No. 129751

IN THE
SUPREME COURT OF ILLINOIS

AARON M. DAVIS and CHARLES G. DAVIS, Plaintiff-Appellees, v. JEFFREY YENCHKO, in his official capacity as Chief of the Firearms Services Bureau of the Illinois State Police, Defendant-Appellant.	)	Direct Appeal from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois, No. 17-CH-631 The Honorable RONALD J. FOSTER Judge Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

Attorneys for Defendant-Appellant

LEIGH J. JAHNIG
Assistant Attorney General
115 South LaSalle Street
Chicago, Illinois 60603
(312) 793-1473 (office)
(773) 590-7877 (cell)
CivilAppeals@ilag.gov (primary)
Leigh.Jahnig@ilag.gov (secondary)

ORAL ARGUMENT REQUESTED

E-FILED
1/4/2024 1:29 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

TABLE OF CONTENTS

NATURE OF THE ACTION

Plaintiffs were charged with recklessly endangering the safety of others by repeatedly shooting a semi-automatic rifle into the air, a felony offense. A few days later, the State Police revoked plaintiffs' FOID cards based on section 8(n) of the Illinois Firearm Owners Identification Act, 430 ILCS 65/8(n) (2022), which authorizes such a revocation when a person is prohibited from acquiring or possessing firearms under federal law. As relevant here, 18 U.S.C. § 922(n) imposes firearms restrictions on individuals charged with a felony by prohibiting them from acquiring firearms. Plaintiffs later pleaded guilty to a misdemeanor, and their FOID cards were restored.

Some months later, plaintiffs filed this action, arguing that the operation of section 8(n) to revoke the FOID cards of those charged with felonies, and thus subject to section 922(n)'s restrictions, violated the Second Amendment to the United States Constitution, and seeking declaratory and injunctive relief. Defendant, the Chief of the State Police's Firearms Bureau, argued that plaintiffs lacked standing, or alternatively that the case was moot, because plaintiffs' FOID cards had been restored. Defendant also argued that, even if the case was justiciable, section 8(n) was constitutional.

The circuit court applied the public interest exception to the mootness doctrine both to overcome mootness and to conclude that this exception also gave plaintiffs standing. It then held that section 8(n) violated the Second Amendment with respect to anyone charged with, but not yet convicted of, a

felony. The court entered a permanent injunction prohibiting defendant from revoking the FOID card of any person based on a felony charge.

Defendant appealed directly to this Court, which granted a stay of the circuit court's injunction pending appeal.

JURISDICTION

This Court has jurisdiction over this direct appeal under Supreme Court Rule 302(a). The circuit court granted plaintiffs' motion for summary judgment and issued a declaration that section 8(n) was unconstitutional with respect to any individual charged with, but not convicted of, a felony, on March 10, 2023. A1-11. The circuit court entered final judgment on May 12, 2023. A12-13. Defendants filed a notice of appeal in the circuit court on June 8, 2023, A14-15, which was timely under Supreme Court Rule 303(a)(1).

ISSUES PRESENTED FOR REVIEW

1. Whether plaintiffs lacked standing to bring this action seeking declaratory and injunctive relief on the theory that revoking FOID cards of individuals under felony indictment is unconstitutional, where plaintiffs had their FOID cards restored before they brought their lawsuit.

2. Alternatively, whether this case is moot, where plaintiffs' FOID cards have been restored and where the public interest exception does not apply, given that (a) the statute at issue affects only a small number of individuals for a limited span of time, and (b) there is no conflicting precedent concerning the constitutionality of the statute.

3. Whether the statute that authorizes the revocation of the FOID card of a person charged with a felony is permissible under the Second Amendment, where the plain text of that Amendment covers only law-abiding, responsible individuals, and where the statute comports with a robust historical tradition of restricting firearm possession in similar contexts.

4. Whether, at the very least, the circuit court erred in declaring the statute unconstitutional as to all individuals charged with, but not convicted of, a felony, when plaintiffs and the circuit court both acknowledged that revoking the FOID cards of some felony defendants would not violate the Second Amendment.

5. Whether the circuit court erred in entering a permanent injunction, when plaintiffs presented no evidence of irreparable harm.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This appeal concerns the constitutionality of 430 ILCS 65/8(n) (2022), which states:

> The Illinois State Police has authority to deny an application for or to revoke and seize a Firearm Owner's Identification Card previously issued under this Act only if the Illinois State Police finds that the applicant or the person to whom such card was issued is or was at the time of issuance:
>
> * * *
>
> (n) A person who is prohibited from acquiring or possessing firearms or firearm ammunition by any Illinois State statute or by federal law.

In this case, the "federal law" operating in conjunction with 430 ILCS 65/8(n) is 18 U.S.C. § 922(n), which states:

> It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.[1]

The relevant constitutional provision is the Second Amendment to the United States Constitution, which states:

> 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.

[1] The 2016 versions of both statutes, which applied in this case, are substantially similar to the current versions.

STATEMENT OF FACTS

Plaintiffs are charged with a felony and their FOID cards are revoked

On July 3, 2016, police in Wood River, Illinois, responded to a 911 call reporting that someone was shooting a firearm from the backyard of a house into the air, C350-51, near other residences, *see* C355.[2] When police arrived at plaintiffs' residence, plaintiffs Aaron and Charles Davis admitted that they had been shooting a Smith and Wesson MP15 semi-automatic rifle, though they claimed they had been shooting the rifle into the ground, not into the air. C354-55. Police recovered 19 fired rifle casings in the backyard, and they observed that the dirt around the spent casings was not disrupted, as one might expect to find if bullets had been shot into the ground. C353-54.

Two days later, on July 5, plaintiffs were charged by information with reckless discharge of a firearm — that is, with shooting the semi-automatic rifle in a reckless manner that endangered the safety of others. C329, C393; *see* 720 ILCS 5/24-1.5(a) (2022).[3] That offense is a class 4 felony under Illinois law, 720 ILCS 5/24-1.5(c) (2022), and punishable by a minimum of one year (and a maximum of three years) of incarceration, 730 ILCS 5/5-4.5-45(a) (2022). Both plaintiffs waived a preliminary hearing, C443-46, in which they

[2] This brief cites the one-volume common law record as "C_" and the one-volume report of proceedings as "R_."

[3] The current statutory provisions cited herein do not meaningfully differ from those in effect in 2016.

could have challenged the charges as unsupported by probable cause, *see* 725 ILCS 5/109-3, 5/109-3.1 (2022).

At the time of their arrest, both plaintiffs possessed valid FOID cards, C337, C401, as required to possess firearms under Illinois law, 430 ILCS 65/2 (2022). A few days after plaintiffs were charged, the State Police revoked their FOID cards. C341, C405. The State Police acted under 430 ILCS 65/8(n) (2022), which authorizes it to revoke the FOID card of any individual who is prohibited from acquiring or possessing firearms under federal law. C341-42, C405-06. And federal law — specifically, 18 U.S.C. § 922(n) — in turn prohibits individuals from acquiring firearms if they are charged with a felony. 18 U.S.C. § 922(n) (referring to indictment); *see id.* § 921(a)(14) (defining "indictment" as including "information").

On November 7, 2016, plaintiffs pleaded guilty to reduced charges of misdemeanor reckless conduct. C333, C397. The State Police then re-issued FOID cards to both plaintiffs: to Charles Davis on May 3, 2017, and to Aaron Davis on August 14, 2017. C337, C401.

Plaintiffs' amended complaint

In October 2017, a few months after the State Police re-issued plaintiffs' FOID cards, plaintiffs filed this action under 42 U.S.C. § 1983. C15. In the operative, amended complaint, they challenged section 8(n), insofar as it authorizes the State Police to revoke the FOID cards of those charged with felonies, as unconstitutional under the Second Amendment. C71-73.

Plaintiffs noted, however, that they were not challenging any federal statute, including section 922(n). C72. They also acknowledged that their FOID cards had been reinstated but alleged that they were at risk of having their FOID cards revoked again based on unspecified future felony charges. C74. They sought a declaration that section 8(n) is unconstitutional with respect to all persons charged with a felony, an injunction restraining defendant from revoking FOID cards of any such individuals under this provision, and costs and attorney fees. *Id.*

Defendant moved to dismiss, arguing that plaintiffs lacked standing, that their action was moot, and that they failed to state a claim. *See* C92-95, C217-34. The circuit court denied the motion without explanation. C245; *see* R55.

The parties' cross-motions for summary judgment

The parties filed cross-motions for summary judgment. C255, C447. Plaintiffs contended that section 8(n) was unconstitutional for any individual charged with, but not convicted of, a felony under the two-part framework set forth in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022). C258-59. Specifically, plaintiffs asserted that "the Second Amendment's plain text covers [their] conduct," and argued that there was no historical tradition of disarming individuals who had been charged with felonies. C259-60. And although plaintiffs sought to invalidate section 8(n) as to every person under felony indictment, they acknowledged that the State Police could

constitutionally revoke a FOID card when the charges involved "substantial evidence of actual violence," C259, or when a person was charged with murder, R12, R49.

Defendant reiterated his arguments that plaintiffs lacked standing, given that their FOID cards had been reinstated months before they filed their action, and they could not bring a claim on behalf of others charged with felonies. C493-94. And their contentions of future harm — that they might again be charged with a felony and have their FOID cards revoked — were speculative. C493-94. Defendant also contended that reinstatement of plaintiffs' FOID cards rendered their claim moot. C491-93.

On the merits, defendant argued that plaintiffs had forfeited any argument regarding the first step of *Bruen* because they offered no meaningful argument that the Second Amendment's text covered their conduct. C467. In any event, defendant continued, the Second Amendment's text does not protect possessing firearms while under felony indictment. C468-74. Defendant further argued that, even if plaintiffs had carried their step-one burden, section 8(n) was constitutional at the second step because it was consistent with a historical tradition of disarming groups and individuals who pose a risk of danger. C474-90.

On March 10, 2023, the circuit court granted plaintiffs' motion for summary judgment and denied defendant's motion. C580. At the threshold, the court recognized that plaintiffs had been re-issued FOID cards, and that

the existence of an actual controversy was essential to its jurisdiction. C580-81. It concluded, however, that it had jurisdiction to resolve plaintiffs' claim because, in its view, the public interest exception to mootness applied. C581-82. Specifically, the court reasoned that whether the General Assembly enacted unconstitutional legislation was "a matter of public importance," that a decision on this issue would "provide guidance" on section 8(n)'s validity, and that questions about "executing the provisions of the firearms suspension statutes" would likely recur. C581-82. The court also concluded that plaintiffs had standing based on this reasoning. C582.

As for the merits, the circuit court held that section 8(n) is unconstitutional as to all persons charged with, but not convicted of, felonies. C588. The court first determined that, "[i]n light of" *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *Bruen*, the Second Amendment's plain text covers the right to possess a firearm when charged with a felony. C585. The court then concluded that defendant had not demonstrated a historical tradition of disarming individuals charged with felonies. C586.

The circuit court acknowledged (as plaintiffs had conceded) that the State Police could constitutionally prohibit a person charged with a felony from possessing firearms if that person was "likely to be dangerous." C584, C635; *see* C259, R12. But the court nevertheless entered a permanent injunction, restraining defendant from "suspending [FOID] Cards, pursuant to 430 ILCS 65/8(n), [of] persons charged with a felony but not convicted of a

felony." C589. In entering this injunction, the court found that plaintiffs had a right in need of protection and no adequate remedy at law, and that they would suffer irreparable harm absent an injunction — although it did not discuss this purported harm. C588-89.

Defendant appealed to this Court, C637-38, and sought a stay of the permanent injunction pending appeal, which this Court granted, C656.

ARGUMENT

Plaintiffs brought suit to challenge — on a prospective basis only — the State Police's authority to revoke the FOID cards of individuals charged with, but not convicted of, felonies. But by the time plaintiffs filed suit, they were no longer under felony indictment, and the State Police had restored their FOID cards months earlier. Nevertheless, the circuit court declared it unconstitutional for the State Police to employ section 8(n) to revoke FOID cards of individuals charged with felonies and enjoined defendant from enforcing that provision in all such applications. This decision should be reversed for multiple, independent reasons.

At the outset, this case was not justiciable from the start. For plaintiffs to have standing to challenge a statute as unconstitutional, the circuit court needed to be able to enter the requested relief. But because the State Police had restored plaintiffs' FOID cards before they filed suit, their request that defendant be enjoined from revoking the FOID cards of individuals charged with felonies could not, if granted, provide any relief to plaintiffs. And plaintiffs' stated concern that they may be charged with some future felony, and have their FOID cards revoked on that basis, is purely speculative.

For many of the same reasons, the restoration of plaintiffs' FOID cards rendered their claim moot, as even plaintiffs have not disputed. But the circuit court erred in concluding that it could reach the merits based on the public interest exception to mootness. This case does not present an issue that

affects the public as a whole — rather, it affects only felony defendants and even for them is necessarily time-limited. Moreover, the absence of any conflicting precedent — indeed, of any precedent at all — meant that there was, and is, no need for any court to weigh in. The circuit court's conclusion to the contrary departs from this Court's binding authority, and provides an independent reason to vacate the judgment.

If this Court were to reach the merits, the circuit court erred there as well. At the threshold, the court erred in declaring section 8(n) unconstitutional with respect to all felony defendants, because plaintiffs conceded that the State Police could properly revoke the FOID cards of at least some felony defendants without running afoul of the Second Amendment. Equally problematic, the circuit court did not apply United States Supreme Court precedent addressing how to analyze Second Amendment claims. When viewed under the correct standard, revoking the FOID cards of individuals charged with felonies does not violate the Second Amendment. First, the Supreme Court has explained that the Second Amendment is limited to law-abiding, responsible citizens, a group that does not encompass those charged with felonies. Second, setting that error aside, our country's historical tradition supports restricting felony defendants from prohibiting firearms. Finally, and in any event, plaintiffs were not entitled to a permanent injunction because they did not demonstrate irreparable harm.

I. This Court reviews the circuit court's decision *de novo*.

Whether plaintiffs have standing and whether a claim is moot are issues of law that this Court reviews *de novo*. *Sierra Club v. Ill. Pollution Control Bd.*, 2011 IL 110882, ¶ 8; *In re Alfred H.H.*, 233 Ill. 2d 345, 350 (2009). The Court also reviews a grant of summary judgment *de novo*, without deference to the circuit court's decision. *See Bartlow v. Costigan*, 2014 IL 115152, ¶ 17. A circuit court shall grant summary judgment when there is "no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (2022). Where, as here, the parties filed cross-motions for summary judgment, they agree there are no factual disputes and that the case presents only questions of law. *See Mancini L. Grp., P.C. v. Schaumburg Police Dep't*, 2021 IL 126675, ¶ 15.

Similarly, a statute's constitutionality is also "subject to *de novo* review." *Bartlow*, 2014 IL 115152, ¶ 17. The Court "presume[s]" the statute to be constitutional, and plaintiffs, as the parties challenging the statute, "bear[ ] the burden of demonstrating its invalidity." *Hayashi v. Ill. Dep't of Fin. & Pro. Regul.*, 2014 IL 116023, ¶ 22. Indeed, the Court "will construe a statute to affirm its constitutionality if reasonably possible and will resolve any doubt on the construction of a statute in favor of its validity." *In re Destiny P.*, 2017 IL 120796, ¶ 13.

When the entry of a permanent injunction depends on an issue of law, that issue is also reviewed *de novo*. *See Mohanty v. St. John Heart Clinic, S.C.*,

225 Ill. 2d 52, 63 (2006). The remaining injunction elements, including whether plaintiffs have shown irreparable harm, are reviewed for abuse of discretion. *See id.* at 62-63; *JL Properties Grp. B, LLC v. Pritzker*, 2021 IL App (3d) 200305, ¶ 58.

II. Plaintiffs lacked standing to bring their claim for prospective relief because their FOID cards were restored before they brought suit.

