No. 127201

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. VIVIAN BROWN, Defendant-Appellee.	) Appeal from the Circuit Court of) the Second Judicial Circuit,) White County, Illinois))) No. 17 CM 60)) The Honorable) Mark R. Stanley,) Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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NATURE OF THE CASE

Defendant Vivian Brown was charged with possession of a firearm without a firearm owner's identification (FOID) card under 430 ILCS 65/2(a)(1) (the "FOID Card Act" or "Act"). C11.[1]

The People appeal from the circuit court's judgment declaring that the Act is unconstitutional under the Second Amendment as applied to defendant. C202-18.

ISSUE PRESENTED

Whether the FOID Card Act, which is this State's chosen method of ensuring that individuals (such as felons and the mentally ill) who are at high risk of misusing firearms do not possess them, complies with the Second Amendment.

JURISDICTION

The People filed a timely notice of appeal from the circuit court's judgment declaring an Illinois statute unconstitutional. Accordingly, this Court has jurisdiction pursuant to Supreme Court Rules 302, 603, and 612(b).

STATUTORY PROVISIONS INVOLVED

430 ILCS 65/2(a)(1) provides:

> (a)(1) No person may acquire or possess any firearm, stun gun, or taser within this State without having in his or her possession a Firearm Owner's Identification Card previously issued in his or

[1] "C_" denotes the common law record; "R_" denotes the report of proceedings.

her name by the Department of State Police under the provisions of this Act.

430 ILCS 65/4 provides, in relevant part:

(a) Each applicant for a Firearm Owner's Identification Card must:

(1) Make application on blank forms prepared and furnished at convenient locations throughout the State by the Department of State Police, or by electronic means, if and when made available by the Department of State Police; and

* * *

(a-20) Each applicant for a Firearm Owner's Identification Card shall furnish to the Department of State Police his or her photograph.

430 ILCS 65/5 provides, in relevant part:

[E]very applicant found qualified under . . . this Act by the Department [of State Police] shall be entitled to a Firearm Owner's Identification Card upon the payment of a $10 fee.

430 ILCS 65/14(b) provides, in relevant part:

(b) Except as provided in subsection (a) with respect to an expired card, a violation of paragraph (1) of subsection (a) of Section 2 is a Class A misdemeanor when the person does not possess a currently valid Firearm Owner's Identification Card, but is otherwise eligible under this Act.

STATEMENT OF FACTS

In March 2017, White County Sheriff's Department personnel responded to a call from defendant's husband reporting that defendant had fired a gun in their home. C167. Upon arrival, police found a rifle beside defendant's bed but found no evidence that she had fired the gun in the home. *Id.* Because defendant did not have a FOID card, she was arrested and charged with possession of a firearm without a FOID card, in violation of

430 ILCS 65/2(a)(1). C11. According to defendant, she was eligible for a FOID card at the time of her arrest. C166.

Defendant moved to dismiss the charges, arguing that "the entire [FOID Card application] process suppresses a fundamental right that is recognized to be enjoyed in the most private of areas, . . . the home." C23. The circuit court granted defendant's motion and declared 430 ILCS 65/2(a)(1) unconstitutional under the Second Amendment to the United States Constitution and Article I, section 22 of the Illinois Constitution,[2] "as applied to this case only." C28-30. The court held that requiring defendant "to fill out a form, provide a picture ID and pay a $10 fee to obtain a FOID card" was an unconstitutional burden on her Second Amendment rights when she possessed the firearm in her own home for the purpose of self-defense. *Id.*

In denying the People's subsequent motion to reconsider, C36-44, the circuit court added a new justification — one that defendant never raised — for its finding of unconstitutionality: that compliance with the FOID Card Act is impossible when in one's own home. C70. The court observed that any person in the home who had knowledge of the firearm and exclusive control over the area where it was located would be in constructive possession of the firearm. C69-70. Therefore, the court reasoned, compliance with the Act

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[2] In contrast, the circuit court's more recent order — the one under review in this appeal — relied solely on the federal constitution's Second Amendment.

would be impossible because "[n]o person could have their FOID card on their person 24 hours each and every day when firearms or ammunition are in the house." C70. The court further observed that, "every person in the home (family member, friend, spouse, etc.) who has knowledge of the firearms or ammunition and has immediate and exclusive control of the area where the firearms or ammunition is located who does not have a FOID card, would be in violation of the statute." *Id.* Therefore, the court held, "430 ILCS 65/2(a)(1) is unconstitutional, as applied to this defendant, because it is impossible to comply in the person's own home." *Id.*

The People appealed directly to this Court, which vacated the circuit court's judgment upon concluding that the lower court's ruling that "section 2(a)(1) of the FOID Card Act is unconstitutional as applied was not necessary to its resolution of this case." *People v. Brown*, 2020 IL 124100, ¶ 36. Specifically, the Court explained, the circuit court had "held that the FOID Card Act did not apply to the act of possessing a firearm in the home as a matter of statutory interpretation and, therefore, could not apply to defendant," and this was "an alternative, nonconstitutional basis for dismissing defendant's information." *Id.* at ¶ 31. The Court also noted that "when the circuit court entered its final judgment on October 16, 2018, and repeated the finding that section 2(a)(1) was unconstitutional as applied, essential factual matters remained unresolved." *Id.* at ¶ 33. Accordingly, this Court ordered "that the October 16, 2018, judgment order dismissing defendant's information be vacated and then modified to exclude the ruling

that section 2(a)(1) is unconstitutional. The modified order is thereupon to be reentered." *Id.* at ¶ 36.

Justice Karmeier, joined by Justice Theis, dissented. Justice Karmeier disagreed with the majority's holding that "the lower court had advanced an additional, nonconstitutional basis for its judgment," and that, even if it had, such a basis precluded this Court's review. *Id.* at ¶ 42 (Karmeier, J., dissenting). Moreover, Justice Karmeier noted, he would not have held that there were any "additional facts that need to be established beyond those to which the parties have already stipulated." *Id.* at ¶ 62 (Karmeier, J., dissenting). As he explained,

> for purposes of defendant's constitutional challenge, only four core facts are relevant: (1) she was charged with violating the FOID Card Act after police discovered a rifle in her bedroom, (2) she kept the weapon in her home for self-defense, (3) she had not sought or obtained a FOID card, and (4) she met the requirements for a FOID card and could have gotten one had she applied.

Id. at ¶¶ 64-65 (Karmeier, J., dissenting). And, he observed, "[a]t this stage in the proceedings, neither defendant nor the State takes issue with any of these points." *Id.*

On remand, the circuit court entered a modified order dismissing defendant's information "on [its] statutory analysis of impossibility of compliance." C114. On June 15, 2020, defendant filed a motion to reconsider, arguing that the "trial court's Modified Order herein is legally erroneous, and forces the defendant to take a position not of her own choosing, one that she will lose on appeal and one which will unnecessarily

delay (perhaps by years) the ultimate disposition of this case." C142-46. The circuit court agreed, vacated the modified order, and reinstated the information. C161-65.

On June 19, 2020, defendant filed a new motion alleging that the FOID Card Act is unconstitutional, arguing that:

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

C169. The People responded, explaining that the FOID Card Act does not regulate conduct within the scope of the Second Amendment because both this Court and the United States Supreme Court have held that the restrictions on gun ownership that the FOID Card Act enforces — such as those preventing felons or people with mental illness from possessing firearms — are constitutionally permissible. C173-97. In the alternative, the People reasoned, even if the FOID Card Act regulated protected conduct, it satisfies means-end scrutiny because it is substantially related to the important government interest of protecting the public health and safety by ensuring that those ineligible to possess firearms do not do so.

The circuit court declared 430 ILCS 65/2(a)(1) and 430 ILCS 65/5[3] unconstitutional as applied to defendant. C218. While it recognized that

[3] The constitutionality of 430 ILCS 65/5 was not at issue before the circuit court, and this Court should vacate the portion of the circuit court's order declaring it unconstitutional. Defendant was charged with violating 430 ILCS

"the Supreme Court left open the option of regulation to combat the dangers of gun violence," the court held that "the FOID Card Act goes too far." C217. Specifically, the court reasoned, the "FOID Card Act is NOT substantially related to an important government interest as applied to the Defendant in this case." *Id.* Moreover, the court held, "*any* fee associated with exercising the core fundamental Constitutional right of armed self-defense within the confines of one's home violates the Second Amendment." C217-18 (emphasis in original).

