No. 124213

IN THE
SUPREME COURT OF ILLINOIS

SHAWNA JOHNSON,	)	On Appeal from the Circuit Court for
	)	the Second Judicial Circuit, Wabash
Petitioner-Appellee,	)	County, Illinois
	)	
v.	)	No. 13 MR 15
	)	
ILLINOIS STATE POLICE,	)	The Honorable
	)	LARRY D. DUNN,
Respondent-Appellant.	)	Judge Presiding.

REPLY BRIEF OF RESPONDENT-APPELLANT

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POINTS AND AUTHORITIES

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ARGUMENT

This case illustrates the interplay between federal law concerning firearm possession and the Illinois firearm licensing scheme. Under that combined regulatory structure and applicable precedent, the circuit court had no basis to grant Johnson her requested relief.

To begin, federal, not Illinois, law prohibits Johnson from possessing a firearm because of her misdemeanor crime of domestic violence ("MCDV") conviction. *See* 18 U.S.C. § 922(g)(9). And Johnson does not qualify for an exception to this prohibition under 18 U.S.C. § 921(a)(33)(B)(ii) for those who have had their "civil rights restored" ("section 921(a)(33)(B)(ii) exception") because these "civil rights" do not include firearm rights, and she did not lose the right to vote, hold public office, or serve on a jury. *See Logan v. United States*, 552 U.S. 23, 28 (2007).

Thus, if Johnson seeks not only an Illinois FOID Card but also the opportunity to possess firearms under federal law, she cannot obtain that relief here for two reasons. One, even if ISP was ordered to issue her a FOID Card, she still would be federally prohibited from possessing firearms. And two, an Illinois court cannot remove Johnson's federal firearm prohibitor. *See Coram v. State*, 2013 IL 113867, ¶ 101 (Burke, J., and Freeman, J., specially concurring); *id.* at ¶ 124 (Theis, J., and Garman, J., dissenting).

In addition, Johnson's as-applied Second Amendment challenge to section 922(g)(9) — and sections 8(n), 10(b), and (c)(4) of the FOID Act

incorporating it — fails. Federal courts — applying intermediate scrutiny, *e.g.*, *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010) — have universally held that section 922(g)(9) is constitutional under the Second Amendment, both facially and as applied, *e.g., Stimmel v. Sessions*, 879 F.3d 198, 210 (6th Cir. 2018); *United States v. Chovan*, 735 F.3d 1127, 1142 (9th Cir. 2013), because its firearm prohibition is reasonably related to preventing gun violence, *e.g., Skoien*, 614 F.3d at 642. Furthermore, federal courts have concluded that arguments like Johnson's, claiming a low risk of recidivism and passage of time since conviction, are not suitable for consideration in as-applied challenges because to do so would erode Congress's valid, categorical prohibition in section 922(g)(9). *See Stimmel*, 879 F.3d at 210-11; *Fisher v. Kealoha*, 855 F.3d 1067, 1071 n.2 (9th Cir. 2017); *Chovan*, 735 F.3d at 1142. This Court follows federal decisions resolving challenges to a federal statute when there is no split among the circuits. *See State Bank of Cherry v. CGB Enters. Inc.*, 2013 IL 113836, ¶ 34. There is no split here and Johnson has presented no sound reason to depart from these precedents.

Finally, Johnson's first-time constitutional challenge to the FOID Act in its entirety is not properly before this Court. She never presented it to the circuit court, and cannot amend her claim before this Court. Moreover, regardless of the FOID Act, Johnson remains federally prohibited from firearm possession, which makes her arguments unworthy of consideration here.

I. Johnson is federally prohibited from possessing a firearm and so cannot obtain full relief in this lawsuit.

ISP's opening brief explained why the circuit court erred in holding that section 922(g)(9) and the provisions of the FOID Act that apply it, is unconstitutional as applied to Johnson and directing ISP to issue her a FOID Card. *See* AT Br. at 27-48. Johnson responds by arguing that this Court need not reach this constitutional question because she qualifies for the "civil rights restored" exception contained in section 921(a)(33)(B)(ii), and, further, that the United States Attorney General is not a necessary party because she can obtain all the relief she seeks from ISP. *See* AE Br. at 13-31. Johnson is incorrect on both fronts.