Courts in this State are empowered to review only "justiciable" matters, Ill. Const. art. VI, § 9, and standing is one component of justiciability, *Cahokia Unit Sch. Dist. No. 187 v. Pritzker*, 2021 IL 126212, ¶ 35. "The purpose of the doctrine of standing is to ensure that courts are deciding actual, specific controversies, and not abstract questions or moot issues." *In re M.I.*, 2013 IL 113776, ¶ 32 (cleaned up). To have standing, the plaintiff must have an injury that is "(1) distinct and palpable; (2) fairly traceable to defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief." *Chi. Tchrs. Union, Loc. 1 v. Bd. of Educ. of City of Chi.*, 189 Ill. 2d 200, 207 (2000). And to have standing to bring a declaratory judgment action in particular, as plaintiffs do here, a plaintiff must show that (1) there is an "actual controversy" and (2) he or she is "interested in the controversy." *Vill. of Chatham v. Cnty. of Sangamon*, 216 Ill. 2d 402, 420 (2005) (cleaned up). Here, at a minimum, plaintiffs failed to meet both requirements for standing to bring a declaratory judgment action — that is, they did not present an actual controversy, nor show that they were interested in the controversy

— and for similar reasons, they did not satisfy the requirement that their alleged injury be redressable by the requested relief.

First, an actual controversy means more than merely "'that a wrong must have been committed and injury inflicted.'" *Id.* (quoting *Underground Contractors Ass'n v. City of Chi.*, 66 Ill. 2d 371, 375-76 (1977)). Rather, the plaintiff must show that, at the time the lawsuit is initiated, the issues presented in the case were not premature, and that the injury alleged was ongoing. *See id.* In other words, when the requested relief will not redress the plaintiff's alleged injury, the actual controversy requirement is not met. *See, e.g.*, *Cahokia Unit Sch. Dist.*, 2021 IL 126212, ¶ 45 (actual controversy requirement not met when proposed orders would not "grant[ ] effective relief"). A plaintiff who cannot meet this requirement effectively asks the court to "issue an advisory opinion," which it "cannot do." *Flynn v. Ryan*, 199 Ill. 2d 430, 438 (2002); *see Vill. of Chatham*, 216 Ill. 2d at 420.

Second, the "'related'" requirement that a plaintiff must be "'interested in the controversy'" means more than "'merely having a curiosity about or a concern for the outcome of the controversy.'" *Vill. of Chatham*, 216 Ill. 2d at 420 (citation omitted). Instead, the plaintiff must have a personal claim that is "'capable of being affected'" by the outcome of the declaratory judgment action. *Id.* (citation omitted). In other words, to have standing to seek a declaratory judgment holding a statute unconstitutional, the plaintiff "must be directly or materially affected by the attacked provision and must be in

immediate danger of sustaining a direct injury as a result of enforcement of the challenged statute." *M.I.*, 2013 IL 113776, ¶ 32.

Applying these principles here shows that plaintiffs lacked standing. When they filed their action, which sought only prospective relief, the State Police had already re-issued their FOID cards. *See* C337, C401. For this reason, plaintiffs cannot meet the standing requirements to bring a declaratory judgment action.

At the threshold, plaintiffs' claim did not present an actual controversy, and indeed, was not redressable by the relief that they sought. The restoration of their FOID cards meant that any injury plaintiffs had experienced had been resolved before they filed this lawsuit. Accordingly, a court order enjoining section 8(n) would not allow plaintiffs to "obtain relief or be impacted in any way." *See Vill. of Chatham*, 216 Ill. 2d at 421-22. That plaintiffs' FOID cards were temporarily revoked in the past does not change this result, because an actual controversy requires more than alleging that "a wrong [was] committed and injury inflicted." *Id.* at 420. In essence, by delaying bringing suit until after their FOID cards were restored, plaintiffs impermissibly asked the circuit court to issue an advisory opinion about section 8(n)'s constitutionality, even though it would give them no tangible relief. *See Cahokia Unit Sch. Dist.*, 2021 IL 126212, ¶ 45 (plaintiffs would obtain no relief if they prevailed, and thus they sought "an advisory opinion, contrary to the actual controversy requirement for a declaratory judgment action").

And although plaintiffs alleged that they "remain at risk for having their FOID cards again revoked in the future," C74, they did not suggest that they are likely to engage in any conduct that will lead to their being charged with another felony. Plaintiffs' allegation that their FOID cards may be revoked again based on a future felony charge is thus "purely speculative" and cannot create standing. *Chi. Tchrs. Union, Loc. 1*, 189 Ill. 2d at 207; *see City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (allegation that police department "routinely appl[ied]" policy of placing arrestees in chokehold fell "far short" of alleging that plaintiff would be arrested and placed in chokehold again in the future, as needed to establish standing to challenge chokehold policy); *cf. DesPain v. City of Collinsville*, 382 Ill. App. 3d 572, 580-81 (5th Dist. 2008) (allegation that city had previously violated statute did not establish actual controversy because it was "speculation" to "assume" that city would do so again). Plaintiffs' stated concern about having their FOID cards revoked in the future thus is "premature" and cannot establish standing. *Vill. of Chatham*, 216 Ill. 2d at 420 (cleaned up).

In addition, plaintiffs did not meet the "somewhat related requirement" of showing that they were "interested in the controversy." *Id.* (cleaned up). By waiting to bring suit until after their FOID cards were restored, plaintiffs no longer had a "personal claim, status or right" that was "capable of being affected" by the declaratory and injunctive relief that they sought. *See id.* (cleaned up). And although the past temporary revocation of their FOID cards

may give them a "concern" about the constitutionality of the statute, that alone does not create standing. *Id.*; *see Lyons*, 461 U.S. at 111 ("Absent a sufficient likelihood" that plaintiff would experience a chokehold again, plaintiff was "no more entitled to an injunction than any other citizen," even though plaintiff had been subjected to chokehold in the past).

The circuit court, however, ignored defendant's standing arguments and failed to undertake any standing analysis. Instead, it merged the standing requirement into its analysis of the public interest exception to the mootness doctrine. C582. As explained *infra* pp. 26-30, the circuit court's conclusion about the public interest exception was erroneous, but regardless, the circuit court was incorrect to conflate standing with mootness, and no authority supports applying mootness exceptions to excuse a lack of standing.

Although standing and mootness are related concepts within justiciability, *see Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 488 (2008), they are not equivalent. Standing examines whether the plaintiffs have pleaded an actual controversy at the start of litigation. *See People v. Coe*, 2018 IL App (4th) 170359, ¶ 48; *see also Cahokia Unit Sch. Dist.*, 2021 IL 126212, ¶ 45 (examining standing based on the allegations "pled in [plaintiffs'] complaint"); *Chi. Tchrs. Union, Loc. 1*, 189 Ill. 2d at 207 (holding plaintiffs lacked standing based on what they "alleged"). A claim will become moot, in contrast, when "intervening events" make it impossible for the reviewing court to grant the plaintiff the relief sought. *In re Benny M.*, 2017 IL 120133, ¶ 17. This Court

has recognized limited exceptions to mootness that allow courts to decide properly filed cases that have become moot for specific reasons, such as "the magnitude or immediacy" of the question presented to the general public, or when the issue is "likely to recur but unlikely to last long enough to allow appellate review to take place because of the intrinsically short-lived nature of the controversies." *Felzak v. Hruby*, 226 Ill. 2d 382, 392 (2007) (cleaned up). These exceptions, however, are "narrowly construed," because to construe them broadly "would result in a string of advisory opinions, including some of constitutional proportion, that would have no effect whatsoever on the rights of the parties or the outcome of the case before the court." *In re J.B.*, 204 Ill. 2d 382, 391 (2003).

This Court has never authorized similar exceptions to the standing requirement. Indeed, neither the circuit court nor plaintiffs cited any authority suggesting that considerations of the public interest or the potentially short-lived nature of a controversy can overcome a lack of standing at the outset of litigation. *Cf. Lyons*, 461 U.S. at 109 (mootness exceptions cannot overcome lack of standing). And expanding mootness exceptions into the context of standing would allow individuals — who lack standing at the beginning of litigation — to bring lawsuits for the sole purpose of seeking advisory opinions or to weigh in on policy matters. The resulting "string of advisory opinions," *see J.B.*, 204 Ill. 2d at 391, would conflict with the Court's settled precedent, *see, e.g., Flynn*, 199 Ill. 2d at 437 (standing requirement

ensures that courts will not "render an advisory opinion"); *Underground Contractors Ass'n*, 66 Ill. 2d at 375 (same).

Plaintiffs thus lacked standing because their FOID cards were restored before they filed their lawsuit. Accordingly, this Court should reverse or vacate the circuit court's judgment, and remand with instructions to dismiss the complaint. *See In re Commitment of Hernandez*, 239 Ill. 2d 195, 203 (2010) (vacating lower court judgment when case was not justiciable); *see also United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) ("established practice" when case becomes non-justiciable on appeal "is to reverse or vacate the judgment below and remand with a direction to dismiss").

III. In the alternative, plaintiffs' claim was moot, and no mootness exception applied.

Alternately, the circuit court's decision should be reversed or vacated because plaintiffs' claim became moot upon the restoration of their FOID cards. A case is moot when intervening events have made it impossible for the reviewing court to grant the plaintiff relief. *Benny M.*, 2017 IL 120133, ¶ 17. As plaintiffs and the circuit court did not dispute, C580-82; *see* C246, the restoration of plaintiffs' FOID cards was such an event, making it impossible for plaintiffs to obtain the relief sought, *see Strauss v. City of Chi.*, 2022 IL 127149, ¶ 50 (request for declaration that zoning ordinance was unconstitutional was moot when plaintiff no longer owned affected building); *In re Marriage of Donald B.*, 2014 IL 115463, ¶ 30 (challenge to statute's constitutionality was moot when statute's restrictions on visitation rights no

longer applied to plaintiff). The circuit court concluded, however, that it had jurisdiction under the public interest exception to mootness. C581-82. That was incorrect.

The public interest exception is "invoked only on rare occasions when there is an extraordinary degree of public interest and concern." *Commonwealth Edison Co. v. Ill. Com. Comm'n,*, 2016 IL 118129, ¶ 13 (cleaned up). To that end, the exception is "narrowly construed," and requires a "clear showing" of three criteria: (1) the question presented is "of a public nature," (2) "an authoritative determination of the question is desirable for the future guidance of public officers," and (3) "the question is likely to recur." *Id.* at ¶¶ 12-13 (internal quotations omitted). If the plaintiff fails to "clear[ly] show[ ]" any single criterion, the exception does not apply. *Id.* at ¶ 13. Because none of these criteria are met, the public interest exception does not apply here.

A. The question presented is not of a public nature.

First, the question presented is not of a sufficiently "public nature," because it affects, at most, only a limited group of people. To begin, plaintiffs conceded in the circuit court that some indicted defendants — those charged based on "substantial evidence of actual violence," C259, or with murder, R12 — could have their FOID cards revoked without violating the Second Amendment. As explained *infra* pp. 30-31, this concession precluded a facial challenge, because "an enactment is facially invalid only if no set of

circumstances exists under which it would be valid." *See Napleton v. Vill. of Hinsdale*, 229 Ill. 2d 296, 306 (2008). This case thus presents only an as-applied challenge, *see infra* pp. 31-32, which requires an assessment of plaintiffs' specific factual circumstances, *Napleton*, 229 Ill. 2d at 306. But "case-specific" claims "do not present the kinds of broad public interest issues" to satisfy the requirement that the issue presented be of a public nature. *Alfred H.H.*, 233 Ill. 2d at 356-57. Applying the public interest exception was incorrect for this reason alone.

Moreover, even if plaintiffs had properly presented a facial challenge, the first criterion for the exception would remain unmet. That a plaintiff challenges the constitutionality of a statute does not alone create a question of a public nature. *See Donald B.*, 2014 IL 115463, ¶¶ 34-35; *see also Eisenberg v. Indus. Comm'n of Ill.*, 337 Ill. App. 3d 373, 380 (1st Dist. 2003) ("[T]he presence of a constitutional defect in a statutory requirement does not automatically mean that the public interest exception to the mootness doctrine applies."). Rather, the issue must have a "significant effect on the public as a whole." *Felzak*, 226 Ill. 2d at 393. This Court has thus declined to find that this criterion is satisfied when an issue affects only a limited group of individuals in a unique circumstance. *In re Marriage of Eckersall*, 2015 IL 117922, ¶ 15 (question was not of a public nature when it "has a limited application to a small group of people and does not significantly affect the public as a whole"); *Donald B.*, 2014 IL 115463, ¶ 34 (disagreeing with circuit

court that statutory provision "broadly determine[d] the rights of parents" because it "affect[ed] a very limited group" of individuals) (internal quotations omitted). Here, defendant's ability to revoke the FOID cards of individuals facing felony charges affects only a small category of individuals (those who have been charged with felonies) for a limited span of time (while the charges are pending). This case thus does not present a broad public interest issue that would satisfy the first criterion.

B. There is no need for an authoritative decision on the question presented.

Second, the public interest exception does not apply because there is no need for an authoritative decision from this Court on the question presented. This criterion does not permit the Court to "review cases merely to set precedent or guide future litigation." *Commonwealth Edison*, 2016 IL 118129, ¶ 15 (cleaned up). Rather, the Court "looks to whether the law is in disarray or conflicting precedent exists." *Id.* at ¶ 16. Generally, "[w]hen a case presents an issue of first impression," no conflict or disarray exists. *Id.* Although the Court has departed from this approach in some circumstances, those are rare situations in which uncertainty cannot be tolerated, such as some challenges to the electoral process or when a child's life is at risk. *See In re Shelby R.*, 2013 IL 114994, ¶¶ 20, 21.

Here, there is no conflict among lower courts as to whether section 8(n) is unconstitutional with respect to persons charged with, but not convicted of, felonies. In fact, to the best of counsel's knowledge, no other court has

weighed in on this question, making it especially unsuitable for the public interest exception. *See, e.g.*, *Commonwealth Edison*, 2016 IL 118129, ¶ 17 (no conflicting precedent, and thus no need for authoritative determination of the law, when the case "involve[d] an issue of first impression"); *Eckersall*, 2015 IL 117922, ¶ 16 (finding factor not met where court had not found, and parties had not cited, "any conflicting precedents" on issue); *Hernandez*, 239 Ill. 2d at 203 (because "*no* precedent exists on this issue, . . . [t]his is clearly not a situation in which an authoritative resolution is needed") (emphasis in original).

Nor does this case present the kind of extraordinary situation where uncertainty cannot be tolerated. *See Shelby R.*, 2013 IL 114994, ¶¶ 20-21. The revocation of a FOID card while felony charges are pending is temporary: the card can be restored upon acquittal or when charges are dismissed. *See Donald B.*, 2014 IL 115463, ¶ 35 (declining to apply public interest exception for parental visitation issue that would not "permanently terminate" parental rights); *cf. Shelby R.*, 2013 IL 114994, ¶ 20 (noting need for "prompt[ ]" action "where a child's life is endangered"). In fact, that is precisely what occurred here. C74, C337, C401. Because the second prong of the public interest exception was also not present, this case does not satisfy the exception's rigid standards.

C. This case presents an as-applied challenge, and thus the question presented is not likely to recur.

Finally, question this case presents is not likely to recur, even as to different FOID card holders. As explained *infra* pp. 30-32, plaintiffs have abandoned a facial challenge to section 8(n), by conceding that some felony defendants could have their FOID cards revoked without running afoul of the Second Amendment. They have thus preserved only an as-applied challenge, which depends on plaintiffs' particular circumstances. Such fact-specific inquiries presented by as-applied challenges do not satisfy the third criterion for the public interest exception. *See Alfred H.H.*, 233 Ill. 2d at 358 (third criterion not met when it was "highly unlikely" that addressing case-specific issue "would have any impact on future litigation"). Plaintiffs have not, and cannot, feasibly contend that the circumstances presented here — suspension of a FOID card after a felony charge of reckless endangerment based on shooting a semi-automatic rifle 19 times — are likely to recur in other cases.

Thus, plaintiffs satisfied none of the requirements for invoking the public interest exception, and the circuit court erred in concluding otherwise.

D. The circuit court erred in applying the public interest exception.

The circuit court's analysis of all three prongs was erroneous. According to the circuit court, this case presents an issue of a public nature because it involves a constitutional challenge to a statute. C581. But as explained, plaintiffs' as-applied constitutional challenge depends on their

particular circumstances, and thus cannot meet this criterion. *See Alfred H.H.*, 233 Ill. 2d at 356-57. Moreover, a claim that a statute is unconstitutional does not necessarily mean that the issue is of public importance. *See Donald B.*, 2014 IL 115463, ¶¶ 34-35; *Eisenberg*, 337 Ill. App. 3d at 380.

The circuit court also stated, without further analysis, that the issue was "of significant breadth and has a significant effect on the public as a whole." C581. But the court also acknowledged that the issue impacted only individuals with FOID cards facing felony charges, C581 — which, as explained, is a limited (and time-limited) group, especially given plaintiffs' concession that section 8(n) can be constitutionally applied to revoke the FOID cards of some felony defendants, *supra* pp. 23-24.