The People timely appealed directly to this Court. C219.

ARGUMENT

The circuit court's judgment should be reversed. It held that the FOID Card Act "goes too far" in regulating defendant's right to possess a firearm in her home for self-defense. But both this Court and the United States Supreme Court have held that the sort of restrictions on gun ownership enforced by the FOID Card Act — including those preventing felons or people with mental illness from possessing firearms — are exactly the sorts of restrictions permitted under the Second Amendment. If a State may constitutionally prohibit certain groups of people from possessing firearms,

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65/2(a)(1), and only the constitutionality of that provision is at issue. To be sure, defendant's argument is that she should not have to apply for a FOID card or pay the $10 fee imposed by section 65/5. But defendant never applied for a FOID card or paid the fee and she was charged only with violating section 65/2(a)(1). Thus, only that provision's constitutionality is properly before the Court. *See, e.g.*, *People v. Chairez*, 2018 IL 121417, ¶ 13 (vacating portions of circuit court opinion invalidating statutes under which defendant was not charged) *People v. Mosley*, 2015 IL 115872, ¶¶ 11-12 (same).

then it must be allowed to establish a process to determine whether individuals fall into those prohibited categories, including by imposing a reasonable fee to defray the costs of administering the process. The FOID card application process is the method the General Assembly chose for this State to make these determinations.

Because the FOID Card Act is merely the process the State uses to confirm that someone is eligible to possess a firearm, and defendant did not challenge, nor did the circuit court question, the Act's eligibility criteria, there is no merit to the circuit court's assertion that "[t]he Act makes criminals out of law-abiding citizens who are attempting to protect their lives within their homes." C217. On the contrary, defendant committed a criminal act by violating the FOID Card Act, even if she could have received a FOID card had she bothered to apply for one. The circuit court's holding that the Act is unconstitutional as applied to defendant therefore is incorrect and should be reversed.

I. Second Amendment Principles and Standard of Review

Review of issues involving the constitutionality of a statute is de novo. *People v. Sharp*e, 216 Ill. 2d 481, 486-87 (2005). A two-step framework governs this Court's analysis of a Second Amendment challenge to a restriction on firearm possession. *In re Jordan G.*, 2015 IL 116834, ¶ 22. First, the Court must determine whether the regulated activity is protected by the Second Amendment. *Id.* To do so, the Court conducts a textual and historical analysis to determine whether the conduct was protected by the

Second Amendment at the time of its ratification. *Id.* If the regulated activity falls outside the scope of the Second Amendment, then the conduct is categorically unprotected, and no further review is necessary. *Id.* If the regulated activity is not categorically unprotected, then, under the second step, the Court applies the appropriate level of scrutiny to the State's justification for the regulation. *Id.*

II. The FOID Card Act Does Not Regulate Conduct Protected by the Second Amendment.

A. Because the FOID Card Act Is Merely the Mechanism by Which the State Enforces Longstanding Regulations on Gun Possession, the Conduct the Act Prohibits Is Categorically Unprotected.

Here, this Court's analysis begins and ends at the first step of the Second Amendment analysis. The FOID Card Act is a permissible regulation of firearm possession consistent with the history of the Second Amendment, which shows that, at the time of ratification, measures designed to ensure that only qualified individuals possessed firearms were commonplace.

"[A] variety of gun regulations were on the books when individual states adopted their arms-bearing provisions and when the Second Amendment was adopted." Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 502 (2004). Relevant here, some laws "allow[ed] government not only to keep track of who had firearms, but require[ed] them to report for a muster or face stiff penalties." *Id.* at 505. "[E]arly gun laws [also] included measures that invoked gun confiscation for a wide range of reasons or offenses including:

military necessity; failure to swear a loyalty oath to the government; improper storage of firearms; improper possession of weapons legal to own under certain circumstances, including, but not limited to, possession of specific, named types of prohibited firearms—especially handguns and machine guns; violations of certain hunting laws; and failure to pay a gun tax." Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 L. Contemp. Probs. 55, 81 (2017). In other words, gun owners at the time of the Second Amendment's ratification faced comparable, if not greater, burdens to ensure that the States could monitor their fitness to keep arms.

The court below contended that "the initial question is [instead] whether the restricted activity was protected by the Second Amendment at the time of the *14th Amendment's* ratification (1868)." C206 (emphasis added). To be sure, some courts have held that "the most relevant historical period for questions about the scope of the Second Amendment as applied to the States is the period leading up to and surrounding the ratification of the Fourteenth Amendment." *Ezell v. City of Chicago*, 651 F.3d 684, 705 (7th Cir. 2011). But this Court has also looked to whether a Second Amendment right existed at the time of the *Second Amendment's* ratification. *See People v. Mosley*, 2015 IL 115872, ¶ 34 ("the court first conducts a textual and historical inquiry to determine whether the challenged law imposes a burden on conduct that was understood to be within the scope of the second amendment's protection at the time of ratification"); *People v. Aguilar*, 2013

IL 112116, ¶ 27 (same; analyzing whether colonial law created right for minors to possess firearms). In any event, similar gun regulations were common in the 1860s, as well. For example, Georgia, Mississippi, and North Carolina each imposed a fee or tax to possess a pistol, and authorities could seize citizens' firearms if they did not comply with the requirement. 1867 Miss. Laws 327, 327; 1866 Ga. Laws 27, 27-28; 1858 N.C. Sess. Laws 28, 35-36.

While licensing schemes, specifically, were not widely employed before the twentieth century, *see* Cornell, *supra*, at 516, other means of ensuring fitness to possess firearms were, and it is well established that for a law to be "longstanding" for purposes of deciding whether the regulated conduct falls within the scope of the Second Amendment, the law is not required to "mirror limits that were on the books in 1791." *United States v. Skoien*, 614 F.3d 638, 640-41 (7th Cir. 2010) (en banc). Indeed, regulations may qualify as longstanding even if they "cannot boast a precise founding-era analogue." *NRA v. ATF*, 700 F.3d 185, 196 (5th Cir. 2012). "After all, [*District of Columbia v.*] *Heller*[, 554 U.S. 570 (2008),] considered firearm possession bans on felons and the mentally ill to be longstanding, yet the current versions of these bans are of mid-20th century vintage." *Id.*

Here, the FOID Card Act is longstanding — both of its own accord and because it is consistent with laws enacted more than a century ago. Not only was the FOID Card Act enacted in 1967 — more than five decades ago — but it is also consistent with a broader history of licensure requirements. In

1918, for example, Montana enacted a statutory registration requirement that gave each gun owner 30 days to fill out a verified report of all firearms in his possession. 1918 Mont. Laws 6–9. And in 1911, the State of New York made it unlawful for any person to possess "any pistol, revolver, or other firearm of a size which may be concealed upon the person" without a license. 1911 Laws of N.Y., ch. 195, § 1, at 443. It remains illegal in New York "to possess a handgun without a valid license, even if the handgun remains in one's residence." *Kwong v. Bloomberg*, 723 F. 3d 160, 162 (2d Cir. 2013). And the State of Massachusetts also requires a license to possess any "firearm, rifle, shotgun or ammunition." M.G.L.A. 140 § 129C.

Unsurprisingly, then, this Court and the appellate court have recognized that the conduct the Act prohibits — possessing a firearm without a valid FOID card — is not protected by the Second Amendment. *See Mosley*, 2015 IL 115872, at ¶ 36 (720 ILCS 5/24-1.6(a)(3)(C)'s prohibition against publicly possessing a firearm without a valid FOID card passes Second Amendment scrutiny under the first step of the framework); *see also People v. Taylor*, 2013 IL App (1st) 110166, ¶¶ 31-32 (statute preventing people who fail to obtain FOID card from possessing firearms in public falls outside scope of Second Amendment as understood at time of amendment's adoption); *see also People v. Henderson*, 2013 IL App (1st) 113294, ¶¶ 16, 29-30 (rejecting challenge to FOID card requirement in section 24-1.6(a)(3)(C) at first step of Second Amendment analysis).

