine Latta of Charlotte, North Carolina, went to the police to obtain permission to buy a handgun. Her ex-boyfriend had previously robbed her, assaulted her several

[9] https://chicago.cbslocal.com/2020/12/09/illinois-state-polie-foid-card-applications-covid-19-pandemic/.

[10] https://fox17.com/news/local/woman-killed-while-waiting-for-gun-permit-for-protection.

times, and raped her. The clerk at the sheriff's office informed her that the gun permit would take two to four weeks. "I told her I'd be dead by then," Ms. Latta later recalled. That afternoon, she illegally bought a pistol on the street. Five hours later, her ex-boyfriend attacked her outside her house, and she shot him dead. The county prosecutor decided not to prosecute Ms. Latta for either the self-defense homicide, or the illegal gun. Gary L. Wright, *Woman Won't Be Charged: Boyfriend's Slaying Ruled Self-Defense*, CHARLOTTE OBSERVER, Oct. 3, 1990.

D. No other state imposes a more severe burden on long gun possession in the home.

In *Moore*, the Seventh Circuit carefully examined the challenged law's severity compared to corresponding laws in other jurisdictions. *Moore* focused on Illinois's carry restrictions being the most severe in the nation. *See* 702 F.3d at 940 ("Illinois is the *only* state that maintains a flat ban on carrying ready-to-use guns outside the home") (emphasis in original); *id.* ("There is no suggestion that some unique characteristic of criminal activity in Illinois justifies the state's taking a different approach from the other 49 states."); *id.* at 941 ("our analysis is not based on degrees of scrutiny, but on Illinois's failure to justify the most restrictive gun law of any of the 50 states."); *id.* at 942 ("Illinois had to provide us with more than merely a rational basis for

believing that its uniquely sweeping ban is justified by an increase in public safety.").

Illinois's requirement of a FOID card for the home possession of a protected arm is similarly among the most restrictive in the nation. Massachusetts is the only other state that requires a license to own a long gun in the home. Mass. Gen. Laws ch. 140, § 129B. The District of Columbia requires that long guns be registered, D.C. Code § 7-2502.01, Connecticut requires a permit to *acquire* a long gun, Conn. Gen. Stat. Ann. § 29-37a(c), and Hawaii requires both a permit to acquire a long gun and that the gun be registered. Haw. Rev. Stat. §§ 134-2(a), 134-3(b).[11]

New Jersey has a general requirement for licenses for long guns and handguns, but the requirement does not apply to arms in the home. *See* N.J. Stat. § 2C:39-5b(1) ("Any person who knowingly has in his possession any handgun, including any antique handgun, without first having obtained a permit to carry the same as provided in N.J.S.2C:58-4, is guilty of a crime of the second degree."); § 2C:39-5c(1) ("Any person who knowingly has in his

[11] While New York City requires a license for home long gun possession, New York City, N.Y., Code §§ 10-131, 10-303 et seq., the State of New York requires a license only for handgun possession. N.Y. Penal Law § 400.00. Some other states similarly require a permit for handguns, but not long guns. For instance, Maryland, North Carolina, and Rhode Island require permits to purchase handguns, but not long guns. Md. Code Ann., Pub. Safety § 5-117.1; N.C. Gen. Stat. §§ 14-402–14-404; R.I. Gen. Laws § 11-47-35.

possession any rifle or shotgun without having first obtained a firearms purchaser identification card in accordance with the provisions of N.J.S.2C:58-3, is guilty of a crime of the third degree."). The home is exempt from these licensing rules: "Nothing in subsections b., c., and d. of N.J.S.2C:39-5 shall be construed to prevent a person keeping or carrying about his place of business, residence, premises or other land owned or possessed by him, any firearm . . ." N.J. Stat. § 2C:39-6e.

New Jersey's home exemption reflects a longstanding American legal tradition respecting the sanctity of the home. *See*, *e.g.*, *Payton v. New York*, 445 U.S. 573, 601 (1980) ("the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic").

A license to own a long gun is more restrictive than a license to acquire one. Thus, while it can be debated whether Illinois imposes a more severe burden than Massachusetts, Hawaii, and the District of Columbia, at a minimum, Illinois imposes a more severe requirement than 47 other states.

IV. The State failed to carry its burden under any form of heightened scrutiny.

A. The State failed to carry its burden under any form of heightened scrutiny by failing to provide any meaningful evidence.