Next, the circuit court determined that the second criterion was satisfied because its decision "will provide guidance to judges and prosecutors and firearm owners, in addition to public officers, including the Defendant, faced with questions regarding the statute's validity." C581. But this is insufficient. It is often the case that a decision could provide guidance, and if all that were required was that a decision "'could be of value to future litigants,'" then this factor "'would be so broad as to virtually eliminate the notion of mootness.'" *Commonwealth Edison*, 2016 IL 118129, ¶ 15 (quoting *Alfred H.H.*, 233 Ill. 2d at 357). That is why this Court demands more to satisfy this criterion — specifically, a clear showing that the law is in disarray

or that there are conflicting precedents. *Id.* at ¶ 16. And as explained, *supra* pp. 24-25, the circuit court did not identify any relevant precedents, let alone conflicting ones, and defendant is not aware of any.

Finally, the circuit court found that the third criteria was met because defendant, as Chief of the Firearms Services Bureau, "execut[es] the provisions of the firearm suspension statutes." C582. This ignores that plaintiffs have chosen to present only an as-applied challenge, *infra* pp. 30-32, which depends on their particular circumstances. Such circumstances are not likely to recur. *Supra* p. 26.

As support for its conclusion that the public interest exception to mootness applies, the circuit court relied exclusively on *Koshinski v. Trame*, 2017 IL App (5th) 150398, but that case is inapposite for at least two reasons. First, the question presented in *Koshinski* was "not case-specific," *id.* at ¶ 24, unlike this case, where plaintiffs preserved only an as-applied challenge, *see infra* pp. 30-32. As explained, as-applied challenges do not present questions of a public nature or questions that are likely to recur. *Supra* pp. 23, 26; *see Alfred H.H.*, 233 Ill. 2d at 356-57. Second, in *Koshinski*, the plaintiff's FOID card was restored during the course of litigation; the plaintiff had brought suit while his FOID card was revoked because an *ex parte* order of protection was entered against him, and the order of protection was vacated while the case was pending. 2017 IL App (5th) 150398, ¶¶ 3-5. Here, in contrast, plaintiffs did not bring suit until after their FOID cards were restored. C15-17.

In any event, *Koshinski* conflicts with this Court's longstanding precedent applying the public interest exception. The appellate court determined that the law there, which applied only to those under orders of protection, affected "the public as a whole." *Koshinski*, 2017 IL App (5th) 150398, ¶ 24. But this Court has made clear that laws that affect such limited groups do not warrant the public interest exception. *See Eckersall*, 2015 IL 117922, ¶ 15; *Donald B.*, 2014 IL 115463, ¶ 34. *Koshinski* also relied on the mere presence of a constitutional issue to find a "matter of public importance," 2017 IL App (5th) 150398, ¶ 24, a conclusion that would allow the public interest exception to swallow the mootness rule whenever a constitutional issue was presented, *see Donald B.*, 2014 IL 115463, ¶¶ 34-35 (refusing to apply public interest exception despite constitutional issue presented); *Eisenberg*, 337 Ill. App. 3d at 380 ("[T]he presence of a constitutional defect in a statutory requirement does not automatically mean that the public interest exception to the mootness doctrine applies."). Finally, like the circuit court here, the *Koshinski* court found that an authoritative determination of the law would "provide guidance," even though there were no conflicting precedents. 2017 IL App (5th) 150398, ¶ 27. As noted, this Court has long held that the public interest exception should not be applied to issues of first impression, *Commonwealth Edison*, 2016 IL 118129, ¶¶ 16-17; *Hernandez*, 239 Ill. 2d at 203, and that doing so merely to provide guidance would "virtually eliminate

the notion of mootness," *Commonwealth Edison*, 2016 IL 118129, ¶ 15 (cleaned up).

Thus, the circuit court should not have reached the merits of plaintiffs' Second Amendment claim because assuming that plaintiffs even had standing, the re-issuance of plaintiffs' FOID cards rendered any controversy between the parties moot, and no exception to mootness applies. This Court thus should reverse or vacate the circuit court's judgment, and remand with instructions to dismiss the complaint. *See Hernandez*, 239 Ill. 2d at 203; *see also Munsingwear, Inc.*, 340 U.S. at 39.

IV. Plaintiffs abandoned a facial challenge, and thus the circuit court erred in declaring section 8(n) unconstitutional with respect to all individuals charged with felonies.

As explained, this Court need not reach the merits of plaintiffs' Second Amendment claim because this case is not justiciable. If this Court does so, however, the Court should first hold that the circuit court committed a threshold error by invalidating section 8(n) with respect to *all* persons charged with a felony. Plaintiffs and the circuit court both acknowledged that some indicted defendants can have their FOID cards revoked without violating the Second Amendment. Thus, if this Court reaches the merits, the Court should reverse the circuit court's decision insofar as that court enjoined defendant from revoking the FOID card of any person "charged with a felony but not convicted of a felony," C589, and then consider plaintiffs' argument that

section 8(n) is unconstitutional as applied to them (which it is not, *see infra* Section V).

As explained, *supra* p. 7, section 8(n) operates with section 922(n) to authorize the State Police revoke the FOID card of any person who is charged with a felony. Plaintiffs styled their constitutional challenge as one to section 8(n) "as applied" to all persons charged with a felony. C74. But plaintiffs also alleged that revoking a FOID card while felony charges are pending is always unconstitutional, regardless of the particular crime charged or the underlying circumstances. C73-74. Thus, notwithstanding the complaint's "as applied" language, Plaintiffs signaled that they had intended to bring a facial challenge. *See Napleton*, 229 Ill. 2d at 306 (a successful facial challenge voids a statute "in all applications"). But plaintiffs later acknowledged (and the circuit court agreed, C584, C635) that that defendant can revoke the FOID cards of some individuals charged with felonies without violating the Second Amendment, C259, R12.

By acknowledging that there is "some set of circumstances" under which section 8(n) can be applied constitutionally to felony defendants, plaintiffs abandoned their facial challenge. *See Napleton*, 229 Ill. 2d at 306. Nevertheless, the circuit court purported to hold section 8(n) unconstitutional whenever it is invoked based on section 922(n); that is, that the operation of the two statutes together is facially unconstitutionally in every circumstance. C589 (declaring 8(n) unconstitutional whenever it purports to revoke the

FOID card for "persons charged with a felony but not yet convicted of a felony"). This was inconsistent with plaintiffs' concession that the statute is constitutional in some circumstances. "So long as there exists a situation in which a statute could be validly applied, a facial challenge must fail." *People v. Huddleston*, 212 Ill. 2d 107, 145 (2004) (cleaned up).

Thus, if this Court reaches plaintiffs' Second Amendment claim notwithstanding the threshold issues of standing and mootness, the Court should at a minimum modify the circuit court's judgment to make clear that section 8(n) is not unconstitutional as to every person charged with a felony. Regardless, as now explained, section 8(n) is constitutional as applied to plaintiffs, and thus their challenge, whether facial or as applied, fails. *See In re Derrico G.*, 2014 IL 114463, ¶ 57 ("if a statute is constitutionally applied as to the challenger, his facial challenge necessarily fails").

V. Revoking plaintiffs' FOID cards while they were under felony indictment did not violate the Second Amendment.

If this Court reaches the merits of plaintiffs' Second Amendment claim, it should reverse the circuit court's judgment because section 8(n) comports with that Amendment as applied to plaintiffs.[4] As this Court has recognized,

[4] In lieu of reaching the merits, the Court may decide to hold this case pending the Supreme Court's resolution of *United States v. Rahimi*, No. 22-915 (U.S.), and *United States v. Range*, No. 23-374 (U.S.). These cases present questions regarding whether federal laws imposing firearms restrictions on individuals subject to domestic violence restraining orders and individuals convicted of felonies, respectively, violate the Second Amendment. Because the Supreme Court's disposition of these cases may provide further clarity on the *Bruen* standard and will constitute binding authority regarding the Second

the Supreme Court's decision in *Bruen* articulated a two-step test for Second Amendment claims. *Caulkins v. Pritzker*, 2023 IL 129453, ¶ 34 (citing *Bruen*, 142 S. Ct. at 2126, 2132, 2138). First, the plaintiff must show that "the Second Amendment's plain text covers an individual's conduct." *Bruen*, 142 S. Ct. at 2129-30. If it does, "the Constitution presumptively protects that conduct" and the analysis proceeds to the second step, where the burden shifts to the government to show that the challenged restriction "is consistent with the [n]ation's historical tradition of firearm regulation." *Id.* Plaintiffs' Second Amendment challenge fails at both steps. The circuit court's holding otherwise ignored *Bruen*'s framework and rested on that court's own novel considerations.

A. The Second Amendment's plain text does not cover possessing firearms while under felony charges.

To begin, plaintiffs' challenge fails at the first step of the *Bruen* analysis because they did not carry their burden to show that possessing a firearm while under indictment is protected by the Second Amendment's plain text. *See Caulkins*, 2023 IL 129453, ¶ 34 *(Bruen*'s first step asks whether "a plaintiff has shown" the plain text covers the relevant conduct); *see also Bruen*, 142 S. Ct. at 2130 (if "plain text covers an individual's conduct . . . the government *must then* justify its regulation") (emphasis added). In fact, plaintiffs did not even attempt to meet their burden. Their motion for summary judgment

---

Amendment, this Court may wish to have the benefit of their reasoning prior to addressing the merits of plaintiffs' claim here.

simply asserted that the Second Amendment's plain text encompassed possessing firearms while under felony indictment, and then proceeded to the historical inquiry. C259. Such bare assertions are insufficient. *See Evanston Ins. Co. v. Riseborough*, 2014 IL 114271, ¶ 36 (parties must raise arguments in the circuit court).

At any rate, possessing firearms while under felony indictment does not come within the plain text of the Second Amendment. The Second Amendment protects "'the right of law-abiding, responsible citizens to use arms' for self-defense." *Bruen*, 142 S. Ct. at 2131 (quoting *Heller*, 554 U.S. at 635); *see also id.* at 2122 (*Heller* "recognized that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense"); *cf. People v. Ramirez*, 2023 IL 128123, ¶ 27 (certain firearms were "not covered by the plain text of the second amendment because they are not typically used by law-abiding citizens for lawful purposes").[5] In contrast, it is "presumptively lawful" to regulate the possession of firearms by groups who are not considered to be responsible or

[5] Indeed, *Bruen* emphasized this limitation by repeatedly using the word "law-abiding" to describe the class of persons protected by the Second Amendment. *See Bruen*, 142 S. Ct. at 2122 ("ordinary, law-abiding citizens"); *id.* at 2125 ("law-abiding, adult citizens"); *id.* at 2131 ("law-abiding, responsible citizens") (cleaned up); *id.* at 2133 ("a law-abiding citizen's right to armed self-defense" and "law-abiding citizens"); *id.* at 2134 ("ordinary, law-abiding, adult citizens"); *id.* at 2135 n.8 ("law-abiding citizens"); *id.* at 2138 ("law-abiding citizens"); *id.* at 2138 n.9 ("law-abiding, responsible citizens") (cleaned up); *id.* at 2150 ("law-abiding citizens"); *id.* at 2156 ("law-abiding, responsible citizens" and "law-abiding citizens").

law-abiding — that is, whose possession of firearms would be considered dangerous to themselves or others — such as "felons and the mentally ill," among others. *Heller*, 554 U.S. at 626; *see id.* at 627 n.26 (describing these categories as "examples" and not "exhaustive").

While a person is under felony indictment — that is, where a judge or grand jury has made a finding of probable cause that an individual has committed a felony — that person's possession of firearms is not protected by the Second Amendment because he or she is, at least temporarily, not considered a responsible, law-abiding citizen. *United States v. Fencl*, No. 21-CR-3101 JLS, 2022 WL 17486363, at *2 (S.D. Cal. Dec. 7, 2022) (indicted defendant, "[b]y definition," fell "outside the scope" of Second Amendment protections for "responsible, law-abiding citizens")), *aff'd sub nom. United States v. Garcia*, No. 22-50314, 2023 WL 2596689 (9th Cir. Jan. 26, 2023); *United States v. Perez-Garcia*, 628 F. Supp. 3d 1046, 1053 (S.D. Cal. 2022) ("a person who has been charged with a crime based on a finding of probable cause . . . would not be considered a law-abiding or responsible citizen" and so "is outside the plain text of the Second Amendment") (internal quotations omitted), *review denied*, 2022 WL 17477918 (S.D. Cal. Dec. 6, 2022), *and aff'd sub nom. Garcia*, 2023 WL 2596689; *see also United States v. Now*, No. 22-CR-150, 2023 WL 2717517, at *5 (E.D. Wis. Mar. 15, 2023) (expressing "doubts" that individual under felony indictment fell into Second Amendment's plain text, but assuming as much for purposes of analysis), *report and*

recommendation adopted, 2023 WL 2710340 (E.D. Wis. Mar. 30, 2023); *United States v. Jackson*, No. CR ELH-22-141, 2023 WL 2499856, at *8 (D. Md. Mar. 13, 2023) (similar).

A felony charge establishes that probable cause exists to believe that the defendant committed the offense. 725 ILCS 5/111-2(a) (2022); *see* 725 ILCS 5/109-3(a) (2022) (charge by information); 725 ILCS 5/112-4(d) (2022) (charge by indictment); *see also Kaley v. United States*, 571 U.S. 320, 328 (2014) (indictment "conclusively determines the existence of probable cause to believe the defendant perpetrated the offense alleged") (cleaned up). Such a determination requires a proceeding — either a preliminary examination or a grand jury proceeding — before a neutral judge or grand jury. 725 ILCS 5/109-3(a); 725 ILCS 5/112-4(d). For this reason, a felony charge allows the State to restrict the liberties of the accused, and even to detain the person pretrial. *See Kaley*, 571 U.S. at 329 ("the determination may also serve the purpose of immediately depriving the accused of her freedom"). Once probable cause exists, a suspected lawbreaker may face reduced First Amendment protections, *Bell v. Wolfish*, 441 U.S. 520, 550 (1979); have assets seized — even if those assets are needed to pay a lawyer — without violating the rights to counsel or to due process, *Kaley*, 571 U.S. at 327-28; be searched when arrested, *United States v. Robinson*, 414 U.S. 218, 224-26 (1973); be made to give a DNA sample, *Maryland v. King*, 569 U.S. 435, 465 (2013); and even be strip

searched when taken to jail, *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 322-23 (2012).

These restrictions underscore that those who have been charged with felonies are not considered law-abiding, and thus may have their rights curtailed to protect public safety. The same is true for Second Amendment rights. *See Bruen*, 142 S. Ct. at 2130 ("Th[e] Second Amendment standard accords with how we protect other constitutional rights."); *id.* at 2156 (Second Amendment is subject to the same "body of rules" as "other Bill of Rights guarantees") (cleaned up). To hold otherwise would elevate the Second Amendment above these other rights, without textual justification. *See United States v. Wendt*, 650 F. Supp. 3d 672, 681 (S.D. Iowa 2023) (to conclude that "courts are categorically forbidden from imposing restrictions on firearm possession pending trial" would conflict with United States Supreme Court decisions holding that it is permissible to restrict other constitutional rights pretrial).

In any event, even if some individuals under felony indictment might be sufficiently law-abiding and responsible to possess firearms, plaintiffs here demonstrated that they were not. They were charged with shooting a semi-automatic rifle 19 times, in a reckless manner that endangered the safety of others. C329, C354, C393. And they conceded that the charges were supported by probable cause by waiving a preliminary hearing. C443-46; *see People v. Ladd*, 294 Ill. App. 3d 928, 932 (5th Dist. 1998), *aff'd*, 185 Ill. 2d 602

(1999). A finding of probable cause that plaintiffs recklessly shot a semi-automatic rifle in a way that endangered others demonstrated their dangerousness and irresponsibility with firearms, and thus temporarily removed them from the scope of the Second Amendment's plain text. Their as-applied challenge to section 8(n) thus fails at *Bruen*'s first step.