Although the circuit court dismissed the relevance of *Mosley* and *Taylor*, C211, it should not have done so. *Mosley*, the circuit court contended, is inapposite because it dealt solely with firearm possession by minors, *id.*, but this is an overly cramped reading of *Mosley*. There, this Court upheld subsection (a)(3)(C) of the AUUW statute, which criminalizes public possession of a weapon without a FOID card regardless of the defendant's age. *Mosley*, 2015 IL 115872, at ¶ 36. As for *Taylor*, the circuit court maintained that it was "unable to give proper deference to *Taylor*'s holding" because it did not approve of the analytical approach the appellate court employed, pointing to *Mosley* as evidence that *Taylor*'s approach was flawed. C211. But in *Mosley*, this Court cited with approval *Taylor*'s holding that the FOID Card Act was "a reasonable restriction on firearm possession." *Mosley*, 2015 IL 115872, ¶ 36 (citing *Taylor*, 2013 IL App (1st) 110166, ¶¶ 28-32). The circuit court thus should not have put *Mosley* and *Taylor* to one side.

To be sure, as the circuit court noted, *Mosley* and *Taylor* "were cases where the possession of the firearm occurred in public." C211. But when the United States Supreme Court held that the Second Amendment right is subject to meaningful regulation, it did so while discussing the right to possess a weapon for self-defense in one's home. *See Heller*, 554 U.S. at 627. Indeed, the valid restrictions identified by the Court in *Heller*, including prohibitions on the possession of firearms by felons and the mentally ill, align with the restrictions imposed by the FOID Card Act. *Id.* at 626 (cautioning that "nothing in our opinion should be taken to cast doubt on longstanding

prohibitions on the possession of firearms by felons and the mentally ill"). For this reason, state and federal courts have upheld analogous licensure or registration requirements imposed as prerequisites to possessing a firearm, including inside the home. *See, e.g.*, *Kwong*, 723 F.3d at 168-69 (New York City's licensure fee for handgun possession, including within home, did not violate Second Amendment)[4]; *Heller v. District of Columbia*, 670 F.3d 1244, 1254–55 (D.C. Cir. 2011) (requirement to register firearm did not violate Second Amendment); *Delgado v. Kelly*, 127 A.D.3d 644 (N.Y. App. Div. 2015) (New York licensing requirement for handgun possession in home did not violate Second Amendment); *Commonwealth v. McGowan*, 982 N.E.2d 495, 501 (Mass. 2013) ("We have consistently held . . . that the decisions in *Heller* and *McDonald* did not invalidate laws that require a person to have a firearm identification card to possess a firearm in one's home or place of business, and to have a license to carry in order to possess a firearm elsewhere.").

Moreover, "[i]f the state may set substantive requirements for ownership, which *Heller* says it may, then it may use a licensing system to enforce them." *Berron v. Ill. Concealed Carry Licensing Review Bd.*, 825 F.3d 843, 847 (7th Cir. 2016). In Illinois, the General Assembly has decided that,

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[4] *New York State Rifle & Pistol Association, Inc. v. Bruen*, No. 20-843 (U.S.), which is currently pending in the United States Supreme Court, presents a challenge to New York's requirement that applicants show "proper cause" to obtain a license to carry a firearm in public. The FOID Card Act has no such requirement, and, in any event, defendant has not challenged the Act's eligibility requirements.

to establish eligibility to possess a firearm, individuals must apply for a FOID card by filling out a form, providing a photo ID, and paying a $10 processing fee. Contrary to the circuit court's suggestion, this process is not "an outright ban" on possessing a firearm in one's home for self-defense. C208. It merely requires that individuals obtain a license before doing so. The distinction should have been dispositive.

The circuit court was also wrong to suggest that the fact that "the firearm at issue here was a bolt-action rifle (long gun)" changed the analysis. C215. Indeed, the United States Court of Appeals for the District of Columbia Circuit rejected a nearly identical argument to hold that application of the District's registration requirement to both long guns and handguns did not implicate the Second Amendment. *See Heller v. District of Columbia*, 801 F.3d 264, 273-74 (D.C. Cir. 2015). The court reasoned that "requiring the registration of handguns is legally different from requiring the registration of long guns only in that basic registration of handguns is deeply enough rooted in our history to support the presumption that it is constitutional. . . ; the registration requirement for long guns lacks that historical pedigree." *Id*. at 273 (cleaned up). But, the court held, "[e]ven absent the presumption that attends the pedigree," the registration requirement for long guns did not implicate the Second Amendment right because the burden it created is de minimis. *Id*. at 273-74. The D.C. Circuit correctly upheld the District's registration requirement at the first step of the

Second Amendment analysis even though it also applied to long guns. The circuit court should not have reached a different result here.

In sum, because Illinois's FOID Card Act has been on the books for more than five decades and is a part of a longstanding tradition of using licensing and other means to limit firearm possession to eligible persons, the Act regulates conduct outside the scope of the Second Amendment.

B. The $10 Licensing Fee Raises No Constitutional Concerns.

For the reasons explained, the Second Amendment is not implicated by Illinois's decision to adopt a licensing system as its method of ensuring that only eligible people possess firearms. And if the State may impose a licensing system to enforce the substantive requirements for firearm possession found in the FOID Card Act, it may further impose a reasonable fee to defray the cost of that licensing system. *See, e.g.*, *People v. Stevens*, 2018 IL App (4th) 150871, ¶¶ 14, 17 (upholding Illinois's $300 fee associated with applying for concealed carry license against Second Amendment challenge, given absence of "evidence the licensing scheme charges more than is necessary for the administration of the licensing statute and maintenance of public order in the matter licensed"); *Kwong*, 723 F.3d at 167 (upholding New York's $100 licensing fee to possess firearm without applying heightened scrutiny because it imposed no more than "a marginal, incremental or even appreciable" burden on right to keep firearm in home for self-defense). This Court thus should uphold the FOID Card Act's $10 fee at

the first step of its Second Amendment analysis along with the licensing regime as a whole.

Nevertheless, the circuit court held that the $10 fee is unconstitutional because, in the court's view, the State may not impose any charge for the enjoyment of a constitutional right within one's own home. C216, 217-18. But the $10 fee is not a charge for the exercise of Second Amendment rights. Rather, the fee compensates the State for the costs associated with processing FOID card applications, and thus serves the valid purpose of defraying the cost of the licensing regime. "The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to [exercise the right] cannot be enough to invalidate it." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992).

As the circuit court acknowledged, C216, "[t]he Supreme Court's First Amendment fee jurisprudence provides the appropriate foundation for addressing fee claims under the Second Amendment." *Stevens*, 2018 IL App (4th) 150871, ¶ 13 (citing *Kwong*, 723 F.3d at 165). Under this analysis, licensing fees, like the one imposed by the FOID Card Act, are permissible "when they are designed 'to meet the expenses incident to the administration of the [licensing statute] and to the maintenance of public order in the matter licensed.'" *Id.* at ¶ 14 (citing *Cox v. New Hampshire*, 312 U.S.569, 577 (1941)). Here, it is clear that the $10 application fee serves the purpose of defraying the costs of administering the licensing scheme and policing the

matter licensed. The plain language of the FOID Card Act provides that the $10 payment is a "fee." 430 ILCS 65/5(a). And a fee by definition "seeks to recoup expenses incurred by the state — to 'compensat[e]' the state for some expenditure incurred." *People v. Jones*, 223 Ill. 2d 569, 582 (2006).