A. Firearm rights are not "civil rights" that can be "restored" under section 921(a)(33)(B)(ii).

Johnson is federally prohibited from possessing firearms because of her MCDV conviction for battering her former spouse. *See* C71, 246. Under the section 921(a)(33)(B)(ii) exception, however, an MCDV conviction does not qualify for the federal firearm prohibition if the offender has had that conviction expunged or pardoned, or has had her "civil rights restored . . . unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not . . . possess . . . firearms." 18 U.S.C. § 921(a)(33)(B)(ii). But Johnson does not currently qualify for this exception because she was denied a pardon once, *see* C369, and lost none of her core civil

rights, and so did not have her "civil rights restored," *People v. Heitmann*, 2017 IL App (3d) 160527, ¶ 27.

It is settled: the "civil rights" referenced in section 921(a)(33)(B)(ii) are the three core civil rights — to vote, hold public office, and serve on a jury. *See Logan*, 552 U.S. at 28. Indeed, federal courts both before and after *District of Columbia v. Heller*, 554 U.S. 570 (2008), have so defined that term, such that the right to possess firearms is excluded from that definition, *see Logan,* 552 U.S. at 28; *Chovan*, 735 F.3d at 1132; *Skoien*, 614 F.3d at 645. The Illinois Appellate Court has reached the same conclusion. *See Heitmann*, 2017 IL App (3d) 160527, ¶ 27; *Baumgartner v. Greene Cty. State's Atty.'s Office*, 2016 IL App (4th) 150035, ¶ 37. This is because in referring to "civil rights restored," Congress "intended to encompass those rights accorded to an individual by virtue of his citizenship in a particular state," rather than "'all rights and privileges'" that one may have. *United States v. Cassidy*, 899 F.2d 543, 549 (6th Cir. 1990).

The United States Supreme Court first adopted this definition of "civil rights" in *Caron v. United States*, 524 U.S. 308, 316, 326 (1998), which addressed a challenge to the sentencing enhancements of the Armed Career Criminal Act, which did not apply if the individual could obtain an exception under section 921(a)(20). Similar to the section 921(a)(33)(B)((ii) exception, section 921(a)(20) stated that a felony conviction would not apply for, among other things, enhanced sentencing, if the offender first had his "civil rights

restored," "unless such . . . restoration of civil rights expressly provides that the person may not . . . possess firearms." *Compare* 18 U.S.C. § 921(a)(20), *with* 18 U.S.C. § 921(a)(33)(B)(ii); *see also United States v. Bridges*, 696 F.3d 474, 475 (6th Cir. 2012). The Supreme Court in *Caron* was asked to decide whether the "unless" clause in section 921(a)(20) continued to create a prohibition on firearm possession when a State had restored an individual's right to possess some, but not all, firearms. 524 U.S. at 310. The Court "agree[d]" with the United States that state law determined whether there had been a "[r]estoration of the right to vote, the right to hold office[,] and the right to sit on a jury," under section 921(a)(20), but further held that the "unless" clause forbade those who have the right to possess "some guns but not others" from possessing firearms federally, thus requiring an enhanced sentence. *Id.* at 309-10, 316.

Subsequently, in 2007, the Supreme Court decided *Logan*, which, like *Caron,* involved an application of the section 921(a)(20) exception to the enhanced sentencing provisions of the Armed Career Criminal Act. 552 U.S. at 26-27. Faced with the question whether a particular felon's "civil rights" had been restored for purposes of section 921(a)(20), the Court stated that the "civil rights relevant" to the inquiry were the rights to "vote, hold office[,] and serve on a jury." *Id.* at 28. And the Court held that if the felon had retained these rights "at all times" during and after conviction, then he could not

establish that his civil rights had been "restored" for purposes of section 921(a)(20) because he never lost those rights. *Id.* at 26, 28.