B. Prohibiting those under felony indictment from possessing firearms comports with the nation's historical traditions.

Even if plaintiffs' conduct was covered by the Second Amendment's plain text, restricting the firearms rights of those charged with felonies squares with historical tradition, as required by the second step of the *Bruen* inquiry. When comparing modern and historical firearm laws, the Supreme Court has explained, courts must often "reason[] by analogy," which requires assessing "whether the two regulations are relevantly similar." *Bruen*, 142 S. Ct. at 2132 (internal quotations omitted). "[A]nalogical reasoning," the Court continued, is not "a regulatory straightjacket." *Id.* It "requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*." *Id.* (emphasis in original). "So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Id.* *Bruen* gave no "exhaustive survey of the features that render regulations relevantly similar" but noted "two metrics: how and why the regulations burden a law-abiding citizen's right to armed self- defense." *Id.* at 2132-33. In other words, the

central inquiry is "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified." *Id.* at 2133.

And here, there is a robust historical tradition supporting section 8(n)'s restriction on firearms possession for those charged with felonies, including: (1) a historical tradition of allowing the government to detain defendants charged with serious offenses, *see infra* Section V.B.1; (2) historical laws restricting the firearm rights of groups deemed dangerous or unlikely to obey the law, *see infra* Section V.B.2; and (3) historical surety laws restricting the firearm rights of people accused of posing a threat, *see infra* Section V.B.3. Following *Bruen*, courts have relied on one or more of these historical precursors to hold that federal laws imposing firearms restrictions on indicted felony defendants are consistent with the Second Amendment at *Bruen*'s second step.[6] And, as explained below, *see infra* Section V.B.4, each of these historical traditions shows that section 8(n)'s prohibition on possessing firearms while under felony indictment does not violate the Amendment

[6] *E.g.*, *United States v. Alston*, No. 5:23-CR-021-FL-1, 2023 WL 7003235 (E.D.N.C. Oct. 24, 2023); *United States v. Adger*, No. CR 122-102, 2023 WL 3229933 (S.D. Ga. May 3, 2023), *report and recommendation adopted*, 2023 WL 3627840 (S.D. Ga. May 24, 2023); *Now*, 2023 WL 2717517; *Jackson*, 2023 WL 2499856; *United States v. Bartucci*, 658 F. Supp. 3d 794 (E.D. Cal. 2023); *United States v. Gore*, No. 2:23-CR-04, 2023 WL 2141032 (S.D. Ohio Feb. 21, 2023); *United States v. Rowson*, 652 F. Supp. 3d 436 (S.D.N.Y. 2023); *Fencl*, 2022 WL 17486363 (S.D. Cal. Dec. 7, 2022); *United States v. Slye*, No. 1:22-MJ-144, 2022 WL 9728732 (W.D. Penn. Oct. 6, 2022); *United States v. Kays*, 624 F. Supp. 3d 1262 (W.D. Okla. 2022).

because each is "relevantly similar" to section 8(n) under the "two metrics" *Bruen* identified: "how and why" they burden Second Amendment rights. 142 S. Ct. at 2132-33.

1. This country has a robust historical tradition of detaining indicted defendants before trial.

To start, our nation has an established tradition of allowing the government to detain individuals charged with serious offenses while awaiting trial. At the founding, it was well understood that legislatures could deprive indicted defendants of their liberty before trial. *United States v. Edwards*, 430 A.2d 1321, 1327 (D.C. 1981) (a "fundamental right to bail was not universal among the colonies or among the early states"). Furthermore, while the Eighth Amendment forbids excessive bail, it "fails to say all arrests must be bailable." *Carlson v. Landon*, 342 U.S. 524, 546 (1952). Rather, that Amendment "was lifted with slight changes from the English Bill of Rights Act," which "has never been thought to accord a right to bail in all cases." *Id.* Thus, since the founding, legislatures have retained the power to "ban bail in an entire class of cases." *United States v. Stephens*, 594 F.3d 1033, 1039 (8th Cir. 2010).

Against that backdrop, American legislatures instituted pretrial detention for defendants charged with serious crimes. Sandra G. Mayson, *Dangerous Defendants*, 127 Yale L.J. 490, 502 (2018); *see Slye*, 2022 WL 9728732, at *2 ("The precedent for denial of pretrial release to those accused of crimes dates to the early days of the Republic — indeed to English common

law."); *see also* Judiciary Act of 1789, Act of Sept. 24, 1789, ch. XX, 1 Stat. 73, § 33 (1789) (defendant accused of federal capital crime was not allowed bail except in judge's discretion). Although founding-era laws described such serious crimes as "capital" offenses, they encompassed a broad swath of criminal conduct, including "nonviolent offenses that we recognize as felonies today, such as counterfeiting currency, embezzlement, and desertion from the army," as well as "forgery and horse theft." *Medina v. Whitaker*, 913 F.3d 152, 158 (D.C. Cir. 2019); *Furman v. Georgia*, 408 U.S 238, 335 (1972) (Marshall, J., concurring) (listing capital crimes in colonial New England, including "idolatry," "blasphemy," "assault in sudden anger," "adultery," and "perjury in a capital trial"). These and other historical laws show that our nation has a settled tradition of allowing the government to detain indicated defendants before trial.

2. This country has a robust historical tradition of approving laws that disarmed groups considered dangerous or untrustworthy.

Next, English and American governments have long restricted the firearms rights of groups deemed dangerous or untrustworthy to promote public safety. For example, in 1662, England empowered officers to "seize all arms in the custody or possession of any person" whom they "judge[d] dangerous to the Peace of the Kingdom." Militia Act of 1662, 13 & 14 Car. 2, c.3, § 13 (1662); *see Bruen*, 142 S. Ct. at 2140 (calling this period of English history "particularly instructive"). And officials did not exercise this power

merely in isolated incidents, but rather on a widespread scale. Patrick J. Charles, *"Arms for Their Defence"?: An Historical, Legal, and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment Should be Incorporated in* McDonald v. City of Chicago, 57 Clev. St. L. Rev. 351, 363-68 (2009). "[B]y the time of American independence, England had established a well-practiced tradition of disarming dangerous persons — violent persons and disaffected persons perceived as threatening to the crown." Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Firearms*, 20 Wyo. L. Rev. 249, 261 (2020); *see id.* at 259-61 (detailing history).

The American colonies (and later the States) continued that tradition by passing laws restricting the possession and use of firearms by groups and individuals deemed dangerous or untrustworthy.

First, "revolutionary and founding-era gun regulations" included "those that targeted particular groups for public safety reasons." *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 200 (5th Cir. 2012), *abrogated on other grounds by Bruen*, 142 S. Ct. 2111. During the Revolutionary War, at least six "jurisdictions passed laws that confiscated weapons owned by persons who refused to swear an oath of allegiance." *Id.*; *see* 5 The Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay 479 (1886) (1776 law); 7 Records of the Colony of Rhode Island and Providence Plantations, in New England 567

(1862) (1776 law); 1 The Public Acts of the General Assembly of North Carolina 231 (1804) (1777 law); 9 Statutes at Large; Being A Collection of All the Laws of Virginia 282 (1821) (1777 law); An Act for constituting a Council of Safety, § 20, Ch. XL, 1776-1777 N.J. Laws, 90 (Rutgers, New Jersey Session Laws Online) (1777 law); 9 Statutes at Large of Pennsylvania 348 (1903) (1779 law); *see also Medina*, 913 F.3d at 159 ("during the revolution, the states of Massachusetts and Pennsylvania confiscated weapons belonging to those who would not swear loyalty to the United States"); Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 Law & Hist. Rev. 139, 157-60 (2007); Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 506-08 (2004) . In fact, the Continental Congress expressly urged colonial governments to disarm "disaffected" loyalists. 4 Journals of the Continental Congress, 1774-1789, at 205 (1906).

Similarly, some colonies also completely banned slaves and Native Americans from owning firearms. *United States v. Jimenez-Shilon*, 34 F.4th 1042, 1047 (11th Cir. 2022); *accord United States v. Jackson*, 69 F.4th 495, 502 (8th Cir. 2023). These laws, while sometimes "overbroad," were "intended to prevent danger," Greenlee, 20 Wyo. L. Rev. at 262 & n.76 (citing examples), based on the perception that such groups were "*per se* dangerous," *Rowson*, 652 F. Supp. 3d at 466 (collecting sources). To be sure, laws discriminating

based on race or ethnicity are repugnant and would be unconstitutional today on equal protection or other grounds. But these laws nevertheless show, as a historical matter, that the founders understood that legislatures could, consistent with the right to bear arms, ban firearms possession for certain groups, based on that group's perceived dangerousness or untrustworthiness. *Jackson*, 69 F.4th at 504; *Bartucci*, 658 F. Supp. 3d at 804; *Rowson*, 652 F. Supp. 3d at 466.

Second, some founding-era laws permitted officials to "take away Arms" of those who went "offensively armed, in Terror of the People." George Webb, The Office and Authority of a Justice of Peace 92 (1736); *see Bruen*, 142 S. Ct. at 2144 n.14 (citing Webb at 92 to illustrate "the existing common law"). Indeed, by the time the Second Amendment was ratified, at least three colonies authorized the arrest of those who went out offensively armed, and confiscated the weapons of those who did so. *See* 1 The Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay 52-53 (1869) (1692 statute); Acts and Laws of His Majesty's Province of New Hampshire in New England; with Sundry Acts of Parliament 1-2 (1761) (1701 statute); Collection of All Such Acts of the General Assembly of Virginia, of a Public and Permanent Nature, as Are Now in Force 33 (1794) (1786 statute).

Beyond these early laws, other sources confirm this county's tradition of disarming groups of individuals because they were considered dangerous or untrustworthy. Accounts of the ratification debates demonstrate the founders'

belief that "disarming select groups for the sake of public safety was compatible with the right to arms specifically and with the idea of liberty generally." *Nat'l Rifle*, 700 F.3d at 200. A "'highly influential' 'precursor' to the Second Amendment" identified in *Heller* recognized that the government could disarm individuals deemed to be dangerous, stating that "citizens have a personal right to bear arms 'unless for crimes committed, or real danger of public injury.'" *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (*en banc*) (quoting *Heller*, 554 U.S. at 604, then quoting 2 Bernard Schwartz, The Bill of Rights: A Documentary History, 662, 665 (1971)). A later treatise cited in *Heller* explained that some groups were "almost universally excluded" from exercising certain civic rights, including "the idiot, the lunatic, and the felon, on obvious grounds." Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 29 (1st ed. 1868); *see Heller*, 554 U.S. at 616 (describing treatise as "massively popular").

Finally, these founding-era disarmament laws were concerned not only with protecting the public from violent or dangerous individuals, but also from those who demonstrated disrespect for civic norms. The founders understood that "the right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm 'unvirtuous citizens.'" *United States v. Yancey*, 621 F.3d 681, 684-85 (7th Cir. 2010) (*per curiam*) (quoting *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010) and collecting

scholarly sources); *United States v. Carpio-Leon*, 701 F.3d 974, 979-80 (4th Cir. 2012) (same); *see also* Stephen P. Halbrook, *The Right To Bear Arms In The First State Bills Of Rights: Pennsylvania, North Carolina, Vermont, And Massachusetts*, 10 Vt. L. Rev. 255-320 (1985), available at https://bit.ly/3NPFctU, at 37 (describing colonial-era local resolution stating "we esteem it an essential privilege to keep Arms in Our houses for Our Own Defense and *while we Continue honest and Lawful subjects of Government* we Ought Never to be deprived of them") (emphasis added). The Second Amendment thus incorporates the historical tradition of permitting firearms restrictions directed at citizens who were considered not law-abiding and "does not preclude laws disarming the unvirtuous citizens (i.e. criminals)." Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 Law & Contemp. Probs. 143-50 (Winter 1986), at 146; *see also* Saul Cornell, *"Don't Know Much About History": The Current Crisis in Second Amendment Scholarship*, 29 N. Ky. L. Rev. 657, 679 (2002) ("Perhaps the most accurate way to describe the dominant understanding of the right to bear arms in the founding era is as . . . limited to those members of the polity who were deemed capable of exercising it in a virtuous manner.").

Thus, the nation's historical tradition includes laws, both before and during the founding era, that restricted firearms access for groups who were perceived to be dangerous or untrustworthy.

3. This country has a robust historical tradition of approving surety laws that restricted the firearms rights of individuals accused of posing a threat.

Finally, the nation has a historical tradition of surety laws, which allowed ordinary citizens to ask a court to take action against individuals who posed a risk of harm. 4 William Blackstone, Commentaries on the Laws of England 252 (1769) ("[W]herever any private man hath just cause to fear, that another will burn his house, or do him a corporal injury, by killing, imprisoning, or beating him; . . . he may demand surety of the peace against such person."). As relevant here, surety laws could restrict access to firearms by "those accused of wrongdoing." *Bartucci*, 658 F. Supp. 3d at 805. A surety did not require a determination that a crime was "actually committed by the party," but rather required only "probable suspicion" that a crime was "intended or likely to happen." 4 Blackstone at 249.

The American colonies adopted the surety practice. *See* William Rawle, A View of the Constitution of the United States of America 126 (2d ed. 1829). For example, a New Hampshire provision allowed a justice of the peace to seize the weapons of a person who went armed in a threatening manner, based on "confession" or "legal proof." Acts and Laws of His Majesty's Province of New Hampshire in New England; with Sundry Acts of Parliament 1-2 (1761) (1701 statute). Other colonies had similar laws. *E.g.,* 1 The Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay 52-53 (1869) (1692 statue); *see* 2 Statutes at Large of Pennsylvania from 1682 to 1801, 23

(1896) (1700 statute); 1 Laws of the State of Delaware from the Fourteenth Day of October, One Thousand Seven Hundred, to the Eighteenth Day of August, One Thousand Seven Hundred and Ninety-Seven 52 (1797) (1700 statute); Acts and Laws of His Majesties Colony of Connecticut in New England 91 (1901) (1702 statute). As further evidence of this tradition, *Bruen* identified 10 States and territories that passed laws requiring any person "who was reasonably likely to 'breach the peace,'" and who could not show a special need for self-defense, to post a bond before publicly carrying firearms. 142 S. Ct. at 2148 & n.23 (collecting statutes).

Thus, our nation has a historical tradition of approving surety laws that allow restrictions on the firearms rights of individuals who posed a risk of harm. As now explained, this tradition, alone or together with the traditions of detaining individuals accused of serious crimes and disarming groups perceived to be dangerous or untrustworthy, establishes that section 8(n)'s restriction on firearms possession by felony defendants is consistent with the Second Amendment under the second step of the *Bruen* inquiry.

4. Section 8(n)'s restriction on firearms possession for indicted defendants is analogous to each of these historical precursors.

Each of these historical precursors supports disarming those under felony indictment because each is "relevantly similar" to section 8(n) under the "two metrics" *Bruen* identified: "how and why the regulations burden a law-abiding citizen's right to armed self-defense." 142 S. Ct. at 2132-33.

To begin, section 8(n) is analogous to the three historical precursors in "how" it burdens the right to bear arms. Like historical laws allowing for the detention of individuals charged with serious crimes, section 8(n) temporarily prohibits a person from possessing firearms. In fact, as courts have recognized, the historical power of legislatures to order pretrial detention for those accused of crimes encompassed the power to restrict a person's access to firearms before trial. *See Slye*, 2022 WL 9728732, at *2-3 ("It would be illogical to conclude" that court had authority to detain the defendant "but lacks the authority to impose far less severe restrictions, such as ordering his release on bond with a firearms restriction."); *United States v. Slone*, No. 5:22-CR-144-KKC-MAS, 2023 WL 8037044, at *6 (E.D. Ky. Nov. 20, 2023) (similar); *Alston,* 2023 WL 7003235, at *2 (similar); *Fencl*, 2022 WL 17486363, at *3 (similar).

Section 8(n) also operates similarly to historical laws authorizing the disarmament of certain groups. *See Now*, 2023 WL 2717517, at *8 (finding section 922(n) analogous to historical laws disarming "uncommonly dangerous or unvirtuous persons"). Both restrict firearms possession because individuals in the designated groups are considered to be dangerous or unlikely to follow the law. *See, e.g.*, Militia Act § 13; *see Nat'l Rifle*, 700 F.3d at 200 (describing colonial era laws that "confiscated" the weapons of loyalists). And neither require a factfinder to make an individualized finding of dangerousness. Instead, both rely on "an objective characteristic" — a felony indictment and

membership in certain groups, respectively — that society often uses as "a fair proxy to dangerousness." *Bartucci*, 658 F. Supp. 3d at 804 (upholding section 922(n) based on this analogy); *Rowson*, 652 F. Supp. 3d at 467 (same).