"In all cases the government bears the burden of justifying its law under a heightened standard of scrutiny." *Ezell II*, 846 F.3d at 892. To carry its burden, 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 *Ezell I*, 651 F.3d at 709). At a minimum, "'there must be *evidence*' to support the [State's] rationale for the 'challenged regulations; 'lawyers' talk is insufficient.'" *Id.* (quoting *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 463 (7th Cir. 2009) (emphasis in original)).

Here, rather than provide evidence demonstrating the effectiveness of its 1967-enacted FOID card law, the State relied on a study showing that license-to-purchase (not license-to-possess) laws have the "potential" to limit firearm acquisition by high-risk individuals, Appellant's Br. at 23, as well as the homicide rate of Missouri after it repealed a handgun licensing law and Connecticut after it enacted a handgun licensing law, *id.* at 25.[12] As for its own law, the State failed to demonstrate its benefits despite its having been in operation for over half a century.

[12] Problems with the Missouri and Connecticut studies are discussed in Part IV.C.

Courts have consistently struck down laws in Second Amendment challenges where the government failed to provide evidence regarding the law at issue.

Under the "elevated intermediate scrutiny" applied in *Chairez*, "the government bears the burden of showing a very strong public-interest justification and a close fit between the government's means and its end, as well as proving that the 'public's interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights.'" 2018 IL, at ¶ 50 (quoting *Ezell I*, 651 F.3d at 708–09). Consequently, this Court struck down the restrictions on public carriage in *Chairez* because "the State provide[d] no evidentiary support for its claims." *Id.* at ¶ 54. The State could not carry its burden "[w]ithout specific data or other meaningful evidence," *id.* at ¶ 54, and its "propositions [we]re devoid of any useful statistics or empirically supported conclusions." *Id.* at ¶ 53.

In *Ezell I*, the range ban was held unconstitutional because "the City produced no empirical evidence and rested its entire defense of the range ban on speculation about accidents and theft." 651 F.3d at 709.

In *Ezell II*, the Seventh Circuit struck down zoning restrictions on firearm ranges, repeatedly emphasizing the City's lack of evidence. 846 F.3d at 895 ("The City has provided no evidentiary support for these claims . . . the City

continues to assume, as it did in *Ezell I*, that it can invoke these interests as a general matter and call it a day. It simply asserts, without evidence, that shooting ranges generate increased crime, cause airborne lead contamination in the adjacent neighborhood, and carry a greater risk of fire than other uses."); *id.* ("The City's own witnesses . . . repeatedly admitted that they knew of no data or empirical evidence to support any of these claims.") (emphasis omitted); *id.* ("the City submitted a list of 16 thefts . . . no evidence suggests that these thefts caused a spike in crime in the surrounding neighborhood."); *id.* ("The City's assertions about environmental and fire risks are likewise unsupported by actual evidence"); *id.* ("As for the concern about fire, the City provided no evidence").

Also in *Ezell II*, the Seventh Circuit struck down a law banning minors from firing ranges because "the City lacked any data or empirical evidence to justify its blanket no-one-under-18 rule." 846 F.3d at 897–98.

The State is required to "establish a close fit between the challenged [] regulations and the actual public benefits they serve—and to do so with actual evidence, not just assertion." *Id.* at 894.

Here, the State provided no evidence regarding the FOID law. The law should therefore be struck down as applied to Ms. Brown. "If the State cannot proffer evidence establishing both the law's strong public-interest

justification and its close fit to this end, the law must be held unconstitutional." *Id.* at ¶ 45.

B. The law is poorly tailored because substantially less burdensome alternatives exist.

Under intermediate scrutiny, a court must ensure that "the means chosen are not substantially broader than necessary to achieve the government's interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989).

In the First Amendment context, "the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). *McCullen* struck a Massachusetts law that prohibited standing on a public way or sidewalk within 35 feet of an entrance or driveway of an abortion clinic. The law furthered a significant governmental interest, but it was unconstitutional because "[t]he buffer zones burden substantially more speech than necessary to achieve the Commonwealth's asserted interests." *Id.* at 490.