Indeed, the Act is explicit about how the $10 fee is distributed to defray various costs: $6 to the Wildlife and Fish Fund, $1 to the State Police Services Fund, and $3 to the State Police Firearm Services Fund. 430 ILCS 65/5(a).[5] And the Illinois Administrative Code sets forth the purposes for which those funds may be used, all of which are directly related to ensuring that those who possess firearms do so safely. For example, the Department of State Police may use money from the State Police Firearm Services Fund

> to finance any of its lawful purposes, mandates, functions, and duties under the Firearm Owners Identification Card Act and the Firearm Concealed Carry Act, including the cost of sending notices of expiration of Firearm Owner's Identification Cards, concealed carry licenses, the prompt and efficient processing of applications under the Firearm Owners Identification Card Act and the Firearm Concealed Carry Act, the improved efficiency and reporting of the LEADS and federal NICS law enforcement data systems, and support for investigations required under these Acts and law. Any surplus funds beyond what is needed to comply with the aforementioned purposes shall be used by the Department to improve the Law Enforcement Agencies Data System (LEADS) and criminal history background check system.

[5] Amendments to the FOID Card Act that will become effective on January 1, 2022, modify how each $10 fee is distributed. Beginning on that date, $5 will go to the State Police Firearm Services Fund and $5 will go into the State Police Revocation Enforcement Fund. *See* 2021 P.A. 102-237 § 20.

20 ILCS 2605/2605-595. Similarly, the portion of the fee that is paid to the Wildlife and Fish Fund relates to policing the safe possession of firearms because the Illinois Department of Natural Resources is required to conduct courses in firearms safety. 520 ILCS 5/3.2 ("Funds for the conducting of firearms and hunter safety courses shall be taken from the fee charged for the Firearm Owners Identification Card."). In short, the $10 payment is a fee imposed to defray the expenses of policing the activities in question, *see, e.g.*, *Kwong*, 723 F. 3d at 166, and therefore permissible.

Although the circuit court recognized that courts traditionally have looked to First Amendment fee jurisprudence to guide their analysis of firearm licensing fees, C216, the court believed that this jurisprudence could not justify even a $10 fee for licensing the possession of firearms within the home, *id.* This was incorrect. In the First Amendment context, the constitutionality of a fee is not dependent on whether one engages in the regulated speech from one's own home. For example, one can make charitable solicitation calls from home, yet the Second Circuit held that a state licensing fee imposed on professionals who engage in charitable solicitations (whether from home or not) was consistent with the First Amendment because, although the fee was imposed on protected speech, it served to meet the State's expenses incident to the regulation. *See National Awareness Found. v. Abrams*, 50 F. 3d 1159, 1165-67 (2d Cir. 1995).

In addition, legislators have greater leeway to enact regulations in the Second Amendment than in the First Amendment context. The First

Amendment begins "Congress shall make no law" infringing on the rights protected by the First Amendment. In contrast, the Second Amendment begins "A well regulated militia, being necessary . . . ." In other words, while "[the language of the First Amendment] suggests the invalidity of any legislation[,] the [Second Amendment] invites regulation." Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 707 (2007). Thus, the circuit court was wrong to believe that the First Amendment does not permit the imposition of licensing fees on constitutionally protected conduct that occurs in the home and, in any event, the legislature has greater leeway to regulate the right protected by the Second Amendment than it does to pass laws affecting First Amendment rights.

In sum, if Illinois may impose the substantive restrictions on firearms possession found in the FOID Card Act — and defendant does not dispute that it may — then the State may impose a licensing system to enforce these eligibility requirements. Indeed, Illinois's licensing regime is part of a longstanding tradition of licensure and other means intended to enforce similar eligibility requirements. And if Illinois may impose a licensing system, then it may also impose a reasonable fee to defray the costs of administering the system. Here, defendant could have applied for a FOID card, which would have provided the State with the opportunity to determine whether one of its legitimate prohibitions applies to her. If, as she claims, she is eligible for a FOID card, she would have received one and could have legally kept a firearm in her home for self-defense. Simply put, it is

constitutional to require an individual to comply with a licensure process before permitting that person to possess a firearm. Therefore, this Court should reverse the circuit court's judgment that the FOID Card Act is unconstitutional at the first step of the Second Amendment analysis.

III. Alternatively, the FOID Card Act Survives Intermediate Scrutiny.

Even if the FOID Card Act regulates protected activity, it survives means-end scrutiny. As this Court has explained, when assessing a firearms regulation for compliance with the Second Amendment, "the argument is not strict versus intermediate scrutiny but rather how rigorously to apply intermediate scrutiny." *People v. Chairez*, 2018 IL 121417, ¶ 35. Accordingly, step two of the Second Amendment analysis "requires an initial determination of where on the sliding scale of intermediate scrutiny the law should be analyzed." *Id.* at ¶¶ 45-46. Here, ordinary, as opposed to heightened, intermediate scrutiny applies because the FOID Card Act does not function "as a categorical prohibition without providing an exception for law-abiding individuals." *Cf. id.* at ¶¶ 48-50 (applying heightened intermediate scrutiny where law imposed complete ban on carriage for self-defense in "a vast number of public areas across the state" and affected "the gun rights of the entire law-abiding population of Illinois"). Rather, the Act prohibits gun possession only by certain categories of people, primarily felons and the mentally ill. Others need only complete the application and pay the $10 processing fee. These requirements — which are necessary to the administration of the State's legitimate prohibitions against possession of

firearms by certain categories of people — do not significantly affect the core Second Amendment right to armed self-defense. So, at most, ordinary intermediate scrutiny should apply.

Under this standard, the FOID Card Act is constitutional as long as it is substantially related to an important government interest. *See People v. Alcozer*, 241 Ill. 2d 248, 262 (2011); *see also Skoien*, 614 F.3d at 641 (applying intermediate scrutiny in Second Amendment case). It is beyond dispute that the State has a legitimate and substantial interest in keeping guns out of the hands of dangerous people. *See, e.g.*, *United States v. Yancey*, 621 F.3d 681, 683 (7th Cir. 2010) ("Congress enacted the exclusions in § 922(g) [including for felons, fugitives, unlawful drug users, and the mentally ill] to keep guns out of the hands of presumptively risky people."). And it likewise cannot be seriously disputed that the Act is substantially related to that important government interest.

For starters, the United States Supreme Court has recognized that, even when applying intermediate scrutiny, legislatures are "far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997); *see also Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997) (where psychiatric experts joined conflicting *amicus* briefs, their disagreements "do not tie the State's hands" in its policy choices, even under intermediate scrutiny); *People v. Minnis*, 2016 IL 119563, ¶ 41 ("Although we exercise independent judgment on issues of constitutional law, the legislature

is in a better position than the judiciary to gather and evaluate data bearing on complex problems."). Thus, intermediate scrutiny does not require legislatures to provide exact empirical justifications for their regulations. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60 (1973) (When applying intermediate scrutiny, "[w]e do not demand of legislatures scientifically certain criteria of legislation.") (internal quotations and citation omitted). Indeed, "[i]t would be foolhardy—and wrong—to demand that the legislature support its policy choices with an impregnable wall of unanimous empirical studies." *Gould v. Morgan*, 907 F.3d 659, 676 (1st Cir. 2018) (applying intermediate scrutiny to state firearm licensing regime). Thus, in applying intermediate scrutiny, courts properly afford a measure of deference to legislative judgments.

But, in any event, this Court need not rely on such deference here because empirical evidence demonstrates that firearm licensing laws like the Act can reduce gun homicides and otherwise protect the public health and safety by preventing high-risk people from possessing firearms. For example, studies have shown that "license-to-purchase" laws, which "require prospective gun purchasers to have direct contact with law enforcement or judicial authorities that scrutinize purchase applications[]" before a proposed gun purchase, have the "potential to significantly restrict gun acquisition by high risk individuals" and deter people intent on doing harm. Daniel W. Webster, *et al.*, *Relationship Between Licensing, Registration, and Other Gun Sales Laws and the Source State of Crime Guns*, 7 Inj. Prev. 184, 184 (2001),

available at https://tinyurl.com/y74h4z2c. Because they require contact with judges or law enforcement prior to firearm acquisition, these laws can deter straw purchasers and reduce the risk that negligent or fraudulent gun sellers will fail to comply with background check laws. *See, e.g.,* Johns Hopkins Bloomberg School of Public Health, *Permit to Purchase Licensing for Handguns* 1 (Mar. 2015), available at https://tinyurl.com/y7cmgwyl. Moreover, these laws give permit-issuing authorities more time to conduct comprehensive background checks and enable law enforcement to quickly investigate illegal transfers. Webster, *supra,* 7 Inj. Prev. at 184.