Section 8(n) operates like historical surety laws for similar reasons.[7] Surety laws were a temporary, not permanent, restriction on firearms rights. 4 Blackstone at 249-50 (surety law restrictions applied only for a specified time). Section 8(n) likewise restricts a person's access to firearms only while a felony indictment is pending; if charges are dropped or a person is acquitted, their FOID card can be restored. *See Gore*, 2023 WL 2141032, at *4 (firearm restrictions on indicted defendants were relevantly similar to surety laws); *Slone*, 2023 WL 8037044, at *6 (same). In addition, surety laws required a "legal process" to trigger firearms restrictions, much like the State Police can revoke a FOID card under section 8(n) only after a legal proceeding — namely, a determination by a judge or grand jury that there is probable cause that the cardholder committed a felony. *See Rowson*, 652 F. Supp. 3d at 469; *Gore*, 2023 WL 2141032, at *4.

[7] Although *Bruen* held that surety laws were insufficiently analogous to the New York concealed carry law challenged there, 142 S. Ct. at 2148-49, surety laws are analogous to section 8(n). This is because while the New York law in *Bruen* "'presume[d] that individuals have no public carry right without a showing of heightened need,'" surety statutes and section 8(n) "presume that individuals have the right to bear arms," but limit that right upon a showing that a person poses a risk to public safety. *See Rowson*, 652 F. Supp. 3d at 469. (quoting *Bruen*, 142, S. Ct. at 1248-49) (upholding section 922(n) based on surety law analogy).

These three historical precursors are also similar to section 8(n) in "why" they burden Second Amendment rights. Both section 8(n) and its historical analogues restrict firearms possession to protect public safety, not to punish individuals. *See, e.g., Nat'l Rifle*, 700 F.3d at 200 (firearms restrictions on loyalists did not require criminal conviction); *Fencl*, 2022 WL 17486363, at *3 (surety laws restricting firearms access were not "a form of punishment"). For starters, historical laws allowing for criminal defendants to be detained before trial were in place to protect public safety. *United States v. Posada*, No. EP-22-CR-1944(1)-KC, 2023 WL 3027877, at *3 (W.D. Tex. Apr. 20, 2023) (collecting academic sources); *see Jackson*, 2023 WL 2499856, at *17 (historical pretrial release restrictions served "the purpose of public safety"). In addition, the "revolutionary and founding-era gun regulations" that "targeted particular groups" did so "for public safety reasons." *Nat'l Rifle*, 700 F.3d at 200; *see Adger*, 2023 WL 3229933, at *4. Surety laws also existed for the purpose of public safety" and were "intended merely for prevention." *Jackson*, 2023 WL 2499856, at *17 (cleaned up); *Bartucci*, 658 F. Supp. 3d at 806 (similar); *see also Kays*, 624 F. Supp. 3d at 1268 (surety laws burdened right to bear arms when there was "'reasonable cause to fear an injury, or breach of the peace.'") (quoting *Bruen*, 142 S. Ct. at 2148).

Like these historical analogues, section 8(n)'s restriction on firearms possession for those under felony indictment furthers public-safety goals. The statute restricts firearms possession based on "a fair proxy to dangerousness:

an indictment for a felony punishable by imprisonment for a term exceeding one year." *Bartucci*, 658 F. Supp. 3d at 804; *accord Rowson*, 652 F. Supp. 3d at 467 (same); *see also Posada*, 2023 WL 3027877, at *4 (firearms restrictions on those charged with felonies "aim to protect the community from firearms in the hands of those the state deems dangerous"). Moreover, as courts have recognized, the pendency of an indictment is a "a volatile period during which the stakes and stresses of pending criminal charges often motivate defendants to do violence to themselves or others." *Kays*, 624 F. Supp. 3d at 1268 (cleaned up); *Bartucci*, 658 F. Supp. 3d at 807 (same); *see also Slye*, 2022 WL 9728732, at *3 (firearms restrictions for those under indictment protects those involved in administering pretrial proceedings).

In fact, this case exemplifies how section 8(n) furthers public safety. Plaintiffs conceded that there was probable cause to charge them with recklessly endangering others through their use of firearms. *Supra* p. 37. The police report indicated that they admitted to shooting a semi-automatic rifle 19 times in a residential area. C329, C354-55, C393. Restricting the ability of such persons to possess firearms, at least until the charges are resolved, protects public safety just like section 8(n)'s historical ancestors.

In sum, section 8(n) is "relevantly similar" to at least three types of historical regulations. *See Bruen*, 142 S. Ct. at 2132. Whether considered on their own or together, these historical analogues establish that section 8(n) comports with the Second Amendment at *Bruen*'s second step.

C. The circuit court's Second Amendment analysis was deeply flawed.

When holding that revoking the FOID cards of indicted defendants under section 8(n) violated the Second Amendment, the circuit court did not adhere to the two-step inquiry required by *Bruen*. Instead, it made the conclusory assertion that "totally disarming all persons merely charged with a felony implicates Second Amendment rights," and then based the entirety of its historical analysis on a dissenting opinion in a pre-*Bruen* decision of the Seventh Circuit. C585-86. These errors, as well as several others discussed below, warrant reversal.

To start, the circuit court stated, without elaboration, that plaintiffs had satisfied their plain text burden based on *Heller* and *Bruen*. C585. But the court ignored that both decisions recognized that the right to keep and bear arms was understood as extending only to law-abiding, responsible citizens. *See Bruen*, 142 S. Ct. at 2122 (*Heller* "recognized that the Second and Fourteenth Amendments protect the right of an *ordinary*, *law-abiding* citizen to possess a handgun in the home for self-defense") (emphasis added); *supra* p. 34. Indeed, the circuit court suggested that even convicted felons are covered by the Second Amendment's plain text, C583-84, C586, ignoring the United States Supreme Court's recognition that laws restricting felons from possessing firearms are presumptively lawful. *Supra* pp. 34-35.

And courts have long recognized that a felony conviction is not required to establish a person as insufficiently "law-abiding" to fall within the Second

Amendment's plain text. For example, courts have held that those who regularly use unlawful drugs are not "law-abiding," and thus may have their firearms rights restricted, regardless of any drug conviction. *See, e.g.*, *United States v. Sanchez*, 646 F. Supp. 3d 825, 827-29 (W.D. Tex. 2022); *United States v. Seiwert*, No. 20 CR 443, 2022 WL 4534605 (N.D. Ill. Sept. 28, 2022). Similarly, courts have held that those who entered the United States illegally are not "law-abiding" for purposes of the Second Amendment's plain text, even though they have not previously been convicted of violating immigration laws. *E.g.*, *Carpio-Leon*, 701 F.3d at 975; *see id.* at 977 (collecting cases).[8]

The circuit court also erred by neglecting *Bruen*'s historical inquiry. It did not engage with any of the historical regulations that defendant offered, let alone conduct analogical reasoning. Instead, the court relied on a single sentence in a dissenting opinion, in which then-Judge Barrett remarked that "[f]ounding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons." C586 (quoting *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting), *abrogated by Bruen*, 142

[8] *Bruen* abrogated application of means-ends scrutiny to the Second Amendment, which courts had used in the second step of their pre-*Bruen* analytical frameworks. *See* 142 S. Ct. at 2126-27. But the court in *Carpio-Leon* upheld the challenged law at step one of its analysis, 701 F.3d at 977-78, 982, which relied on text and history and was "broadly consistent with *Heller*," *see Bruen*, 142 S. Ct. at 2127. Nothing in *Bruen* abrogates courts' analyses at "step one" of their pre-*Bruen* frameworks. *See United States v. Grinage*, No. SA-21-CR-00399-JKP, 2022 WL 17420390, at *2 (W.D. Tex. Dec. 5, 2022) ("[T]o the extent pre-*Bruen* cases relied on textual and historical analysis to find firearms restrictions constitutional, those cases are still good law.").

S. Ct. 2111). This statement cannot bear the weight that the circuit court placed on it.

As an initial matter, the statement was made without the benefit of *Bruen*, and in a dissent in a case that presented different questions. Moreover, in *Heller*, the Supreme Court had confirmed that legislatures may enact categorical restrictions on firearms possession for groups perceived to be dangerous — "'longstanding prohibitions on the possession of firearms by felons and the mentally ill,'" for example, remain "'presumptively lawful'" — and *Bruen* did not depart from *Heller* on this point. *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring) (quoting *Heller*, 554 U.S. at 626-27 & n.26); *see also id.* at 2157 (Alito, J., concurring) (*Bruen* did not "disturb[ ] anything" in *Heller* "about restrictions that may be imposed on the possession or carrying of guns").

Thus, as courts have held, "history demonstrates that there is no requirement for an individualized determination of dangerousness as to each person in a class of prohibited persons." *Jackson*, 69 F.4th at 504; *see id.* at 502-03 (reviewing historical record); *accord Medina*, 913 F.3d at 160 (those ratifying the Second Amendment did not "underst[an]d the right to be so expansive and limitless" as to require individualized assessments before firearms can be restricted). Rather, as explained, the founding era contained a robust tradition of disarming entire categories of people who were considered dangerous or untrustworthy. *See supra* pp. 41-46.

And many federal courts, including after *Bruen*, have relied on the country's history to uphold firearms prohibitions that extend to groups that are considered to be generally dangerous to public safety, even if some individuals within that group "might otherwise show, on a case-by-case basis, that they are not particularly dangerous." *Medina*, 913 F.3d at 159-60; *accord Vincent v. Garland*, 80 F.4th 1197, 1202 (10th Cir. 2023); *Jackson*, 69 F.4th at 504; *see, e.g.*, *Carpio-Leon*, 701 F.3d at 979-80; *Nat'l Rifle*, 700 F.3d at 201-03. This Court has also recognized that categorical restrictions on firearms possession "reflect and comport with a longstanding practice of prohibiting certain classes of individuals from possessing firearms." *People v. Aguilar*, 2013 IL 112116, ¶ 27 (cleaned up) (rejecting Second Amendment challenge to state law prohibiting minors from possessing firearms). And since *Bruen*, several courts have specifically found that the nation's historical tradition of firearms regulation analogizes to, and therefore justifies, categorical firearms restrictions on indicted defendants. *E.g.*, *Bartucci*, 658 F. Supp. 3d at 804; *Rowson*, 652 F. Supp. 3d at 466.

In any event, even if, notwithstanding the historical tradition of disarming categories of people considered to be dangerous, this Court were to consider whether these plaintiffs are themselves dangerous, the circuit court would still have erred. Though the court asserted that plaintiffs were not charged with a "violent crime," C583, plaintiffs did not contest that there was probable cause to believe that they had used firearms to recklessly endanger

the safety of others, *supra* p. 37. Such a finding can be sufficient to "immediately depriv[e] the accused of her freedom," *Kaley*, 571 U.S. at 329, and limit various constitutional protections in the interest of public safety, *supra* pp. 36-37. That plaintiffs engaged in their conduct over the Independence Day holiday weekend, *see* C583, does not eliminate the real danger posed by shooting a semi-automatic weapon 19 times in a residential area. And to the extent that the circuit court believed that it could invalidate section 8(n) because it might be applied to others charged with less obviously dangerous felonies — such as someone charged with "bouncing a $300.00 check," C586 — it ignored the rule that courts cannot invalidate statutes "'on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.'" *Derrico G.*, 2014 IL 114463, ¶ 57 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973)).

The circuit court also deemed it relevant that plaintiffs were indicted for "a statutory felony of recent enactment" and not an "English common-law felon[y]." C583. But no United States Supreme Court decision suggests that the historical tradition of restricting firearms access to specified groups is, or should be, limited to those convicted of felonies under English common law. Indeed, such a conclusion would contradict *Heller*'s assurance that firearms prohibitions on "felons" — without qualification — are presumptively lawful.

554 U.S. at 626-27 & n.26.[9] It would also be inconsistent with *Bruen*'s instruction that the government need only "identify a well-established and representative historical *analogue*, not a historical *twin*." 142 S. Ct. at 2133 (emphasis in original).

The circuit court also noted that federal law (which plaintiffs did not challenge, C72) does not prohibit "persons merely charged with a felony from *possessing* arms." C586 (emphasis in original); *accord* C584. But the fact that Illinois law is more restrictive than federal law does not render it unconstitutional. And comparison to modern-day statutes is irrelevant in a *Bruen* analysis, which demands a historical inquiry. Moreover, although the circuit court cited one federal district court that held section 922(n) unconstitutional, C584 (citing *United States v. Quiroz*, 629 F. Supp. 3d 511 (W.D. Tex. 2022)) — in a decision currently being appealed, *see* No. 22-50834 (5th Cir.) — many other federal courts have concluded otherwise, *supra* p. 39

[9] In any event, neither source the circuit court cited indicates that the felonies the court identified were the only felonies existing at the founding, and they were not. *See Jerome v. United States*, 318 U.S. 101, 108 n.6 (1943) (listing examples of crimes that "were felonies" at common law); Wayne R. LaFave, Substantive Criminal Law § 2.1(b) (3d ed.) (October 2023 update) (identifying crimes that English judges had defined "by the 1600's," as well as additional crimes defined in the 1700s). "Felony crimes in England at the time [of the founding] . . . included nonviolent offenses that we would recognize as felonies today, such as counterfeiting currency, embezzlement, and desertion from the army." *Medina*, 913 F.3d at 158. American colonies, and later States, adopted their own criminal statutes that further expanded those crimes. *See Furman*, 408 U.S. at 335 (Marshall, J., concurring); LaFave, Substantive Criminal Law § 2.1(c). By the time the Second Amendment was ratified, the list of crimes considered "capital offenses," or felonies, included "forgery and horse theft." *Medina*, 913 F.3d at 158.

n.6. And they have done so based on the same history that defendant presented here. *See id*; *supra* pp. 48-52. Moreover, at least one court has criticized *Quiroz* for demanding a "minutely precise analogy to historical prohibitions," *United States v. Kelly*, No. 3:22-cr-00037, 2022 WL 17336578, at *5 n.7, (M.D. Tenn. Nov. 16, 2022), despite *Bruen*'s admonition that a "historical twin" is not required, 142 S. Ct. at 2133.

In sum, the circuit court's Second Amendment analysis was replete with errors. It failed to apply the *Bruen* standard, ignored defendant's historical evidence, and relied on incorrect statements of law and fact. If this Court reaches the merits of plaintiffs' Second Amendment claim, it should reverse the circuit court's judgment.

VI. Plaintiffs did not show irreparable harm.

To be entitled to a permanent injunction, a plaintiff must not only show "a clear and ascertainable right in need of protection" — that is, success on the merits of their claim — but also that he or she will suffer irreparable harm without an injunction. *Vaughn v. City of Carbondale*, 2016 IL 119181, ¶ 44. When a plaintiff does not show irreparable harm, the court can deny the injunction without reaching the merits. *See Smith v. Dep't of Nat. Res.*, 2015 IL App (5th) 140583, ¶ 27.

Plaintiffs did not establish that they would be irreparably harmed absent a permanent injunction. Irreparable harm requires more than "injury that is beyond repair," but rather "denotes transgressions of a continuing

nature." *Behl v. Duffin*, 406 Ill. App. 3d 1084, 1093 (4th Dist. 2010) (cleaned up); *Lucas v. Peters*, 318 Ill. App. 3d 1, 16 (1st Dist. 2000) (same); *Opportunity Ctr. of Se. Ill., Inc. v. Bernardi*, 145 Ill. App. 3d 899, 904 (5th Dist. 1986) (same). "Generally, the damage sought to be enjoined must be likely and not merely possible." *Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk & W. Ry. Co.*, 195 Ill. 2d 356, 371 (2001); *accord Smith*, 2015 IL App (5th) 140583, ¶ 27. Thus, the United States Supreme Court has concluded that a plaintiff did not show irreparable harm when his assertion that he would be subjected to the same policy in the future was "speculative." *Lyons*, 461 U.S. at 111.

Here, as explained, plaintiffs have offered no allegations that they are likely to be charged with a felony, and thus have their FOID cards revoked again. *Supra* p. 18. This forecloses their ability to show irreparable harm. *See Kirsner v. Johnson & Johnson Prods., Inc.*, 118 Ill. App. 3d 564, 566 (1st Dist. 1983) ("In the absence of an allegation that the injury is likely to recur, plaintiffs have not demonstrated a threat of irreparable injury and the trial court therefore erred in granting the injunction."). And for its part, the circuit court simply asserted that the irreparable harm requirement was satisfied, without any analysis. C588-89. Plaintiffs' failure to satisfy this additional requirement for an injunction presents an independent and alternative grounds to reverse the judgment.