The Fourth Circuit recently explained its less-burdensome-requirement rule while applying intermediate scrutiny to a content-neutral speech restriction:

> the government must, inter alia, present evidence showing that — before enacting the speech-restricting law — it "seriously undertook to address the problem with less intrusive tools

> readily available to it." *See McCullen*, 573 U.S. at 494, 134 S.Ct. 2518. In other words, the government is obliged to demonstrate that it actually tried or considered less-speech-restrictive alternatives and that such alternatives were inadequate to serve the government's interest. *Id.*; *see also* [*Reynolds v. Middleton*, 779 F.3d 222, 231–32 (4th Cir. 2015)]. The government's burden in this regard is satisfied only when it presents "actual evidence supporting its assertion[s]." *See Reynolds*, 779 F.3d at 229.

Billups v. City of Charleston, S.C., 961 F.3d 673, 688 (4th Cir. 2020).

Many courts have properly applied this approach in the Second Amendment context. The D.C. Circuit, quoting *McCullen*, struck a requirement for the triennial re-registration of firearms because less burdensome alternatives already existed. *Heller v. District of Columbia*, 801 F.3d 264, 277–78 (D.C. Cir. 2015) ("*Heller III*"). Although re-registration could be used to check whether the owner had become a prohibited person, "District officials and experts conceded [that] background checks could be conducted at any time without causing the registrations to expire." *Id.* at 277 (brackets in original).

The District argued that re-registration would help "to maintain the accuracy of the registration database." *Id.* at 278. But the already-existing "requirement that gun owners report relevant changes in their information" was substantially less burdensome. *Id.*

Next, the District argued that re-registration would help to "determine when firearms have been lost or stolen." *Id.* But the already-existing law

requiring the immediate report of the loss or theft of a firearm was substantially less burdensome. *Id.* So because substantially less burdensome alternatives existed, re-registration failed intermediate scrutiny.

Striking down a restriction on shooting ranges, the Seventh Circuit noted "the availability of straightforward range-design measures that can effectively guard against accidental injury" and that "[o]ther precautionary measures might include limiting the concentration of people and firearms in a range's facilities, the times when firearms can be loaded, and the types of ammunition allowed." *Ezell I*, 651 F.3d at 709. The court also cited range safety manuals, and range safety statutes from other states, which demonstrated the availability of less burdensome alternatives. *Id.* at 709–10.

The Ninth Circuit considered a substantially less burdensome alternative to San Francisco's ban on hollow-point ammunition sales in *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014). The ban was upheld because Jackson's proposed alternative of prohibiting the possession of such bullets in public but allowing their purchase for home defense was actually *more* burdensome—because the sales ban still allowed for possession anywhere. *Id.* at 969–70.

The Tenth Circuit upheld a firearms ban on persons subject to domestic violence restraining orders only after determining that there was not "a

severable subcategory of persons as to whom the statute is unconstitutional." *United States v. Reese*, 627 F.3d 792, 803 (10th Cir. 2010). In other words, there was not a substantially less burdensome alternative that would prevent a severable subcategory of persons from being unnecessarily burdened.

In another case, the Tenth Circuit upheld a firearms ban on United States Postal Service property. *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121 (10th Cir. 2015). The majority and the dissent disagreed as to the feasibility of a substantially less burdensome alternative. The dissent argued that USPS could issue permits allowing firearms in its parking lots. But the majority concluded that "an alternative system involving piecemeal exceptions and individual waivers would be wasteful and administratively unworkable." *Id.* at 1128.

Recently, the Third Circuit reversed the dismissal of a Second Amendment challenge to shooting range restrictions because the district court "perform[ed] no analysis of alternatives." *Drummond v. Robinson Twp.*, No. 20-1722, at *21 (3d Cir. Aug. 17, 2021). The Third Circuit held that the Township "cannot forego an entire 'range of alternatives' without developing 'a meaningful record . . . that those options would fail to alleviate the problems meant to be addressed." *Id.* at *23 (quoting *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370–71 (3d Cir. 2016)). "If considered judgment or

experience has exposed less-burdensome alternatives as unreasonable," the court continued, "that is for the Township to show. . . ." *Id.*

Several less burdensome alternatives exist to the proffered purposes for the FOID law, which is demanding of *all* gun owners at *all* times, since one must possess her FOID at all times in which she possesses her firearm. *See* C70 (Circuit Court holding FOID law unconstitutional in part because "[n]o person could have their FOID card on their person 24 hours each and every day when firearms or ammunition are in the house.").