While it is true, as the circuit court pointed out, that the research on firearm licensing laws has focused on license-to-purchase laws, C215, it follows that "license-to-possess" laws like the FOID Card Act will be at least as effective at keeping guns out of the hands of high-risk individuals. Both types of regimes allow law enforcement (and, in some instances, courts) to confirm that only eligible persons are authorized to lawfully possess firearms and thus, in turn, deter ineligible persons from possessing such weapons illegally. Critically, moreover, some people initially licensed to purchase a firearm may later become ineligible to possess, because, for example, they are disqualified due to a subsequent criminal conviction or commitment in a mental institution. Other people may acquire guns in State without a license-to-purchase requirement or via gift or other conveyance that eludes a license-to-purchase regime. Because license-to-purchase laws do not restrict any of these individuals from possessing firearms, license-to-possess laws are

likely to be *more* effective at preventing high-risk people from possessing firearms or, at the very least, are an important supplement to license-to-purchase laws.

Thus, evidence regarding the success of license-to-purchase laws at keeping firearms from individuals likely to misuse them is equally if not more supportive of the efficacy of license-to-possess laws like the Act. And substantial evidence confirms that license-to-possess are strongly associated with significant reductions in gun homicides. One study, from researchers at Johns Hopkins, found that a dramatic increase in gun homicides followed Missouri's repeal of a handgun licensing law in 2007. Daniel W. Webster, *et al.*, *Effects of the Repeal of Missouri's Handgun Purchaser Licensing Law on Homicides*, 91 J. Urban Health 598, 296-97 (2014), available at https://tinyurl.com/3y3tvkbh; *see also* Greg Sargent, *Why Expanding Background Checks Would, In Fact, Reduce Gun Crime*, Wash. Post, Apr. 3, 2013, available at https://tinyurl.com/q3hxm4y (between 2008 and 2010, "the rate of homicides with guns increased 25 percent in Missouri while nationally there was a 10 percent decline"). Another study found that after Connecticut adopted a similar law in 1995, the State experienced a 40% reduction in gun homicides over the following ten years. Kara E. Rudolph, *et al.*, *Association Between Connecticut's Permit-to-Purchase Handgun Law and Homicides*, 105 Am. J. Pub. Health e49, e49 (2015), available at https://tinyurl.com/t2jrn44d. No similar reduction was observed in States that did not require firearm purchasers to obtain a license. Cassandra K. Crifasi, *et al.*, *Association*

between Firearm Laws and Homicide in Urban Counties, 95 J. Urban Health 383, 384, 387 (2018), available at https://tinyurl.com/hnhsdf5.

In addition, studies show that firearm licensing laws are associated with fewer police deaths and injuries. Missouri's repeal of its licensing law was followed by an 83-percent increase in nonfatal and 52-percent increase in fatal shootings of law enforcement officers. Cassandra K. Crifasi et al., *Effects of State-Level Policy Changes on Homicide and Nonfatal Shootings of Law Enforcement Officers*, 22 Inj. Prevention 274 (2016). Similarly, the adoption of Connecticut's licensing law was associated with an 80-percent reduction in the number of fatal police shootings. *Id.*

And studies demonstrate that firearm licensing laws are an effective way to reduce suicides. Because "suicidal ideation is often transient," suicide can be prevented if a suicidal person's immediate access to a firearm is "restricted during periods of distress or impulsivity" — such as through a law requiring would-be gun owners to apply for a license. Cassandra K. Crifasi, et al., *Effects of Changes in Permit-to-Purchase Handgun Laws in Connecticut and Missouri on Suicide Rates*, 79 Prev. Med. 43, 43 (2015). Unsurprisingly, then, research suggests that licensing laws are "associated with fewer suicide attempts overall, a tendency for those who attempt to use less lethal means, or both." Michael D. Anestis, et al., *Association Between State Laws Regulating Handgun Ownership and Statewide Suicide Rates*, 105 Am. J. Pub. Health 2059, 2059 (2015), available at https://tinyurl.com/9p7p7cz8. Again, the experiences of Connecticut, which

adopted a license-to-purchase law in 1995, and Missouri, which repealed a similar law in 2007, are instructive. After adopting its licensing law, "Connecticut experienced a drop in its firearm suicide rate . . . that was greater than nearly all of the 39 other states that did not have such a law at that time[.]" Crifasi, *supra*, 79 Prev. Med. at 47. Conversely, "Missouri experienced an increase in its firearm suicide rate . . . that was larger than all states that retained" their licensing laws. *Id.*

It is not surprising, then, that in *Heller III*, the D.C. Circuit upheld the District's requirement that all gun owners appear in person to be photographed and fingerprinted. 801 F.3d at 275-77. The court explained that requiring gun owners to register with law enforcement "directly and materially advance[s] public safety by preventing at least some ineligible individuals from obtaining weapons[.]" *Id.* at 277. This Court should reach the same result here. Assuming the FOID Card Act regulates conduct protected by the Second Amendment, it satisfies intermediate scrutiny because it protects the public safety by seeking to ensure that only eligible people possess firearms.

CONCLUSION

This Court should reverse the judgment of the circuit court.

October 14, 2021

Respectfully submitted,

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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 containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 28 pages.

/s/ Garson S. Fischer
GARSON S. FISCHER
Assistant Attorney General

APPENDIX

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIFTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
WHITE COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 127201
	)	Circuit Court No: 2017CM60
	)	Trial Judge: T Scott Webb
v	)	
	)	
	)	
BROWN, VIVIAN CLAUDINE	)	
Defendant/Respondent	)	

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FILED
White Co. Circuit Court
2nd Judicial Circuit
Date: 4/28/2021 11:13 AM
Kelly L. Fulkerson

DIRECT APPEAL TO THE SUPREME COURT OF ILLINOIS
FROM THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT
WHITE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, v. VIVIAN CLAUDINE BROWN, Defendant.	)))))))))	No. 17 CM 60 The Honorable T. Scott Webb Judge Presiding.

Notice of Appeal

An appeal is taken from the order or judgment described below.

(1) Court to which appeal is taken: Illinois Supreme Court

(2) Name and address of appellant's attorney on appeal:

Party: The People of the State of Illinois
Name: Garson S. Fischer
Address: Office of the Illinois Attorney General
100 W. Randolph St., 12th Floor
Chicago, IL 60601
Email: garson.fischer@illinois.gov

(3) Date of judgements or orders: April 26, 2021

(4) If appeal is not from a conviction, nature of order appealed from: Order declaring 430 ILCS 65/2(a)(1) and 430 ILCS 65/5 unconstitutional

(5) A copy of the court's opinion is appended to the notice of appeal.

April 28, 2021

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. The undersigned certifies that on April 28, 2021, the foregoing **Notice of Appeal** was filed with the Clerk of the Circuit Court of Illinois for the Second Circuit, and a copy was served upon the following by email:

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Garson S. Fischer
Assistant Attorney General

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
WHITE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	
Plaintiff,	)	
	)	
	)	
Vs.	)	
	)	
	)	CASE NUMBER: 17-CM-60
	)	
VIVIAN CLAUDINE BROWN	)	
	)	
	)	
Defendants.	)	
	)	

ORDER ON DEFENDANT'S MOTION TO FIND STATUTE UNCONSTITUTIONAL

Now comes the Court, being fully advised in the premises, and enters this Order on Defendant's Motion to Find Statute Unconstitutional.

FACTS[1]

1. On March 18, 2017, the Defendant, a person over the age of 21, resided at a residence located at 1290 County Road 1700 East, White County, Illinois, and occupied such residence as her home.

2. On March 18, 2017, the Defendant did not have a Firearm Owner's Identification Card (hereinafter referred to as a "FOID card") issued pursuant to the provisions of 430 ILCS 65/0.01 *et seq.*, nor had she ever had a FOID card revoked.

3. On March 18, 2017, the Defendant did not have any criminal record and was otherwise eligible to have and possess a firearm and be issued a FOID card pursuant to the provisions of 430 ILCS 65/0.01 *et seq*.