Because the Supreme Court in *Logan* needed to define the "civil rights" at issue before it could determine whether those rights had been "restored," identifying those was "fairly included" in the question for certiorari and was not — as Johnson contends, *see* AE Br. at 23 — outside the scope of the question presented. *See Richlin Sec. Service Co. v. Chertoff*, 553 U.S. 571, 579 n.4 (2008) (subsidiary question is fairly included in question presented in petition for certiorari when question "could not genuinely be answered without addressing the subsidiary question"); *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 213 n.8 (2005) (same); *Ballard v. Commissioner of Internal Revenue*, 544 U.S. 40, 46-47, n.2 (2005) (same); *see also Cassidy*, 899 F.2d at 546 (noting that court must first decide "which civil rights must be restored to constitute a 'restoration of civil rights'" before it could evaluate operation of "unless" clause).

Since *Logan*, the federal courts have unanimously held that the "civil rights" in the section 921(a)(33)(B)(ii) exception (as well as the section 921(a)(20) exception) are limited to "the rights to vote, hold public office, and serve on a jury." *E.g., Skoien*, 614 F.3d at 645. And when the Supreme Court decided *Heller* in 2008, it did not overrule *Logan*, and so post-*Heller* courts have continued to define "civil rights" in both exceptions as the rights to vote, hold public office, and serve on a jury. *See id.*; *Chovan*, 735 F.3d at 1127; *see*

also United States v. Shields, 789 F.3d 733, 749 (7th Cir. 2015); *Walker v. United States*, 800 F.3d 720, 721 (6th Cir. 2015). Likewise, the Illinois Appellate Court has followed *Logan* to hold that the "civil rights" referred to in the section 921(a)(33)(B)(ii) exception consist of the rights to vote, hold office, and serve on a jury only. *See Heitmann*, 2017 IL App (3d) 160527, ¶ 21 ("we agree with *Logan* . . . that gun rights were not included in the rights contemplated in the Gun Control Act"); *Baumgartner*, 2016 IL App (4th) 150035, ¶ 37 (relying on *Logan's* definition of "civil rights").

DuPont v. Nashua Police Department, 113 A.3d 239 (N.H. 2015) — upon which Johnson relies, *see* AE Br. at 20, 24 — thus is an outlier. In fact, as explained, *DuPont's* conclusion that the "civil rights" referred to in section 921(a)(33)(B)(ii) include firearm rights is contrary to every federal court — including the United States Supreme Court — that has looked at the issue. *Supra* at pp. 3-6. Because the federal courts "are not split on [this] issue," *State Bank of Cherry*, 2013 IL 113836, ¶ 34, this Court should "maintain[ ] a uniform body of law in interpreting [the] federal statute[ ]," *id.*, and follow the unanimous federal decisions to hold that the "civil rights" in section 921(a)(33)(B)(ii) are the rights to vote, hold public office and serve on a jury.

In any event, contrary to Johnson's suggestion, *see* AE Br. at 19-20, she is not similarly situated to the petitioner in *DuPont*. The petitioner in *DuPont* had his firearm rights revoked as a result of his Massachusetts conviction, but those rights were later restored to him. *See* 113 A.3d at 241. By contrast,

under Illinois law, Johnson's misdemeanor conviction did not result in the deprivation of her firearm rights; thus, those rights could not be "restored" to her. *Heitmann*, 2017 IL App (3d) 160527, 23 ("[e]ven if we were to agree with petitioner that gun rights should be considered under the purview of the Gun Control Act's civil rights restored, Illinois does not provide a framework for the restoration of such a right"). Thus, even if this Court were to depart from the consistent body of federal law and follow *DuPont*, Johnson would not qualify for the section 921(a)(33)(B)(ii) exception.

B. If Johnson seeks to possess a firearm under federal law, she cannot obtain that relief here.

In this appeal, Johnson states that the only relief she seeks is a FOID Card. *See* AE Br. at 13 ("Petitioner seeks a FOID Card"); *id.* at 15 ("[a] judgment in Petitioner's favor could require ISP to take action — specifically, to issue Petitioner a FOID Card"). If all Johnson desires is a FOID Card — and not the opportunity to lawfully possess a firearm — that issue is justiciable between the current parties. *See* 430 ILCS 65/8 (ISP has authority to issue and revoke FOID Cards).