CONCLUSION

For these reasons, Defendant-Appellant asks this Court to reverse or vacate the circuit court's judgment, and remand with instructions to dismiss, because plaintiffs lacked standing or, alternatively, because the case was moot. If the Court reaches the merits of plaintiffs' Second Amendment claim or the issue of irreparable harm, the Court should reverse the circuit court's judgment, or, at a minimum, modify the judgment so that it applies only to plaintiffs.

Respectfully submitted,

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

Attorneys for Defendant-Appellant

LEIGH J. JAHNIG
Assistant Attorney General
115 South LaSalle Street
Chicago, Illinois 60603
(312) 793-1473 (office)
(773) 590-7877 (cell)
CivilAppeals@ilag.gov (primary)
Leigh.Jahnig@ilag.gov (secondary)

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 pages or 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 14,693 words.

/s/ Leigh J. Jahnig
LEIGH J. JAHNIG
Assistant Attorney General
115 South LaSalle Street
Chicago, Illinois 60603
(312) 793-1473 (office)
(773) 590-7877 (cell)
CivilAppeals@ilag.gov (primary)
Leigh.Jahnig@ilag.gov (secondary)

TABLE OF CONTENTS TO APPENDIX

E-FILED
1/4/2024 1:29 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

c

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

AARON M. DAVIS and CHARLES G. DAVIS,	)	
Plaintiffs,	)	**Case No. 17-CH-0631**
v.	)	
JEFFREY YENCHKO, in his official capacity as Chief of the Firearms Services Bureau of the Illinois State Police,	)	
Defendant.	)	

ORDER

Before the Court are Plaintiffs' Motion for Default Judgment, Motion for Summary Judgment and Permanent Injunction along with Defendant's Motion for Summary Judgment. In sum, Plaintiffs bring this action pursuant to 42 U.S.C. 1983, the Second Amendment and Fourteenth Amendment to the United States Constitution challenging the blanket prohibition of persons who are merely charged with a felony, whether violent or not, from keeping a valid Firearm Owner's Identification Card {hereinafter referred to as "FOID card"}. For the reasons that follow, Plaintiffs' Motion for Summary Judgment and Permanent Injunction is granted. Plaintiffs' Motion for Default is denied. Defendant's Motion for Summary Judgment is denied.

In the case at bar, Defendant argues that the Plaintiffs' claim is moot and that they lack standing to bring this action. "The existence of an actual controversy is essential to . . . jurisdiction, and courts . . . generally do not decide moot questions." *People v. Lance H. (In re Lance H.)*, 2014 IL 114899, 25 N.E3d 511, 516 (2014). "Where intervening events have made it impossible for the . . . court to grant effective relief to the complaining party, the issues involved in the trial court no longer exist, and the case is moot." *Id.* Here, Plaintiffs' felony indictments

were lifted and they have since received their FOID cards. Therefore, the Defendant argues that this Court cannot grant Plaintiffs effective relief, and the case is moot. This argument is without merit.

In *Koshinki v. Trame*, 79 N.E.3d 659, 664-667 (5th Dist. 2017) the Court held:

> The public interest exception to the mootness doctrine permits review of an otherwise moot question when the magnitude or immediacy of the interests involved warrants action by the court. The public interest exception to the mootness doctrine applies only when (1) the question presented is of a public nature; (2) an authoritative determination of the question is desirable for the future guidance of public officers; and (3) the question is likely to recur. The public interest exception is narrowly construed and requires a clear showing of each of its criteria. If any one of the criteria is not established, the exception may not be invoked. *Id.*

Similar to *Koshinki v. Trame*, this case involves a question of public nature. The issue being whether legislature-enacted legislation that violates our Constitution is a matter of public importance. The right to bear arms is grounded in the Second Amendment to the Constitution and a fundamental right. The Defendant is a public official sued in his official capacity acting under his interpretation of the law. The issue presented in the above-captioned matter will broadly determine the rights of firearm licensees who are subject to felony charges, not felony convictions. This issue is of sufficient breadth and has a significant effect on the public as a whole to satisfy the public nature criterion. Consequently, the first criterion for review under the public interest exception is satisfied.

As to the second criteria to the public interest exception, this Court finds that providing a decision as to the constitutionality of the State's authority to limit a citizen's firearm ownership as a result of a felony charge will provide guidance to judges and prosecutors and firearm owners, in addition to public officers, including the Defendant, faced with questions regarding the statute's validity. Therefore, this Court finds that the second requirement for the public interest exception to the mootness doctrine is met.

The role of the Defendant, as Chief of the Firearms Services Bureau, in executing the provisions of the firearm suspension statutes is a recurring question. The question is likely to recur. This Court finds that the public interest exception to the mootness doctrine applies in the case at bar.

Having established the Plaintiffs have standing, the Court will now address the constitutional issues before it. In their First Amended Complaint, Plaintiffs seek a declaration that 430 ILCS 65/8(n) is unconstitutional as applied to persons charged with a felony but not yet convicted of a felony. Plaintiffs also request a permanent injunction enjoining Defendant from suspending FOID cards, pursuant to 430 ILCS 65/8(n), based on a person being charged with a felony but not yet convicted of a felony.

Section 8(n) of the FOID Card Act provides, in pertinent part, as follows:

> 430 ILCS 65/8 Grounds for denial and revocation.
>
> The Illinois State Police has authority to deny an application for or to revoke and seize a Firearm Owner's Identification Card previously issued under this Act only if the Illinois State Police finds that the applicant or the person to whom such card was issued is or was at the time of issuance:
>
> * * *
>
> (n) A person who is prohibited from acquiring or possessing firearms or firearm ammunition by any Illinois State statute or by federal law;

In the present case, Plaintiffs are longtime owners of firearms and for several years have held a legally-valid Firearms Owner's Identification Card, apparently without incident, except as set forth in this order.

At all times relevant, Plaintiffs, like all American citizens pursuant to the Second Amendment, have a fundamental constitutional right to keep and bear arms in the home for the purpose of self-defense. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). This Second Amendment right applies to the states through its incorporation in the Due Process Clause of the

Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010). Recently, the U.S. Supreme Court further opined on the Second Amendment in the case of *New York Rifle & Pistol Ass'n v. Bruen*, 142 S.Ct. 2111, 2127 (2022), which made clear that the two-step Second Amendment test previously adopted by the Illinois Supreme Court, was, in the words of the U.S. Supreme Court, "one step too many." The U.S. Supreme Court made crystal clear that the appropriate test is the historical test, as set forth in *Heller* and *Bruen*.

This Court finds Plaintiffs were not convicted of a felony in the present case. On July 3, 2016, Plaintiffs Aaron Davis and Charles Davis were arrested for discharging firearms within 600 feet of an occupied residence from the backyard of a house located in Wood River, Illinois. Plaintiffs were accused of discharging the firearms into the air; though, they claimed they fired them into the ground. On July 5, 2016, the Madison County State's Attorney charged Plaintiffs with committing the criminal offense of reckless discharge of a firearm, a Class 4 felony. Because Plaintiffs were under felony indictment, the Illinois State Police revoked their FOID cards on July 11, 2016. On November 7, 2016, both Plaintiffs pled guilty to reduced charges of misdemeanor reckless conduct pursuant to 720 ILCS 5/12-5. Thereafter, the Illinois State Police issued an active FOID card to Charles Davis on May 3, 2017, and to Aaron Davis on August 14, 2017. Whether their actions were legal or not, the fact that the discharge was made during the Independence Day holiday, and not in the commission of a violent crime, is important to note.

In the case at bar, Plaintiffs were not alleged to have committed a crime under a common-law felony; rather, they were accused of a statutory felony of recent enactment. On the issue of whether or not the Founders would exclude persons *convicted* of felonies as unworthy of Second Amendment rights, the State has two problems. First, the English common-law felonies consisted of murder, rape, manslaughter, robbery, sodomy, larceny, arson, mayhem and burglary.

Jerome v. United States, 318 U.S. 101, 108 n.6 (1943); Wayne R. LaFave, Criminal Law, § 2.1(b) (5th ed. 2010). If the Founders intended to allow Congress to disarm unvirtuous felons, that intent would have been limited to individuals convicted of one of those nine felonies, or at least something analogous. Plaintiffs were never charged with any such common-law crimes. Second, Plaintiffs were never actually convicted of any felonies, whether common law or statutory.

In this case, Plaintiffs were disarmed solely based on an *accusation*. There was no hearing, such as a bond hearing, to determine whether these Plaintiffs were dangerous and, thus, should be disarmed pending trial. Nothing would stop a criminal court from imposing a bond condition requiring a person that is likely to be dangerous to refrain from possessing firearms, after some sort of individualized determination, based on all relevant facts. However, this did not occur. In the case before this Court, Plaintiffs' rights were suspended for only being charged with a felony.

There is no express State statute that directs the suspension of a FOID card for only being charged with a felony. Under federal law, a person merely *charged* with a felony cannot acquire firearms or ammunition but remain free to continue to possess firearms already in their possession. 18 U.S.C. 922(n). However, under Illinois law, 430 ILCS 65/8(n), a person who cannot lawfully acquire firearms is disqualified from a FOID card. Interestingly, if 18 U.S.C. 922(n) were unconstitutional or repealed, Illinois would have no existing statutory grounds to suspend a FOID card from a felony charge of any kind. At least one Court has declared 18 U.S.C. 922(n) unconstitutional itself. *See U.S. v. QUIROZ, U.S.D.C. W.D.* of Texas, Case No. 22-cr-00104-DC Filed 09/19/22.

Expounding on *Heller*, the United States Supreme Court held that, "[w]hen the Second Amendment's plain text covers an individual's conduct; the Constitution presumptively protects that conduct." *Bruen,* 142 S. Ct. at 2129–30. In that context, the Government bears the burden of "justify[ing] its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2130. Put another way, "the [G]overnment must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127. In the course of its explication, the Court expressly repudiated the means-end scrutiny—the second step adopted by many courts previously. *Id.* at 2128–30.

The first question is: Does the Second Amendment's plain text cover the right to possess a firearm somewhere, under some sort, or set, of circumstances, even if *charged* with a felony of some kind? In light of the cases of *Heller, Bruen*, the answer is yes, both inside the home and outside as well, with inside the home being entitled to the highest protection. Since the suspension of a FOID card in Illinois functions to ban possession of firearms by such a person with a suspended or revoked FOID card, it is clear that the Second Amendment protects the right to a FOID card, if that is what is required to lawfully possess a firearm. This is not to say that the requirement for a FOID card itself is constitutional or unconstitutional, as that matter is not before this Court, and the Court will not make an advisory opinion on that issue. However, what is clear is that totally disarming all persons merely *charged* with a felony implicates Second Amendment rights.

This is not the end of the analysis. The Defendant can still show the conduct permissible if it satisfies its burden under *Bruen.* To satisfy its burden, the Government must point to "historical precedent from before, during, and even after the founding [that] evinces a

comparable tradition of regulation." *Id.* at 2131–32. As noted by now-Justice Barrett dissent in *Kantor v. Barr,* 919 F.3d 437, 451 (7th Cir 2019), abrogated by *New York Rifle & Pistol Ass'n v. Bruen*, 142 S.Ct. 2111 (2022), "founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons". *Id.* If actual convicted felons were not so stripped, it is difficult to see how persons merely charged can be so stripped, without more. Again, as noted by Justice Barrett, "in 1791—and for well more than a century afterward—legislatures disqualified categories of people from the right to bear arms only when they judged that doing so was necessary to protect the public safety". *Id.* While the Court can easily conceive of how a dangerous person might be charged with a felony, it is not the felony charge that makes the person dangerous. It is the fact that the person is dangerous that makes him or her dangerous. It is safe to say that some felonies are not *per se* dangerous, for example, bouncing a $300.00 check.

To that end, Defendant has failed to show any historical precedent from before, during, or even shortly after the founding to sustain the regulation. Even today there is no federal prohibition on persons merely charged with a felony from *possessing* arms.

Defendant also noted that a statute is presumed constitutional. While true, the fact that a statute is *presumed* to be constitutional does not make it actually so. Courts are duty-bound to strike down unconstitutional acts of the legislature. The Constitution of the United States and the decisions of the United States Supreme Court are the supreme law of the land and bind every court in the land. *People v. Loftus*, 400 Ill. 432, 436 (1948).

In cases where a court determines that a statute is repugnant to the Constitution, its duty to declare the law void, in order to protect the rights, which that document guarantees, is a paramount and constitutionally-mandated function of our court system. *Droste v. Kerner*, 34

Ill.2d 495, 498-99 (1966)(General Assembly basically may enact any law, provided it is not inhibited by some constitutional provision); *Henson v. City of Chicago*, 415 Ill. 564, 570 (1953) (judiciary has power to decide whether law is within scope of constitutional powers of legislature); *People v. Bruner* 343 Ill. 146, 158 (1931)(interpretation of statutes and determining their validity are inherently judicial functions vested in courts by Constitution); see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60, 73 (1803)("an act of the legislature, repugnant to the constitution, is void," and "[i]t is emphatically the province and duty of the judicial department to say what the law is").

This duty to review and invalidate the unconstitutional actions of our legislature is also exhibited in the strong language of precedents declaring the *ab initio* principle: When a statute is held unconstitutional in its entirety, it is void *ab initio*. *Quitman v. Chicago Transit Authority*, 348 Ill. App. 481, 483 (1st Dist. 1952). "An invalid law is no law at all." *Van Driel Drug Store, Inc. v. Mahin,* 47 Ill.2d 378, 381 (1970), quoting *Sbarbaro,* 386 Ill. at 590. An unconstitutional law "confers no right, imposes no duty and affords no protection. It is * * * as though no such law had ever been passed." *People v. Schraeberg,* 347 Ill. 392, 394 (1932). Therefore, where a statute violates constitutional guarantees, this Court has a duty not only to declare such a legislative act void but also to correct the wrongs wrought through such an act by holding our decision retroactive.

Understanding that finding a statute unconstitutional is no minor affair, the Court must look to Illinois Supreme Court Rule 18. Illinois Supreme Court Rule 18 states:

> A court shall not find unconstitutional a statute, ordinance, regulation or other law, unless:
>
> (a) the court makes the finding in a written order or opinion, or in an oral statement on the record that is transcribed;
> (b) such order or opinion clearly identifies what portion(s) of the statute, ordinance, regulation or other law is being held unconstitutional;

(c) such order or opinion clearly sets forth the specific ground(s) for the finding of unconstitutionality, including:

(1) the constitutional provision(s) upon which the finding of unconstitutionality is based;
(2) whether the statute, ordinance, regulation or other law is being found unconstitutional on its face, as applied to the case *sub judice*, or both;
(3) that the statute, ordinance, regulation or other law being held unconstitutional cannot reasonably be construed in a manner that would preserve its validity;
(4) that the finding of unconstitutionality is necessary to the decision or judgment rendered, and that such decision or judgment cannot rest upon an alternative ground; and
(5) that the notice required by Rule 19 has been served, and that those served with such notice have been given adequate time and opportunity under the circumstances to defend the statute, ordinance, regulation or other law challenged.

In accordance with Illinois Supreme Court Rule 18(c), the Court states that the Second and Fourteenth Amendment to the United States Constitution are the constitutional provisions upon which this Court finds that 430 ILCS 65/8(n) unconstitutionality is based. The Court also finds that 430 ILCS 65/8(n) to be unconstitutional as applied to persons charged with a felony but not yet convicted of a felony. The Court further finds that neither party has suggested a mechanism by which the 430 ILCS 65/8(n) can be reasonably construed to preserve its validity, and the Court, after considering the issue, cannot conceive of one. Finding 430 ILCS 65/8(n) unconstitutional is necessary to this judgment and cannot be based on any alternative ground. This Court further finds that Plaintiffs have complied with Illinois Supreme Court Rule 19. The Defendant has had years to defend the statute in question.

To obtain a permanent injunction, a party "must demonstrate (1) a clear and ascertainable right in need of protection, (2) that he or she will suffer irreparable harm if the injunction is not granted, and (3) that no adequate remedy at law exists." *Vaughn v. City of Carbondale*, 2016 IL 119181, 50 N.E.3d 643, 652 (2016). Plaintiffs have demonstrated that they have a right in need

of protection, that they would suffer irreparable harm in the absence of an injunction and that there is no adequate remedy at law.