[1] The "facts" are stipulated to by the Defendant and the State. (Transcript of July 7, 2020 Hearing, pgs. 2-3).

4. On March 18, 2017, at approximately 1:47 o'clock p.m., the White County Illinois Sheriff's Department (hereinafter referred to as the "Sheriff's Department") received a call from the Defendant's husband, Scott Brown, in reference to the Defendant shooting a gun inside the residence at 1290 County Road 1700 East, White County, Illinois.

5. When the Sheriff's Department personnel arrived at the Defendant's home, they found a rifle beside the Defendant's bed that the Defendant had for protection but, after conducting an investigation, they did not find any evidence that the rifle (or any gun) had been fired in the residence. Further, the Defendant denied firing a gun and other occupants of the residence denied hearing a gun shot.

6. The Sheriff's Department made a report of the incident and forwarded it to the State's Attorney of White County, Illinois, who filed a criminal Information in the above-entitled cause charging the Defendant with Possession of Firearm without Requisite Firearm Owner's I.D. Card, a class A misdemeanor, in violation of 430 ILCS 65/2(a)(1). The specific charge reads as follows:

> That on March 18th, 2017, in White County, Vivian Claudine Brown, committed the offense of Possession of Firearm without Requisite Firearm Owner's I.D. Card in that said defendant, knowingly possessed a firearm, within the State of Illinois, without having in her possession a Firearm Owner's identification card previously issued in her name by the Department of State Police under the provisions of the Firearm Owners Identification Card Act in violation of 430 ILCS 65/2(a)(1).

7. The criminal Information in the above-entitled cause is now pending and undetermined.

8. 430 ILCS 65/2(a)(1) provides as follows:

> No person may acquire or possess any firearm, stun gun, or taser within this State without having in his or her possession a Firearm Owner's Identification Card previously issued in his or her name by the Department of State Police under the provisions of this Act.

There are certain exceptions to the requirement of possessing a Firearm Owner's Identification card, as set forth in 430 ILCS 65/2(a)(2)(b), none of which are applicable to a person who has a firearm in his or her own home for protection.

9. 430 ILCS 65/5 requires the payment of a $10.00 fee for the issuance of the Firearm Owner's Identification Card.

PREFATORY REMARKS

The Bill of Rights to Constitution of the United States is a limiting instrument. It limits the powers of the government while upholding and protecting the rights of citizenry. It is ground zero for the convergence of order and liberty. Order and liberty are inextricably bound together. For where order ends, liberty becomes a chaotic show of strength where only the strongest can survive and therefore, self-destructs. Conversely, where liberty ends, order becomes tyranny. Like most things valued in this life, order and liberty must co-exist in a tenuous harmony so that one does not overwhelm and overcome the other. Order and liberty are co-dependent for their very existence.

Throughout the history of our young representative republic, the government has enacted certain limitations on the rights of its citizenry in an effort to prevent liberty from becoming a license to be used against fellow citizens. However, there are certain instances where those limitations become overreaching and usurp the power afforded it by the people.

The Second Amendment is an area where the government has enacted numerous restrictions in an attempt to ensure the safety of citizens. There can be no question that firearms can be dangerous when they fall into the wrong hands and are used for malevolent purposes. The question then becomes, "what are the limitations to the restrictions of the right to bear arms?"

The Supreme Court in *District of Columbia* v. *Heller,* found that the right to bear arms and the right to self-defense are both embodied as individual rights within the Second Amendment. 554 U.S. 579 (2008). The Defendant asserts that because she was exercising her

right to self-defense within the confines of her home, there is an inherent right to privacy at issue as well. As set forth in *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965), "the home derives its pre-eminence as the seat of family life." Thus, this case is unique in that it flows from a triumvirate of personal liberties. It arrives at the crossroads of Brown's right to privacy, right of self-defense, and right to bear arms.

Accordingly, if there exists a place in this life where a person should feel safe and protected, it is within the confines of one's home. Self-defense within one's home should be honored and revered as nowhere else on Earth. When a person exercises self-defense in public, said person is voluntarily exposing themselves to would-be assailants. However, at home, one should not be made to feel the same sense of vulnerability. The right of self-defense is paramount when one is tucked away in the privacy, comfort, and protection of one's home. The need to defend oneself, family, and property is most acute within the home. *Heller* at 626. The framers of our Constitution recognized that our homes are sacred escapes from unwanted intrusions. In most circumstances, even the government must obtain a warrant based on probable cause before they can enter the sacred sanctuary of one's home to investigate unlawful activity.

SECOND AMENDMENT ANALYSIS

"Statutes are presumed to be constitutional, and courts must construe legislative enactments so as to affirm their constitutionality if reasonably possible." *People v. Howard*, 2017 IL 120443, ¶24. When a court analyzes a Second Amendment challenge, it must follow a two-step process when reviewing whether a restricted activity is protected by the second amendment.

> First, the court must make a threshold inquiry into whether the restricted activity is protected by the second amendment. Under this threshold analysis, the court conducts a textual and historical analysis to determine whether the challenged state law imposes a burden on conduct understood to be within the scope of the second amendment's protection at the time of ratification. If the challenged law regulates activity falling outside the scope of the second amendment right as it was understood at the relevant historical time, then the regulated activity is categorically unprotected, and is not subject to further second amendment review. *Id.* However, if the historical evidence is inconclusive or suggests that the regulated activity is not categorically unprotected, then the court, applying the appropriate level of scrutiny, conducts an inquiry into the strength of the state's justification for regulating or restricting the activity.
>
> *People v. Jordan G. (In re Jordan G.)*, 2015 IL 116834, ¶ 22.

However, the analysis is a little different when the inquiry addresses laws passed by the state and local authorities as opposed to federal laws. In *McDonald v. City of Chicago*, the Supreme Court found that the operative time for textual and historical analysis for state and local laws was the time of the ratification of the 14th Amendment, which was 1868. 561 U.S. 742, 777-778 (2010).

STEP ONE ANALYSIS

While the initial question is whether the restricted activity was protected by the Second Amendment at the time of the 14th Amendment's ratification (1868), the "activity" needs to be framed properly before that question can be analyzed. The inquiry can be complex and confusing at times. Generally, the defined activity has focused upon either groups of people, types of firearms, or both. For instance, in *Heller*, the court analyzed a blanket prohibition on the possession of usable handguns in the home. 554 U.S. 570, 573. A similar ban on handguns in the home for residents of Chicago and its suburbs was declared unconstitutional in *McDonald v. City of Chicago*, 561 U.S. 742, 750. Both cases involved both types of firearms--handguns, and group of people--everyone. Conversely and more commonly, challenges have been made

when groups of people are prevented from possessing firearms. In *Kanter v. Barr*, the challenge was based upon a non-violent felon's right to possess a firearm. 919 F.3d 437 (7th Circuit, 2019). In addition, minors were found to fall outside the scope of the Second Amendment protections because prohibitions on persons under 21 years of age to purchase and 18 years of age to possess handguns were firmly historically rooted. *People v. Mosely*, 2015 IL 115872, ¶'s 35-36.

In this case, the State makes a blanket statement that the "conduct prohibited here – possessing a firearm without a valid FOID card—is not protected by the Second Amendment." (State's Response, p.8.) That is a shortsighted way of framing the issue. The FOID Card Act seeks to prevent groups of people from possessing firearms such as felons, juveniles, mentally ill persons, addicts, etc. 430 ILCS 65/8. However, the Act also prevents all people who have failed to even apply for a FOID card from possessing a firearm. 430 ILCS 65/2 (a)(1). This prohibition encompasses all non-applicants, regardless of whether they are part of the group that the Act is designed to identify and disqualify or not. To this end, this Court frames the group of people being excluded that the Defendant represents as "all non-licensed, law-abiding residents who are in the privacy of their homes."