But if Johnson seeks to lawfully possess a firearm, that is not relief that ISP can provide because that would be contrary to federal law, *see* 430 ILCS 65/8(n), 10(b), (c)(4), even if ISP were ordered to issue Johnson a FOID Card. Indeed, in *Coram*, the special concurrence noted that whether a FOID Card applicant "is prohibited from possessing a firearm as a matter of federal law" is an issue "to be resolved between [the applicant] and the federal authorities."

2013 IL 113867, ¶ 105 (Burke, J. specially concurring); *see also Heitmann*, 2017 IL App (3d) 160527, ¶ 34 (allowing for "reinstatement of the FOID card only once the federal prohibition had been relieved").

And ISP cannot direct the federal government to allow Johnson to possess a firearm. Thus, an order from this Court directing ISP to re-issue Johnson a FOID Card, in addition to being inconsistent with Illinois' FOID Act, would have little practical effect. Even if Johnson were to obtain a FOID Card, because she lacks the right under federal law to possess firearms, she cannot legally purchase or possess firearms in any jurisdiction. If she does so, she would be subject to federal criminal prosecution under 18 U.S.C. § 922(g)(9).

Thus, Johnson falls into the category of individuals recognized by a majority of the justices in *Coram* — individuals to whom, after the 2013 Amendments to the FOID Act, ISP cannot be ordered by a court to issue a FOID Card because they are prohibited from possessing a firearm under federal law. 2013 IL 113867, ¶ 101 (Burke, J., and Freeman, J., specially concurring); *id.* at ¶ 124 (Theis, J., and Garman, J., dissenting). That majority's holding is the holding of this Court on that issue, *see People v. Lampitok*, 207 Ill. 2d 231, 238 (2003), which the Illinois Appellate Court has faithfully followed, *see Heitmann*, 2017 IL App (3d) 160527, ¶ 34; *see also In re Bailey*, 2016 IL App (5th) 140586, ¶ 16; *Walton v. Ill. State Police*, 2015 IL App (4th) 141055, ¶¶ 23, 25; *People v. Frederick*, 2015 IL App (2d) 140540, ¶ 32;

Odle v. Dep't of State Police, 2015 IL App (5th) 140274, ¶ 33; *O'Neill v. Director of Ill. Dep't. of State Police*, 2015 IL App (3d) 140011, ¶ 31.

However, Johnson is not without the ability to obtain relief from her federal firearm prohibition even though she cannot here seek to remove it. She could apply for relief under the federal safety valve in 18 U.S.C. § 925(c). *See* AT Br. at 9-10. One cannot consider an avenue of relief "futile without ever being tried." *Coram*, 2013 IL 113867, ¶ 134 (Theis, J., and Garman, J., dissenting). And if that were unsuccessful, Johnson could seek relief from the appropriate federal authority in an appropriate venue, perhaps federal court. She could also apply again for a pardon in Illinois, as there is no limit on the number of times one may seek a pardon. *See* Ill. Const. 1970, art. V, § 12.

To be sure, as the Supreme Court recognized in *Logan*, the federal firearm prohibitions created by Congress may result in serious offenders — individuals who went to prison, lost their core civil rights, and then had them restored — being treated differently, and arguably more favorably, than those offenders who lost no core civil rights, because the serious offenders may take advantage of the exceptions in sections 921(a)(20) — and 921(a)(33)(B)(ii). *See* 52 U.S. at 31-37. But the Court found that these disparities were consistent with Congressional intent, and further, that addressing any perceived inequity was a matter for the legislature, not the courts. *Id.* at 34-37. And the Sixth Circuit has noted that the non-judicial branches of government may be better suited to resolve issues pertaining to the federal firearm prohibition of section

922(g)(9). *See Stimmel*, 879 F.3d at 209-10 (citing *United States v. Bean*, 537 U.S. 71, 77 (2002)) (noting that applicant with as-applied challenge to section 922(g)(9) who "no longer poses a risk of future violence" could not obtain individualized hearing, just as those denied relief under the federal safety valve could not, because the inquiry of whether, under the safety valve, one was "'likely to act in a manner dangerous to public safety'" was "a function best performed by the Executive, which unlike courts, is institutionally equipped for conducting a neutral, wide-ranging investigation"); *but see Coram*, 2013 IL 113867, ¶¶ 60, 65 (Karmeier, J.).