IT IS THEREFORE ORDERED Plaintiffs' Motion for Default is DENIED. Defendant's Motion for Summary Judgment is DENIED. Plaintiffs' Motion for Summary Judgment and Permanent Injunction is GRANTED, as follows:

A. 430 ILCS 65/8(n), which states:

"The Illinois State Police has authority to deny an application for or to revoke and seize a Firearm Owner's Identification Card previously issued under this Act only if the Illinois State Police finds that the applicant or the person to whom such card was issued is or was at the time of issuance: … n) A person who is prohibited from acquiring or possessing firearms or firearm ammunition by any Illinois State statute or by federal law;"

is hereby declared unconstitutional as applied to persons charged with a felony but not yet convicted of a felony.

B. Defendant Jeffrey Yenchko, in his official capacity as Chief of the Firearms Services Bureau of the Illinois State Police, as well as his successors in office and successors in authority to administer, are, effective immediately, enjoined from suspending Firearms Owner's Identification Cards, pursuant to 430 ILCS 65/8(n), persons charged with a felony but not convicted of a felony. Nothing in this order shall prohibit Defendant from denying a transfer request or authorization for firearms or ammunition, pursuant to 18 U.S.C. 922(g)(n), for persons with currently-pending felony charges at the time of the request.

C. Plaintiffs have a claim for costs and attorney fees pursuant to 42 U.S.C. 1988. Plaintiffs and Plaintiffs' counsel are granted 14 days from the date of this order to file an attorney

fees and costs petition. Defendants are granted 14 days from the date of filing said petition to file any objection to any fees or costs claimed. Plaintiffs are allowed 10 days from the date of filing said objection to file any reply in support. After reviewing said information, the Court, as it deems appropriate, will either rule on the fees and costs petition or set the matter for hearing.

D. This order resolves all pending matters in this case, except attorney fees and costs. This Court shall retain jurisdiction to enforce this order.

SO ORDERED

Dated 3/10/2023

Hon. Ronald J. Foster, Jr. Associate Judge

09 all

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

AARON M DAVIS and CHARLES G. DAVIS,	)	
Plaintiff,	)	
	)	**Case No. 17-CH-631**
v.	)	
JESSICA TRAME, in her official capacity as Chief of the Firearms Services Bureau of the Illinois State Police,	)	
Defendant.	)	

ORDER

Before the Court on Defendant's Motion to Stay March 10, 2023, Order, Plaintiff's Petition for Costs and Attorney Fees, Defendant's Response, and Plaintiff's Reply in support.

As to Motion to Stay. Court finds it has the discretion to grant the motion, but, finds that doing to would allow conduct to proceed that this Court found to be unconstitutional. Again, nothing stops a court, in an appropriate case, from imposing bail conditions or denying bail to an actually dangerous person, including a bail condition, if appropriate, of no access to firearms. An across the board ban of mere possession, based on a mere unsupported accusation, is insufficient to deny fundamental constitutional rights. Defendant makes no compelling argument to the contrary Motion to Stay DENIED.

As to the Fee and Costs Petition, the response and reply thereto, Court rules that pursuant to 42 USC 1988, Plaintiff is the prevailing party in this case, and should be awarded costs and fees.

Court find $300.00 an hour is fair, reasonable and customary for trial court work in this County, at this time.

Court finds that the allotted hours requested by Plaintiff, who has acceded to Defendant's mathematical calculations, are fair, reasonable and necessary. Court finds no excessive hours, either from travel time or alleged secretarial tasks.

After deducting the $50 from the costs, as acknowledged by Plaintiff to be in error, Court awards $366.86 in out of pocket costs.

Taking into account the totality of the matter, including all objections, Court awards 27,520.00
~~$28,020.00~~ in attorney fees for work thus far. $27,886.86

This is a total fee and cost award of ~~$28,386.86~~. Defendant is ORDRED to pay Plaintiff said amount, via funds payable to Maag Law Firm, LLC, 22 West Lorena Avenue, Wood River, IL 62095, within 35 days of this order, unless they previously file a Notice of Appeal.

If an appeal is timely taken, fees and costs are stayed, pending outcome of appeal. However, interest on this amount may accrue if not paid. Interest would obviously not apply on any amount paid within 35 days.

Barring an appeal, or a matter related to enforcement, this is the final order in this case. Judgment Entered Per Supreme Court Rule 272. However, Court retains jurisdiction to enforce its orders in this case, if necessary, and retains jurisdiction to hear any fee or costs petition following any appeal of this matter.

SO ORDERED

Dated: 5/12/23

EFILED
Case Number 2017CH000631
Date: 6/8/2023 11:20 AM
Thomas McRae
Clerk of Circuit Court
Third Judicial Circuit, Madison County Illinois

APPEAL TO THE SUPREME COURT OF ILLINOIS

FROM THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

AARON M. DAVIS and CHARLES G. DAVIS,	)	
Plaintiffs-Appellees,	)	No. 17-CH-631
v.	)	
JESSICA TRAME, in her official capacity as Chief of the Firearms Services Bureau of the Illinois State Police,	)	The Honorable RONALD J. FOSTER,
Defendant-Appellant.	)	Judge Presiding.

NOTICE OF APPEAL

Under Ill. Sup. Ct. R. 302(a)(1), Defendant Jessica Trame,* in her official capacity as Chief of the Firearms Services Bureau of the Illinois State Police, by her attorney, Kwame Raoul, the Attorney General of Illinois, hereby appeals directly to the Illinois Supreme Court from the final orders entered by the Honorable Ronald J. Foster of the Circuit Court for the Third Judicial Circuit, Madison County, Illinois, on March 10, 2023, and May 12, 2023. In the March 10, 2023 order, the circuit court held that 430 ILCS 65/8(n) (2020) is unconstitutional under the Second and Fourteenth Amendments to the United States Constitution as applied to persons charged, but not yet convicted, of a felony, and entered a permanent injunction

* Jeffrey Yenchko, in his official capacity, should be automatically substituted as the defendant in this action because he is the current Chief of the Firearms Services Bureau of the Illinois State Police. *See* 735 ILCS 5/2-1008(d) (2020).

preventing defendant and her successors in office and in authority from suspending Firearm Owners Identification cards under this statute when a person is charged, but not yet convicted, of a felony. In the May 12, 2023 order, the circuit court denied defendant's motion to stay and granted plaintiff's petition for costs and fees. Copies of the circuit court's March 10, 2023 and May 12, 2023 orders are attached hereto as Exhibits A and B.

By this appeal, Defendant Trame, in her official capacity, requests that the Supreme Court reverse and vacate these orders of the circuit court, and grant her any other relief deemed appropriate.

Respectfully submitted,

KWAME RAOUL
Attorney General
State of Illinois

By: /s/ Priyanka Gupta
PRIYANKA GUPTA
ARDC No. 7320720
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2109 (office)
(872) 272-0799 (cell)
CivilAppeals@ilag.gov (primary)
Priyanka.Gupta@ilag.gov (secondary)

June 8, 2023

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

AARON M. DAVIS and CHARLES G. DAVIS,	)	
Plaintiffs,	)	
	)	**Case No. 17-CH-0631**
v.	)	
JEFFREY YENCHKO, in his official capacity as Chief of the Firearms Services Bureau of the Illinois State Police,	)	
Defendant.	)	

ORDER

Before the Court are Plaintiffs' Motion for Default Judgment, Motion for Summary Judgment and Permanent Injunction along with Defendant's Motion for Summary Judgment. In sum, Plaintiffs bring this action pursuant to 42 U.S.C. 1983, the Second Amendment and Fourteenth Amendment to the United States Constitution challenging the blanket prohibition of persons who are merely charged with a felony, whether violent or not, from keeping a valid Firearm Owner's Identification Card {hereinafter referred to as "FOID card"}. For the reasons that follow, Plaintiffs' Motion for Summary Judgment and Permanent Injunction is granted. Plaintiffs' Motion for Default is denied. Defendant's Motion for Summary Judgment is denied.

In the case at bar, Defendant argues that the Plaintiffs' claim is moot and that they lack standing to bring this action. "The existence of an actual controversy is essential to . . . jurisdiction, and courts . . . generally do not decide moot questions." *People v. Lance H. (In re Lance H.)*, 2014 IL 114899, 25 N.E3d 511, 516 (2014). "Where intervening events have made it impossible for the . . . court to grant effective relief to the complaining party, the issues involved in the trial court no longer exist, and the case is moot." *Id.* Here, Plaintiffs' felony indictments

were lifted and they have since received their FOID cards. Therefore, the Defendant argues that this Court cannot grant Plaintiffs effective relief, and the case is moot. This argument is without merit.

In *Koshinki v. Trame*, 79 N.E.3d 659, 664-667 (5th Dist. 2017) the Court held:

> The public interest exception to the mootness doctrine permits review of an otherwise moot question when the magnitude or immediacy of the interests involved warrants action by the court. The public interest exception to the mootness doctrine applies only when (1) the question presented is of a public nature; (2) an authoritative determination of the question is desirable for the future guidance of public officers; and (3) the question is likely to recur. The public interest exception is narrowly construed and requires a clear showing of each of its criteria. If any one of the criteria is not established, the exception may not be invoked. *Id.*

Similar to *Koshinki v. Trame*, this case involves a question of public nature. The issue being whether legislature-enacted legislation that violates our Constitution is a matter of public importance. The right to bear arms is grounded in the Second Amendment to the Constitution and a fundamental right. The Defendant is a public official sued in his official capacity acting under his interpretation of the law. The issue presented in the above-captioned matter will broadly determine the rights of firearm licensees who are subject to felony charges, not felony convictions. This issue is of sufficient breadth and has a significant effect on the public as a whole to satisfy the public nature criterion. Consequently, the first criterion for review under the public interest exception is satisfied.

As to the second criteria to the public interest exception, this Court finds that providing a decision as to the constitutionality of the State's authority to limit a citizen's firearm ownership as a result of a felony charge will provide guidance to judges and prosecutors and firearm owners, in addition to public officers, including the Defendant, faced with questions regarding the statute's validity. Therefore, this Court finds that the second requirement for the public interest exception to the mootness doctrine is met.

The role of the Defendant, as Chief of the Firearms Services Bureau, in executing the provisions of the firearm suspension statutes is a recurring question. The question is likely to recur. This Court finds that the public interest exception to the mootness doctrine applies in the case at bar.

Having established the Plaintiffs have standing, the Court will now address the constitutional issues before it. In their First Amended Complaint, Plaintiffs seek a declaration that 430 ILCS 65/8(n) is unconstitutional as applied to persons charged with a felony but not yet convicted of a felony. Plaintiffs also request a permanent injunction enjoining Defendant from suspending FOID cards, pursuant to 430 ILCS 65/8(n), based on a person being charged with a felony but not yet convicted of a felony.

Section 8(n) of the FOID Card Act provides, in pertinent part, as follows:

> 430 ILCS 65/8 Grounds for denial and revocation.
>
> The Illinois State Police has authority to deny an application for or to revoke and seize a Firearm Owner's Identification Card previously issued under this Act only if the Illinois State Police finds that the applicant or the person to whom such card was issued is or was at the time of issuance:
>
> * * *
>
> (n) A person who is prohibited from acquiring or possessing firearms or firearm ammunition by any Illinois State statute or by federal law;

In the present case, Plaintiffs are longtime owners of firearms and for several years have held a legally-valid Firearms Owner's Identification Card, apparently without incident, except as set forth in this order.

At all times relevant, Plaintiffs, like all American citizens pursuant to the Second Amendment, have a fundamental constitutional right to keep and bear arms in the home for the purpose of self-defense. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). This Second Amendment right applies to the states through its incorporation in the Due Process Clause of the

Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010). Recently, the U.S. Supreme Court further opined on the Second Amendment in the case of *New York Rifle & Pistol Ass'n v. Bruen*, 142 S.Ct. 2111, 2127 (2022), which made clear that the two-step Second Amendment test previously adopted by the Illinois Supreme Court, was, in the words of the U.S. Supreme Court, "one step too many." The U.S. Supreme Court made crystal clear that the appropriate test is the historical test, as set forth in *Heller* and *Bruen*.

This Court finds Plaintiffs were not convicted of a felony in the present case. On July 3, 2016, Plaintiffs Aaron Davis and Charles Davis were arrested for discharging firearms within 600 feet of an occupied residence from the backyard of a house located in Wood River, Illinois. Plaintiffs were accused of discharging the firearms into the air; though, they claimed they fired them into the ground. On July 5, 2016, the Madison County State's Attorney charged Plaintiffs with committing the criminal offense of reckless discharge of a firearm, a Class 4 felony. Because Plaintiffs were under felony indictment, the Illinois State Police revoked their FOID cards on July 11, 2016. On November 7, 2016, both Plaintiffs pled guilty to reduced charges of misdemeanor reckless conduct pursuant to 720 ILCS 5/12-5. Thereafter, the Illinois State Police issued an active FOID card to Charles Davis on May 3, 2017, and to Aaron Davis on August 14, 2017. Whether their actions were legal or not, the fact that the discharge was made during the Independence Day holiday, and not in the commission of a violent crime, is important to note.

In the case at bar, Plaintiffs were not alleged to have committed a crime under a common-law felony; rather, they were accused of a statutory felony of recent enactment. On the issue of whether or not the Founders would exclude persons *convicted* of felonies as unworthy of Second Amendment rights, the State has two problems. First, the English common-law felonies consisted of murder, rape, manslaughter, robbery, sodomy, larceny, arson, mayhem and burglary.

Jerome v. United States, 318 U.S. 101, 108 n.6 (1943); Wayne R. LaFave, Criminal Law, § 2.1(b) (5th ed. 2010). If the Founders intended to allow Congress to disarm unvirtuous felons, that intent would have been limited to individuals convicted of one of those nine felonies, or at least something analogous. Plaintiffs were never charged with any such common-law crimes. Second, Plaintiffs were never actually convicted of any felonies, whether common law or statutory.

In this case, Plaintiffs were disarmed solely based on an *accusation*. There was no hearing, such as a bond hearing, to determine whether these Plaintiffs were dangerous and, thus, should be disarmed pending trial. Nothing would stop a criminal court from imposing a bond condition requiring a person that is likely to be dangerous to refrain from possessing firearms, after some sort of individualized determination, based on all relevant facts. However, this did not occur. In the case before this Court, Plaintiffs' rights were suspended for only being charged with a felony.

There is no express State statute that directs the suspension of a FOID card for only being charged with a felony. Under federal law, a person merely *charged* with a felony cannot acquire firearms or ammunition but remain free to continue to possess firearms already in their possession. 18 U.S.C. 922(n). However, under Illinois law, 430 ILCS 65/8(n), a person who cannot lawfully acquire firearms is disqualified from a FOID card. Interestingly, if 18 U.S.C. 922(n) were unconstitutional or repealed, Illinois would have no existing statutory grounds to suspend a FOID card from a felony charge of any kind. At least one Court has declared 18 U.S.C. 922(n) unconstitutional itself. *See U.S. v. QUIROZ, U.S.D.C. W.D.* of Texas, Case No. 22-cr-00104-DC Filed 09/19/22.

Expounding on *Heller*, the United States Supreme Court held that, "[w]hen the Second Amendment's plain text covers an individual's conduct; the Constitution presumptively protects that conduct." *Bruen,* 142 S. Ct. at 2129–30. In that context, the Government bears the burden of "justify[ing] its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2130. Put another way, "the [G]overnment must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127. In the course of its explication, the Court expressly repudiated the means-end scrutiny—the second step adopted by many courts previously. *Id.* at 2128–30.

The first question is: Does the Second Amendment's plain text cover the right to possess a firearm somewhere, under some sort, or set, of circumstances, even if *charged* with a felony of some kind? In light of the cases of *Heller, Bruen*, the answer is yes, both inside the home and outside as well, with inside the home being entitled to the highest protection. Since the suspension of a FOID card in Illinois functions to ban possession of firearms by such a person with a suspended or revoked FOID card, it is clear that the Second Amendment protects the right to a FOID card, if that is what is required to lawfully possess a firearm. This is not to say that the requirement for a FOID card itself is constitutional or unconstitutional, as that matter is not before this Court, and the Court will not make an advisory opinion on that issue. However, what is clear is that totally disarming all persons merely *charged* with a felony implicates Second Amendment rights.