1. National Instant Criminal Background Check System.

A substantially less burdensome alternative has long applied in Illinois. Federal law requires that a background check be completed before any firearm purchase from a federally licensed dealer. 18 U.S.C. § 922(t)(1). The FBI boasts that "[s]ince launching in 1998, more than 300 million checks have been done, leading to more than 1.5 million denials." *National Instant Criminal Background Check System (NICS)*, FBI, last visited Nov. 17, 2021, https://www.fbi.gov/services/cjis/nics. The State has not argued that the federal system—which worked successfully over 300 million times and prevented more than 1.5 million prohibited persons from acquiring a firearm—is inadequate to achieve its stated goal of preventing firearm acquisition by dangerous persons.

2. California's Armed and Prohibited Persons System.

The California Department of Justice developed the Armed and Prohibited Persons System (APPS) in 2001. APPS uses the California DOJ's data to identify gun owners who have become prohibited persons since acquiring their firearms, so that law enforcement can ensure that those individuals no longer possess arms. "As of January 1, 2021, the APPS has 2,999,872 individuals of which 23,598 are armed and prohibited from possessing firearms." APPS enforcement efforts in 2020 resulted in 16,000 contacts with potentially prohibited persons, seizing 1,243 firearms. California Department of Justice, *Armed and Prohibited Persons System (APPS) 2020 Annual Report*, https://oag.ca.gov/system/files/attachments/press-docs/2020-apps-report.pdf. Notably, APPS requires nothing from gunowners beyond a $31.19 fee imposed at the time the firearm is transferred. Cal. Code Regs. tit. 11, § 4001. The State has not demonstrated why the substantially less burdensome APPS is inadequate.

It is no answer that the FOID database facilitates firearm confiscation from those who have become prohibited persons since acquiring their FOID cards. *See* Amicus Brief of Chicago and Cook County, at 21. As a threshold matter, a program against prohibited persons is not a basis for criminalizing

innocent acts in one's home, "where the need for defense of self, family, and property is most acute." *Heller*, 554 U.S. at 628. To do so is to levy upon lawful firearm owners collective guilt and collective punishment for the unlawful acts of a few. Moreover, California has shown that it is possible effectively to disarm prohibited individuals without relying on an owner-licensing system that burdens firearm possession at home, where the Second Amendment right is "elevate[d] above all other [governmental] interests." *Id.*; California Department of Justice, *Armed and Prohibited Persons System (APPS) 2020 Annual Report*.

C. The State has failed to meet its intermediate scrutiny burden under *Alameda Books*.

City of Los Angeles v. Alameda Books, Inc. provides a template for conducting intermediate scrutiny review. 535 U.S. 425 (2002). First, the government must offer evidence to meet its burden of proof. If the government does so, the challengers may "cast direct doubt on this rationale, either by demonstrating that the [government's] evidence does not support its rationale or by furnishing evidence that disputes the [government's] factual findings." *Id.* at 438–39. "If plaintiffs succeed in casting doubt on a [government] rationale in either manner, the burden shifts back to the

[government] to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Id*. at 439.

Both times Ms. Brown's case has appeared before this Court, Appellant and its amici have relied heavily on articles by Professors Cassandra Crifasi and Daniel Webster, regarding the benefits of Permit-to-Purchase (PTP) gun control laws in Missouri and Connecticut. Several of the amici on this brief filed a brief in *Brown I* to dispute the government's cited findings. Brief for State's Attorneys Stewart J. Umholtz and Brandon J. Zanotti et al., as Amici Curiae Supporting Appellee, *People v. Brown*, 2020 IL 124100, at 33–54.

That brief presented a new study by Professor Carlisle Moody, a Professor of Economics at William & Mary. Whereas Webster's Missouri study had looked at 1999 to 2012; Moody expanded coverage to 1960 through 2016. Crifasi's Connecticut study had covered 1981 to 2012. Moody considered 1968 (the first year data are available) through 2016. He also examined how Missouri and Connecticut compared to neighboring states (Kansas and Rhode Island) that did not change their laws.

Additionally, Professor Moody conducted a national study of PTP laws. He examined all six states that had changed their PTP laws, and compared them with the 44 states that had no change. His data analysis controlled for twenty variables.

The Moody study found:

(1) permit-to-purchase laws have no statistically significant effect on homicides; and

(2) permit-to-purchase laws may reduce suicide by firearm but do not reduce total suicide.

Professor Moody's study in the amicus brief was reported with full transparency. The brief included 31 Appendix pages of STATA log tables generated by the Moody study and detailing the methodology.