With the group of people being excluded properly defined, the Court will now conduct the textual and historical analysis. While the Court isn't going to address all of the disqualification criteria as set forth in the Act, it understands that there have been several court decisions finding groups of people excluded from having Second Amendment rights because, historically (at the time of ratification of the 14th Amendment) they were viewed as not having the right to bear arms, such as felons and juveniles. However, in setting up a mechanism to

identify the "unwanteds", the legislature has created an entirely new group of people to be excluded from the Second Amendment—unlicensed, law-abiding citizens within the privacy and confines of their homes. Surely this group cannot be said to be a necessary byproduct of the FOID Card Act protocol since it encompasses such a large group of people. Additionally, this group of people will never have the right to defend themselves within the confines of their home with a firearm. Yes, they may do something that removes them from that group by paying the $10 fee, filling out the prescribed application, and submitting a photo, but unless and until they leave their original assigned group, they will never have the rights guaranteed to them by the Second Amendment.

The State asserts that the "FOID Card Act does not ban possession of a gun in an individual's own home for self-defense. It merely requires that an individual obtain a license before to do so." (State's Response, p.12.) The Court finds this assertion is a distinction without a difference. Without the license, it is unlawful to possess such a firearm inside one's home. Thus, it has the same ultimate effect as an outright ban. It just gets to the same end by different means.

The State claims that the FOID Card Act is longstanding on its own because it is consistent with laws enacted more than a century ago. (State's Response, p. 9). While it may be true[2] that there is history of disarming felons and the mentally ill, the Defendant in the case *sub judice* does not fit into any of the historically proscribed groups. After exhaustive research, this Court cannot find a single instance where unlicensed, law-abiding citizens within the

[2] *Kanter v. Barr*, 919 F.3d 437, 445-447 (7th Circuit, 2019), found the historical evidence inconclusive as to whether all felons were categorically excluded from the scope of the Second Amendment.

privacy of their home were excluded from exercising their Second Amendment rights to armed self-defense.

Instead, this Court finds quite the opposite to be true. Law abiding citizens have a long and rich history of being able to defend themselves within their homes. Long guns have permeated our country since before the revolutionary war. They served not only as a means for this country to gain freedom from the British, but also as a means of self-defense within citizens' homes.

This Court will presume, for argument's sake, that the government has the ability to strip someone of their Second Amendment rights based upon their conduct, such as a felony conviction or mental health disability. *See, Heller* 554 U.S. 570, 626. However, it is the manner of the "stripping" that this Court finds most troubling. The government has a long history of "disarming" its citizenry if they committed an act that it found would make it too dangerous for them to possess firearms. *See, U.S. v. Yancey*, 621 F.3d 681, 684-685 (7th Cir. 2010). The notion of "disarming" implies that person possessed the right to be armed in the first place. Unfortunately, that is not the case in the State of Illinois pursuant to the FOID Card Act. The *Heller* Court found the Second Amendment to be an individual right applicable to all Americans. *Id.* at 581. Moreover, that right is a pre-existing right that was merely codified by the Second Amendment. *Id.* at 657. Unfortunately, the State of Illinois, through the FOID Card Act, doesn't recognize a citizen's Second Amendment right to armed self-defense within the privacy of their home, unless and until they can pay the $10 fee, provide a photograph, and demonstrate that they don't meet any of the litany of disqualifying criteria. In the eyes of this Court, the entire process is inverted. The burden should be on the state to demonstrate that a citizen has

committed an act thereby disqualifying them from being in the group of people that *already* possess a Second Amendment right. Instead, the opposite is true. A citizen in the State of Illinois is not born with a Second Amendment right. Nor does that right inure when a citizen turns 18 or 21 years of age. It is a facade. They only gain that right if they pay a $10 fee, complete the proper application, and submit a photograph. If the right to bear arms and self-defense are truly core rights, there should be no burden on the citizenry to enjoy those rights, *especially* within the confines and privacy of their own homes. Accordingly, if a person does something to disqualify themself from being able to exercise that right, like being convicted of felony or demonstrating mental illness, then and only then may the right be stripped from them.

A citizen's Second Amendment rights should not be treated in the same manner as a driver's license. A person does not possess a Constitutional right to drive a vehicle. Instead, in order to enjoy that privilege, they must pay a fee and pass tests to demonstrate that they are competent to drive. Sadly, the State of Illinois has adopted a "privileges" framework where a citizen's Second Amendment rights do not exist until and unless they comply with the FOID Card Act.

There is no reason, especially in today's society, that the State of Illinois could not rely upon the reporting of felony and domestic battery convictions as well as the required reporting of mental health professionals for the consideration of revocation of a citizen's right to possess a firearm within their home. Such an act would apply to all citizens. In fact, the State of Illinois already requires this information to be reported pursuant to 430 ILCS 65. A framework such as this would actually provide greater protection than the FOID Card Act in that it would apply to

all Illinois residents, not just those who have obtained/applied for a FOID card. That said, this Court fully understands that a statutory framework such as mentioned above is beyond its judicial purview and leaves such matters to the legislature.

The State cites *People v. Mosely*, 2015 IL 115872, and *People v. Taylor*, 2013 IL App (1st) 110166, to support its position that the Defendant falls outside of the protections of the Second Amendment. However, this Court finds the State's reliance misplaced. As set forth above, *Mosely* held that juveniles, as a group, historically fell outside the protections of the Second Amendment and, as such, were not protected. *Mosely* at ¶'s 35-36. It is fully inapplicable to the Defendant in this matter.

The State also uses *People v. Taylor*, 2013 IL App (1st) 110116, to support its position that any challenge to the FOID Cart Act falls outside the scope of the Second Amendment. (State's Response, p. 10). The First District Appellate Court's analysis is abbreviated and unclear to this Court. The *Taylor* Court appears to have combined the traditional strict scrutiny analysis with step one (text, history, and tradition) of the two-step analysis set forth in *People v. Jordan G. (In re Jordan G.)*, 2015 IL 116834, and other courts that have made more recent Second Amendment inquiries. *Taylor*, ¶'s 28-32. The holdings of *Heller, McDonald, Jordan G., Kanter, Mosely, et alii,* demonstrate that the proper Second Amendment analysis is not a choice between, or combination of, the strict scrutiny and "text, history, and tradition" approaches as seems to have been used by the *Taylor* Court but is instead the two-step approach set forth herein. To that end, this Court is unable to give proper deference to *Taylor's* holding.

Moreover, *Mosely* and *Taylor* both differ from the case before this Court in one critical aspect. They were cases where the possession of a firearm occurred in *public*, not within the

privacy of one's home. The distinction between private (within one's home) and public possession of a firearm is critical to this Court's analysis. The FOID Card Act, as admitted by the State, is Illinois' attempt at "keeping guns out of the hands of dangerous people." (State's Response, P.17). Presumably, the logic follows that the ultimate goal of the Act is to protect the larger public. Simply stated, that goal or objective is merely anticipatory when the possessor of a firearm is confined within their home. The goal only becomes realized once the owner steps outside of their residence with the firearm. The *Heller* Court conceded that there were "longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Heller* at 626. Yet, those prohibitions seem to be prefaced on what a felon or mentally ill person may do with a firearm *outside of the home*.

The State also relies upon *Kwong v. Bloomberg*, 723 F.3d 160 (2nd Circuit, 2013) for the proposition that it is illegal in New York to "possess a handgun without a valid license, even if the handgun remains in one's residence." (State's Response, p. 9.) However, just because that is the law in New York, does not necessitate that the law is constitutional as it relates to the facts and Defendant as presented to this Court. *Kwong* did not address the constitutionality of the law with respect to a person's right to possess a firearm within their own home without first obtaining a license. Instead, the *Kwong* Court determined whether the *licensing fee scheme* as set forth in the New York City administrative code and state penal law violated the Constitution. Indeed, the court found that it did not. Yet, the court was not faced the issues that are before this Court, nor did the *Kwong* Court speak to the differences between private possession (inside one's home) and public possession of a firearm. For those reasons, this Court gives little consideration to the analysis of *Kwong*.

In light of the foregoing and based upon the lack of textual and historical evidence that unlicensed, law-abiding citizens within the private confines of their own home represented a group of people that the government sought to disarm at the time of the ratification of the 14th Amendment to the Constitution, the Court finds that Defendant is among those protected by the Second Amendment.