Thus, in the end, Johnson's dispute is with Congress, the federal government, and/or the United States Attorney General — not ISP. *See* AT Br. at 31-34. Because neither this Court nor ISP can relieve Johnson's federal firearm prohibitor, and because a FOID Card without the right to possess firearms under federal law has little practical effect, this Court should reverse the circuit court's decision directing ISP to issue Johnson a FOID card.

II. Section 922(g)(9), and the sections of the FOID Act incorporating it, do not violate the Second Amendment as applied to Johnson.

As explained in ISP's opening brief, *see* AT Br. at 37-38, when assessing the constitutionality of section 922(g)(9), and the sections of the FOID Act incorporating it, this Court and the federal courts apply the same two-step Second Amendment inquiry, first asking wither section 922(g)(9) "burdens conduct protected by the Second Amendment"; and, if so, "apply[ing] an

appropriate level of scrutiny" to the provision. *Chovan*, 735 F.3d at 1136; *accord In re Jordan G.*, 2015 IL 116834, ¶ 22. As further explained, under this test, Johnson's as-applied challenge fails. First, Johnson has an MCDV conviction and so falls outside of Second Amendment protections. *See* AT Br. at 39-40 (citing *United States v. Booker*, 644 F.3d 12, 23-24 (1st Cir. 2011)). Second, every federal court has concluded that section 922(g)(9) is constitutional, both facially and as applied, under intermediate scrutiny. *See* AT Br. at 37, 41-44 (collecting cases).

Johnson seeks to avoid the same result by arguing that her circumstances are different because her MCDV conviction occurred a number of years ago, she was a victim of domestic violence, and she is "not a recidivist," *e.g.,* AE Br. at 33; there purportedly is "no relief available" to her from the federal firearm prohibition*, e.g., id.* at 36; and finally, as a misdemeanant she allegedly is treated less favorably than an offender who serves a term of confinement, *e.g., id.* at 38. She is incorrect on every point. Section 922(g)(9), and the sections of the FOID Act that incorporate it, is constitutional as applied to her.

A. Johnson falls outside of Second Amendment protections because of her MCDV conviction.

Johnson's MCDV conviction, *see* C71, 246, removes her from the category of "law abiding, responsible citizens" who have the right to bear arms, *see Heller*, 554 U.S. at 635; *Booker*, 644 F.3d at 23-24. As explained, *see* AT Br. at 39-40, the federal government historically has disarmed those who

were considered dangerous because they had been convicted of a serious crime. Section 922(g)(9) is "historically and practically, a corollary outgrowth of the federal felon disqualification statute," and it "fits comfortably among the categories of regulations that *Heller* suggested would be 'presumptively lawful.'" *Booker*, 644 F.3d at 23-24 (citing *Heller*, 554 U.S. at 627 n.26).

Indeed, it is of no consequence that a long period of time has passed since Johnson's MCDV conviction, and that there is no evidence that she is recidivist, *see* AE Br. at 33, for she still falls within the confines of the firearm prohibition of section 922(g)(9). After all, "if Congress had wanted section 922(g)(9) to apply only to individuals with recent domestic violence convictions it could have easily created a limited duration." *Chovan,* 735 F.3d at 1142. Congress also could have "created a good behavior clause" to section 922(g)(9) whereby "those without new domestic violence arrests or charges within a certain number of years of conviction would automatically regain their rights to possess firearms. But Congress did not do so." *Id.* Thus, Johnson remains within the ambit of section 922(g)(9). And since she is one who courts and Congress have deemed neither law abiding nor peaceful, she is outside of Second Amendment protections. *See* AT Br. at 39-40.

Thus, this Court could end the constitutional inquiry here, and reverse the circuit court's judgment on this basis alone. *See Jordan G.*, 2015 IL 116834, ¶ 22; *see also Stimmel*, 879 F.3d at 204.

B. Section 922(g)(9) and the provisions of the FOID Act incorporating it, withstand Johnson's as-applied challenge under intermediate scrutiny.