This is not the end of the analysis. The Defendant can still show the conduct permissible if it satisfies its burden under *Bruen.* To satisfy its burden, the Government must point to "historical precedent from before, during, and even after the founding [that] evinces a

comparable tradition of regulation." *Id.* at 2131–32. As noted by now-Justice Barrett dissent in *Kantor v. Barr,* 919 F.3d 437, 451 (7th Cir 2019), abrogated by *New York Rifle & Pistol Ass'n v. Bruen*, 142 S.Ct. 2111 (2022), "founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons". *Id.* If actual convicted felons were not so stripped, it is difficult to see how persons merely charged can be so stripped, without more. Again, as noted by Justice Barrett, "in 1791—and for well more than a century afterward—legislatures disqualified categories of people from the right to bear arms only when they judged that doing so was necessary to protect the public safety". *Id.* While the Court can easily conceive of how a dangerous person might be charged with a felony, it is not the felony charge that makes the person dangerous. It is the fact that the person is dangerous that makes him or her dangerous. It is safe to say that some felonies are not *per se* dangerous, for example, bouncing a $300.00 check.

To that end, Defendant has failed to show any historical precedent from before, during, or even shortly after the founding to sustain the regulation. Even today there is no federal prohibition on persons merely charged with a felony from *possessing* arms.

Defendant also noted that a statute is presumed constitutional. While true, the fact that a statute is *presumed* to be constitutional does not make it actually so. Courts are duty-bound to strike down unconstitutional acts of the legislature. The Constitution of the United States and the decisions of the United States Supreme Court are the supreme law of the land and bind every court in the land. *People v. Loftus*, 400 Ill. 432, 436 (1948).

In cases where a court determines that a statute is repugnant to the Constitution, its duty to declare the law void, in order to protect the rights, which that document guarantees, is a paramount and constitutionally-mandated function of our court system. *Droste v. Kerner*, 34

Ill.2d 495, 498-99 (1966)(General Assembly basically may enact any law, provided it is not inhibited by some constitutional provision); *Henson v. City of Chicago*, 415 Ill. 564, 570 (1953) (judiciary has power to decide whether law is within scope of constitutional powers of legislature); *People v. Bruner* 343 Ill. 146, 158 (1931)(interpretation of statutes and determining their validity are inherently judicial functions vested in courts by Constitution); see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60, 73 (1803)("an act of the legislature, repugnant to the constitution, is void," and "[i]t is emphatically the province and duty of the judicial department to say what the law is").

This duty to review and invalidate the unconstitutional actions of our legislature is also exhibited in the strong language of precedents declaring the *ab initio* principle: When a statute is held unconstitutional in its entirety, it is void *ab initio*. *Quitman v. Chicago Transit Authority*, 348 Ill. App. 481, 483 (1st Dist. 1952). "An invalid law is no law at all." *Van Driel Drug Store, Inc. v. Mahin,* 47 Ill.2d 378, 381 (1970), quoting *Sbarbaro,* 386 Ill. at 590. An unconstitutional law "confers no right, imposes no duty and affords no protection. It is * * * as though no such law had ever been passed." *People v. Schraeberg*, 347 Ill. 392, 394 (1932). Therefore, where a statute violates constitutional guarantees, this Court has a duty not only to declare such a legislative act void but also to correct the wrongs wrought through such an act by holding our decision retroactive.

Understanding that finding a statute unconstitutional is no minor affair, the Court must look to Illinois Supreme Court Rule 18. Illinois Supreme Court Rule 18 states:

> A court shall not find unconstitutional a statute, ordinance, regulation or other law, unless:
>
> (a) the court makes the finding in a written order or opinion, or in an oral statement on the record that is transcribed;
> (b) such order or opinion clearly identifies what portion(s) of the statute, ordinance, regulation or other law is being held unconstitutional;

(c) such order or opinion clearly sets forth the specific ground(s) for the finding of unconstitutionality, including:

(1) the constitutional provision(s) upon which the finding of unconstitutionality is based;
(2) whether the statute, ordinance, regulation or other law is being found unconstitutional on its face, as applied to the case *sub judice*, or both;
(3) that the statute, ordinance, regulation or other law being held unconstitutional cannot reasonably be construed in a manner that would preserve its validity;
(4) that the finding of unconstitutionality is necessary to the decision or judgment rendered, and that such decision or judgment cannot rest upon an alternative ground; and
(5) that the notice required by Rule 19 has been served, and that those served with such notice have been given adequate time and opportunity under the circumstances to defend the statute, ordinance, regulation or other law challenged.

In accordance with Illinois Supreme Court Rule 18(c), the Court states that the Second and Fourteenth Amendment to the United States Constitution are the constitutional provisions upon which this Court finds that 430 ILCS 65/8(n) unconstitutionality is based. The Court also finds that 430 ILCS 65/8(n) to be unconstitutional as applied to persons charged with a felony but not yet convicted of a felony. The Court further finds that neither party has suggested a mechanism by which the 430 ILCS 65/8(n) can be reasonably construed to preserve its validity, and the Court, after considering the issue, cannot conceive of one. Finding 430 ILCS 65/8(n) unconstitutional is necessary to this judgment and cannot be based on any alternative ground. This Court further finds that Plaintiffs have complied with Illinois Supreme Court Rule 19. The Defendant has had years to defend the statute in question.

To obtain a permanent injunction, a party "must demonstrate (1) a clear and ascertainable right in need of protection, (2) that he or she will suffer irreparable harm if the injunction is not granted, and (3) that no adequate remedy at law exists." *Vaughn v. City of Carbondale*, 2016 IL 119181, 50 N.E.3d 643, 652 (2016). Plaintiffs have demonstrated that they have a right in need

of protection, that they would suffer irreparable harm in the absence of an injunction and that there is no adequate remedy at law.

IT IS THEREFORE ORDERED Plaintiffs' Motion for Default is DENIED. Defendant's Motion for Summary Judgment is DENIED. Plaintiffs' Motion for Summary Judgment and Permanent Injunction is GRANTED, as follows:

A. 430 ILCS 65/8(n), which states:

"The Illinois State Police has authority to deny an application for or to revoke and seize a Firearm Owner's Identification Card previously issued under this Act only if the Illinois State Police finds that the applicant or the person to whom such card was issued is or was at the time of issuance: … n) A person who is prohibited from acquiring or possessing firearms or firearm ammunition by any Illinois State statute or by federal law;"

is hereby declared unconstitutional as applied to persons charged with a felony but not yet convicted of a felony.

B. Defendant Jeffrey Yenchko, in his official capacity as Chief of the Firearms Services Bureau of the Illinois State Police, as well as his successors in office and successors in authority to administer, are, effective immediately, enjoined from suspending Firearms Owner's Identification Cards, pursuant to 430 ILCS 65/8(n), persons charged with a felony but not convicted of a felony. Nothing in this order shall prohibit Defendant from denying a transfer request or authorization for firearms or ammunition, pursuant to 18 U.S.C. 922(g)(n), for persons with currently-pending felony charges at the time of the request.

C. Plaintiffs have a claim for costs and attorney fees pursuant to 42 U.S.C. 1988. Plaintiffs and Plaintiffs' counsel are granted 14 days from the date of this order to file an attorney

fees and costs petition. Defendants are granted 14 days from the date of filing said petition to file any objection to any fees or costs claimed. Plaintiffs are allowed 10 days from the date of filing said objection to file any reply in support. After reviewing said information, the Court, as it deems appropriate, will either rule on the fees and costs petition or set the matter for hearing.

D. This order resolves all pending matters in this case, except attorney fees and costs. This Court shall retain jurisdiction to enforce this order.

SO ORDERED

Dated 3/10/2023

Hon. Ronald J. Foster, Jr. Associate Judge

09 all

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

AARON M DAVIS and CHARLES G. DAVIS,	)	
	)	
Plaintiff,	)	
	)	**Case No. 17-CH-631**
v.	)	
	)	
JESSICA TRAME, in her official capacity as Chief of the Firearms Services Bureau of the Illinois State Police,	)	
	)	
Defendant.	)	

ORDER

Before the Court on Defendant's Motion to Stay March 10, 2023, Order, Plaintiff's Petition for Costs and Attorney Fees, Defendant's Response, and Plaintiff's Reply in support.

As to Motion to Stay. Court finds it has the discretion to grant the motion, but, finds that doing to would allow conduct to proceed that this Court found to be unconstitutional. Again, nothing stops a court, in an appropriate case, from imposing bail conditions or denying bail to an actually dangerous person, including a bail condition, if appropriate, of no access to firearms. An across the board ban of mere possession, based on a mere unsupported accusation, is insufficient to deny fundamental constitutional rights. Defendant makes no compelling argument to the contrary Motion to Stay DENIED.

As to the Fee and Costs Petition, the response and reply thereto, Court rules that pursuant to 42 USC 1988, Plaintiff is the prevailing party in this case, and should be awarded costs and fees.

Court find $300.00 an hour is fair, reasonable and customary for trial court work in this County, at this time.

Court finds that the allotted hours requested by Plaintiff, who has acceded to Defendant's mathematical calculations, are fair, reasonable and necessary. Court finds no excessive hours, either from travel time or alleged secretarial tasks.

After deducting the $50 from the costs, as acknowledged by Plaintiff to be in error, Court awards $366.86 in out of pocket costs.

Taking into account the totality of the matter, including all objections, Court awards ~~$28,020.00~~ 27,520.00 in attorney fees for work thus far.

This is a total fee and cost award of ~~$28,386.86~~ $27,886.86. Defendant is ORDRED to pay Plaintiff said amount, via funds payable to Maag Law Firm, LLC, 22 West Lorena Avenue, Wood River, IL 62095, within 35 days of this order, unless they previously file a Notice of Appeal.

If an appeal is timely taken, fees and costs are stayed, pending outcome of appeal. However, interest on this amount may accrue if not paid. Interest would obviously not apply on any amount paid within 35 days.

Barring an appeal, or a matter related to enforcement, this is the final order in this case. Judgment Entered Per Supreme Court Rule 272. However, Court retains jurisdiction to enforce its orders in this case, if necessary, and retains jurisdiction to hear any fee or costs petition following any appeal of this matter.

SO ORDERED

Dated: 5/12/23

CERTIFICATE OF FILING AND SERVICE

I certify that on June 8, 2023, I electronically filed the foregoing Notice of Appeal with the Clerk of the Circuit Court for the Third Judicial Circuit, Madison County, Illinois, by using the Odyssey eFileIL system.

I further certify that the other participant in this case, named below, is a registered contact on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

Thomas Maag
tmaag@maaglaw.com

Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

/s/ Priyanka Gupta
PRIYANKA GUPTA
Assistant Attorney General
ARDC No. 6320720
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2109 (office)
(872) 272-0799 (cell)
CivilAppeals@ilag.gov (primary)
Priyanka.Gupta@ilag.gov (secondary)

TABLE OF CONTENTS TO THE RECORD ON APPEAL

04/23/2021	Defendants Motion for Extension of Time to File Answer or Otherwise Respond	C76-78
04/28/2021	Circuit Court Order (granting extension of time)	C79
06/04/2021	Defendant's Second Motion for Extension of Time to File Answer or Otherwise Respond	C80-82
06/11/2021	Circuit Court Order (granting extension of time)	C83
07/15/2021	Defendant's Third Motion for Extension of Time to File Answer or Otherwise Respond	C84-86
07/21/2021	Circuit Court Order (granting extension of time)	C87-88
07/22/2021	Defendant's Fourth Motion for Extension of Time to File Answer or Otherwise Respond	C89-91
07/29/2021	Defendant's Combined Motion to Dismiss	C92-95
	Exhibit 3 – Illinois State Police Business Records regarding Aaron Davis (redacted)	C96-152
	Exhibit 6 – Illinois State Police Business Records regarding Charles Davis (redacted)	C153-196
	Exhibit List – listing exhibits 1-8	C197
	Exhibit 1 – *People v. Aaron Davis*, No. 16-CF-1739, Charging Information and Bond Order, July 5, 2016	C198-200
	Exhibit 2 – *People v. Aaron Davis*, No. 16-CF-1739, Amended Charging Information and Judgment and Sentence Orders, Nov. 7, 2016	C201-04
	Exhibit 4 – *People v. Charles Davis*, No. 16-CF-1738, Charging Information and Bond Order, July 5, 2016	C205-07
	Exhibit 5 – *People v. Charles Davis*, No. 16-CF-1738, Amended Charing Information and Judgment and Sentence Orders, Nov. 7, 2016	C208-11
	Exhibit 7 – *People v. Aaron Davis*, No. 16-CF-1739, Waiver of Right to Preliminary Hearing, July 21, 2016	C212-13
	Exhibit 8 – *People v. Charles Davis*, No. 16-CF-1738, Waiver of Right to Preliminary Hearing, July 21, 2016	C214-15
	Certificate of Service for Exhibits	C216
07/29/2021	Defendants Memorandum of Law in Support of Defendant's Combined Motion to Dismiss	C217-34
07/29/2021	Circuit Court Case Management Order (granting extension of time)	C235
09/13/2021	Circuit Court Order (Plaintiffs to respond to Defendants July 29, 2021 filing within a reasonable time not to exceed thirty days)	C236
08/23/2021	Circuit Court Order (Plaintiffs granted an additional 45 days to respond to Defendants July 29, 201 filing)	C237
03/16/2022	Appearance of Jessica Trame	C238-39
03/16/2022	Defendant's Motion to Substitute Counsel	C240-42

03/31/2022	Notice of Hearing scheduled for Apr. 19, 2022	C243-44
04/19/2022	Circuit Court Order (Denying Defendant's motion to dismiss first amended complaint. Defendant to file answer within 30 days)	C245
04/19/2022	Plaintiff's Response and Objection to Motion to Dismiss First Amended Complaint	C246-50
07/08/2022	Affidavit of Aaron M. Davis	C251-52
	Letter addressed to Aaron Davis from Illinois State Police revoking FOID Card, dated July 11, 2016	C253-54
07/08/2022	Plaintiff's Motion for Default and/or Summary Judgment and Permanent Injunction	C255-61
07/21/2022	Notice of Hearing scheduled for Aug. 2, 2022	C262-63
07/21/2022	Defendant's Response to Plaintiff's Motion for Default and/or Summary Judgment and Permanent Injunction	C264-67
08/02/2022	Circuit Court Order (Defendant granted leave to file answer within 5 days and response to Plaintiff's summary judgment within 30 days. Plaintiff to reply within 7 days of the response. Case reset for all motions on Oct. 4, 2022)	C268
08/03/2022	Defendant's Answer to Plaintiff's First Amended Complaint	C269-76
08/31/2022	Amended Proposed Order (regarding Defendant's Motion for Extension of Time)	C277-78
8/31/2022	Defendant's Motion for Extension of Time	C279-81
08/31/2022	Proposed Order (regarding Defendant's Motion for Extension of Time)	C282
09/07/2022	Circuit Court Order (granting extension of time)	C283
09/19/2022	Defendant's Motion to Substitute Parties	C284-87
09/19/2022	Amended Proposed Order (regarding Defendant's Motion for Extension of Time)	C288
09/19/2022	Defendant's Motion for Extension of Time	C289-92
09/29/2022	Circuit Court Order (granting extension of time)	C293
09/29/2022	Circuit Court Order (substituting Jeffrey Yenchko as defendant for Jessica Trame)	C294
10/04/2022	Defendant's Fourth Motion for Extension of Time	C295-99
10/06/2022	Plaintiff's Motion for Change of Judge, as a of Right	C300-01
10/06/2022	Plaintiff's Notice of Supplemental Authority	C302
	Memorandum Opinion, *United States v. Quiroz*, No. 4:22-cr-00104-DC (W.D. Tex. Sept. 19, 2022)	C303-27
	Exhibits to Defendant's Cross-Motion for Summary Judgment	
	Exhibit 1 – *People v. Aaron Davis*, No. 16-CF-1739, Charging Information and Bond Order, July 5, 2016	C328-30
	Exhibit 2 – *People v. Aaron Davis*, No. 16-CF-1739, Amended Charging Information and Judgment and Sentence Orders, Nov. 7, 2016	C331-34

CERTIFICATE OF FILING AND SERVICE

I certify that on January 4, 2024, I electronically filed the foregoing **Brief and Appendix of Defendant-Appellant** with the Clerk of the Court for the Supreme Court of Illinois by using the Odyssey eFileIL system.

I further certify that the other participant in this appeal, named below, is a registered service contact on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

Thomas G. Maag
tmaag@maaglaw.com

Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

/s/ Leigh J. Jahnig
LEIGH J. JAHNIG
Assistant Attorney General
115 South LaSalle Street
Chicago, Illinois 60603
(312) 793-1473 (office)
(773) 590-7877 (cell)
CivilAppeals@ilag.gov (primary)
Leigh.Jahnig@ilag.gov (secondary)