STEP 2, LEVEL OF SCRUTINY ANALYSIS

Since this Court has found that the FOID Card Act regulates protected activity of unlicensed, law-abiding citizens within the private confines of their home, pursuant to the Second Amendment, the second step is to determine the level of scrutiny to apply. *People v. Jordan G. (In re Jordan G.)*, 2015 IL 116834, ¶ 22. Proximity to the core of the right determines the strength of scrutiny to be applied. *Ezell v. City of Chicago*, 651 F3d 684, 708 (7th Cir. 2011). "The rigor of the review is dependent on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right." *Id.* at 703. "Severe burdens on this core right require a very strong public-interest justification and a close means-end fit; lessor burdens, and burdens on activity lying closer to the margins of the right, are more easily justified". *Id.* Thus, the proper standard of review is intermediate scrutiny subject to a sliding scale. *People v. Chairez*, 2018 IL 121417, ¶ 46. The greater the burden on the Second Amendment, the greater the burden on the state to demonstrate a strong public interest.

The State contends that the FOID Card Act does not restrict the core individual right afforded by the Second Amendment. Specifically, it argues that the FOID Card Act does not function as a categorical prohibition without providing an exception for law abiding individuals. (State's Response, p. 17). Thus, ordinary scrutiny should apply.

While this Court agrees with the State that it does provide an exception, that exception is not automatic. Instead, the Act makes it illegal for a law-abiding citizen to possess a firearm within their own home. Unless or until a person pays a $10 fee, fills out and submits an application and a photo, they will *always* be engaged in criminal activity. That is a substantial burden indeed and could not have been envisioned by the framers of the Constitution.

Accordingly, this Court adopts the intermediate or "heightened" level of scrutiny with a sliding scale. The Court views the sliding scale as having two ends. To the left, it's more akin to a rational basis standard. Opposingly, toward the right, it approaches the strict scrutiny standard. Due to facts of this case, which include the Defendant being in the privacy of her home, the Court views the sliding scale more towards the strict scrutiny side of the spectrum than the rational basis side.

Generally, a statute is constitutional if the state is able to establish that the act is substantially related to an important government interest. *U.S. v. Skoien*, 614 F3d 638, 641 (7th Cir. 2010). Yet, based on the substantial burden placed on the Defendant's Second Amendment core rights in this case, the Court believes that the State must demonstrate more than what is commonly understood as an "important" interest. Although this Court cannot fully articulate the most appropriate standard based upon the sliding scale or means-end analysis, it should be greater than what is commonly understood when evaluating whether a law is substantially related to an important government interest.

The State has provided the Court with data and studies that, at first blush, seem to demonstrate that it has an important interest in burdening the Defendant's rights. The State quotes Daniel Webster, "licensing laws require prospective gun purchasers to have direct

contact with law enforcement or judicial authorities that scrutinize purchase applications before a proposed gun purchase." (State's Response, p. 19). This Court is perplexed by this quote in that it has no application to the case *sub judice*. The purchase of firearms has no relevance to the issues in this matter. Neither does Illinois require an applicant or FOID card holder to contact a judge or police officer prior to either obtaining a FOID Card or purchasing a firearm. Again, this case is about an unlicensed, law-abiding citizen *possessing* a firearm within the confines of her home.

The State also provides a great deal of data on "permit-to-purchase" laws. (State's Response, pp's 21-23). Once again, that data has no application as this Court is not addressing the dangers inherent in purchasing firearms. It also provided the Court with crime rates and suicide statistics as they relate to Missouri's repeal of its permit-to-purchase statute in 2007 and Connecticut's adoption of a similar act in 1995. (State's Response, pp's 21-23). Perhaps most glaring is the State's overwhelming lack of evidence that possessing a firearm by an unlicensed, law-abiding citizen within their home poses any risk to the public. All of the evidence that has been provided addresses collateral issues associated with the purchase, sale, and distribution of firearms.

The Court agrees that the government does have an interest in protecting the public. As set forth above, requiring a law-abiding citizen to obtain a FOID card and paying a $10 fee to exercise her Second Amendment right within the confines and privacy of her own home does little to protect the general public. Moreover, the firearm at issue here was a bolt-action rifle (long gun), which is not easily concealable, nor is it even a semi-automatic. Bolt-action rifles require the shooter to manually eject the spent casing and load another live round into the

chamber after each successive firing. If the Defendant were to take that firearm outside of her home, then the danger to the public may be enhanced. However, those are not the facts before this Court. This Court simply cannot stretch facts *sub judice* such that the danger to public safety is the same as someone possessing a firearm outside of the home.

430 ILCS 65/5 (a) provides, "...every applicant found qualified under Section 8 of this Act [430 ILCS 65/8] by the Department shall be entitled to a Firearm Owner's Identification Card upon the payment of a $10 fee."

The Defendant argues that the fee required for the issuance of a FOID card is unconstitutional because it "suppresses a fundamental right that is recognized to be enjoyed in the most private areas, such as the home." (Defendant's Motion, p. 4.) The State counters by pointing out that the $10 is not a charge or a tax on the exercise of Second Amendment rights. Rather, it compensates the state for costs associated with processing the application. (State's Response, p. 13).

This Court agrees with the State. However, its agreement only extends to areas outside of one's home. Courts have routinely looked to First Amendment analysis when analyzing Second Amendment issues. *People v. Stevens*, 2018 IL App (4th) 150871. Yet, that analysis fails with respect to exercising a core Constitutional right *within one's home*. It simply cannot be the case that a citizen must pay a fee in order to exercise a core individual Second Amendment right within their own home. While it is true that fees have been found to be constitutional with respect to exercising First Amendment rights, the exercise of those rights were public in nature and not within one's home. This Court cannot contemplate another Constitutional right where one must pay a fee to exercise it within the safety and privacy of one's own home.

If we compare it to the right to vote, (which some would argue isn't an individual right but a civic right along the same lines as the right to join the armed forces or serve as jurors[3]), requiring a voter to pay an administrative fee for voting absentee in their own home would be unthinkable. There is no question that voting from home requires more administrative work. Yet, to require the payment of additional fees would disenfranchise voters. Illinois even requires that the return ballot postage be prepaid. 10 ILCS 5/19-4. There is no question that requiring a voter to pay a processing fee for absentee voting within their own home violates their right to vote. Moreover, requiring a person to remit a fee, regardless of how nominal it may be, to exercise their *First Amendment* rights inside their home violates their Constitutional First Amendment Rights as well. People are treated differently inside of their homes because their homes are sanctuaries and the dangers posed to the public at large are nominal. The dangers of yelling "fire" inside of one's home simply don't exist in the manner they exist in a crowded theatre.

CONCLUSION

Even though the Supreme Court left open the option of regulation to combat the dangers of gun violence in *Heller*, it is this Court's opinion that the FOID Card Act goes too far. *Heller* at 636. The Act makes criminals out of law-abiding citizens who are attempting to protect their lives within their homes.

After analyzing all of the evidence in this matter, this Court finds that FOID Card Act is NOT substantially related to an important government interest as applied to the Defendant in this case. In addition, the Court finds that *any* fee associated with exercising the core

[3] *Kanter v. Barr*, 919 F.3d 437, 465 (7th Circuit, 2019), Justice Barrett's Dissent.

fundamental Constitutional right of armed self-defense within the confines of one's home violates the Second Amendment. Specifically, the Court finds 430 ILCS 65/2(a)(1) and 430 ILCS 65/5 unconstitutional as applied to the Defendant in the case *sub judice* under the Second Amendment to the United States' Constitution. This Court cannot reasonably construe the FOID Card Act in a manner that would preserve its validity. Additionally, the finding of unconstitutionality is necessary to this Court's decision and it cannot rest its decision upon an alternative ground. Finally, this Court finds that the notice requirements of Rule 19 have been met by the Defendant serving her Motion on the White County State's Attorney thereby giving the State's Attorney and the Illinois Attorney General opportunity to defend the constitutionality of the applicable provisions of the FOID Card Act.

So Ordered, this 26th day of April, 2021

T. Scott Webb,
White County Resident Circuit Judge

PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On October 14, 2021, the foregoing **Appellant's Brief and Appendix** was electronically filed with the Clerk, Illinois Supreme Court, through the Odyssey eFileIL system, which will serve the following, counsel for defendant:

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