When the government's evidence has been rebutted, "the burden shifts back to the [government] to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Alameda Books, Inc.*, 535 U.S. at 439.

Appellant's reply brief in *Brown I* accurately stated that the Moody study had not been peer reviewed. Appellant's Reply Br., *People v. Brown*, 2020 IL 124100, at 16. But the Moody study, which is part of the record in this case, has been available to the Appellant, its amici, or anyone else to review and critique since May 2019. If there were flaws in Professor Moody's methods or analysis, perhaps they would have been pointed out by now. Here in *Brown II*, Appellant and its amici do not address the Moody study. Appellant has not met its burden of proof under intermediate scrutiny.

CONCLUSION

The Circuit Court's opinion should be affirmed.

Respectfully submitted,

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APPENDIX

Royce de R. Barondes is the James S. Rollins Professor of Law at the University of Missouri School of Law. He teaches firearms law and business law subjects. His research on firearms law is published by the Houston Law Review, the Journal of Law & Politics, the Idaho Law Review, and the Southern Illinois University Law Journal. His most recent article concerning firearms law is forthcoming in the Texas Review of Law & Politics. His scholarship concerning firearms law has been cited by the Supreme Court of Pennsylvania.

Robert J. Cottrol is the Harold Paul Green Research Professor of Law at George Washington. His scholarship was cited in Justice Thomas's concurring opinions in *McDonald v. Chicago* and *Printz v. United States*, and by the Fourth Circuit in *Kolbe v. Hogan*, 849 F.3d 114 (2017) (Traxler, J., dissenting). Professor Cottrol is author of four legal history books on race and law, and editor of a three-volume anthology of the right to arms. He wrote the entries for "The Right to Bear Arms" in *The Oxford International Encyclopedia of Legal History* and "The Second Amendment" in *The Oxford Companion to the Supreme Court of the United States*. His Second Amendment scholarship has been published in the *Yale Law Journal*, *Georgetown Law Journal*, and *Journal of American Legal History*.

Nicholas J. Johnson is a Professor of Law at Fordham University, School of Law. He is co-author of the first law school textbook on the Second Amendment, *Firearms Law and the Second Amendment: Regulation, Rights, and Policy* (Aspen Pub. 2d ed. 2017) (with David B. Kopel, George A. Mocsary, and Michael P. O'Shea). The casebook has been cited by majorities in *People v. Chairez* (Supreme Court of Illinois) and *Grace v. District of Columbia* (D.C. Cir.), and by dissents in *Drake v. Filko* (3d Cir.) and *Heller II* (D.C. Cir.). Professor Johnson is also author of *Negroes and the Gun: The Black Tradition of Arms* (2014). His articles on the right to arms have been published by the *Hastings Law Review*, *Ohio State Law Journal*, and *Wake Forest Law Review*. Other courts citing his right to arms scholarship include the Seventh Circuit, Eastern District of New York, and Washington Court of Appeals.

Joseph Muha is an Adjunct Professor of Law at the University of Akron, where he teaches Second Amendment and Ohio firearms law. Professor Muha submitted an amicus brief to the Michigan Supreme Court in a firearms law case, *Wade v. University of Michigan*.

E. Gregory Wallace is a Professor of Law at Campbell University School of Law, where his constitutional law courses include a course on the Second Amendment. He recently published an article on "Assault Weapon" Myths in

the *Heller* symposium issue of the Southern Illinois Law Journal. He has spoken on Second Amendment issues in various law school symposia and recently supervised the Campbell Symposium on the tenth anniversary of the Heller decision. He is co-author of the third edition of the textbook Firearms Law and the Second Amendment, described above.

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and 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 9,438 words.

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CERTIFICATE OF FILING AND SERVICE

The foregoing Brief of Amici Curiae State's Attorney Stewart J. Umholtz, Professors of Second Amendment Law, Independence Institute, Firearms Policy Foundation, and Firearms Policy Coalition in Support of Defendant-Appellee was electronically filed with the Supreme Court of Illinois, and served upon the following by email:

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Within five days of acceptance by the Court, the undersigned will cause thirteen copies of the Brief to be mailed with postage prepaid addressed to:

Clerk's Office – Springfield
Supreme Court Building
200 E. Capitol Ave.
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Under penalties by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this Certificate of Filing and Service are true and correct.

/s/ *Gregory A. Bedell*
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