Even if this Court chooses not to end the constitutional inquiry as described above, it should follow all federal courts and apply intermediate scrutiny to Johnson's as-applied challenge, *see, e.g., Chovan*, 735 F.3d at 1136, and conclude that there is no constitutional problem, *see e.g., Stimmel*, 879 F.3d at 204. Every federal court considering the constitutionality of section 922(g)(9) has concluded that traditional intermediate scrutiny, not a more rigorous standard of intermediate scrutiny, is appropriate, and that section 922(g)(9) is constitutional both facially and as applied under the Second Amendment. *See* AT Br. at 37 (collecting cases).

As these courts have explained, the restrictions on firearm possession in section 922(g)(9) are not an absolute categorical prohibition on firearm possession because they give an exception for "law-abiding" individuals. *See Chovan*, 735 F.3d at 1138; *accord People v. Chairez*, 2018 IL 121417, ¶¶ 49-50 (noting "elevated intermediate scrutiny" with more rigorous review and justification for imposed burdens is necessary only when categorical prohibition applies to law-abiding persons). Those, including Johnson, falling under the prohibitions of section 922(g)(9), however, are not law abiding — they were convicted of using force against a domestic relation, *see United States v. Hayes*, 555 U.S. 415, 421 (2009), and thus do not fall close to "'the core of the right identified in *Heller* — the right of a *law abiding*, *responsible*

citizen to possess and carry a weapon for self-defense — by virtue of [the individual's] criminal history as a domestic violence misdemeanant,'" *Chovan*, 735 F.3d at 1134-35 (quoting *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010)); *see also Stimmel*, 879 F.3d at 198, 207 (section 922(g)(9) did not touch the Second Amendment's core, requiring application of intermediate scrutiny).

And Johnson, like every other misdemeanant falling within the ambit of section 922(g)(9), has the potential for relief available through a pardon, expungement, or a restoration of her civil rights, *see* 18 U.S.C. § 921(a)(33)(B)(ii), or through the federal safety valve, *see* 18 U.S.C. § 925(c); *see also* AT Br. at 9-10; *supra* p. 10.

For her part, Johnson argues that because she has thus far been unsuccessful in obtaining relief under section 921(a)(33)(B)(ii), a more rigorous form of intermediate scrutiny is warranted. *See* AE Br. at 33-36. She is wrong. As all courts to have considered the issue have indicated, the mere *potential* for obtaining relief from the prohibition on possessing firearms precludes section 922(g)(9) from operating as a categorical prohibition, making intermediate scrutiny appropriate. *See Stimmel*, 879 F.3d at 207 n.7; *Fisher*, 855 F.3d at 1071 n.2; *Chovan*, 735 F.3d at 1133, 1138. As these courts have explained, the general availability of relief through the mechanisms identified in sections 921(a)(33)(B)(ii) — and section 925(c) — means that there is not a substantial burden on law abiding citizen's right to possess firearms, and a

lessened burden for those with MCDV convictions, making only intermediate scrutiny, not heightened intermediate scrutiny, warranted. *See e.g., Chovan*, 735 F.3d at 1138.

Next, Johnson argues that even if intermediate scrutiny were applicable, it is not satisfied here. *See* AE Br. at 36-42. Again, Johnson is incorrect. As explained, *see* AT Br. at 41, intermediate scrutiny requires only a "reasonable fit" between the challenged regulation and "the government's significant, substantial or important objective." *Stimmel*, 879 F.3d at 207-08; *see also Skoien*, 614 F.3d at 641-42; *Chester*, 628 F.3d at 683. And the government has a "significant, substantial, and important objective" in "reducing domestic gun violence" and "preventing armed mayhem," AT Br. at 41-43 (quoting, *e.g., Stimmel*, 879 F.3d at 206; *United States v. Staten*, 666 F.3d 134, 161 (4th Cir. 2011); *Booker*, 644 F.3d at 24; *Skoien*, 614 F.3d at 642). There is a reasonable fit between section 922(g)(9)'s purpose of disarming those with MCDV convictions and the government's important interest in reducing domestic gun violence. *See* AT Br. at 44-45 (citing, *e.g., Stimmel*, 879 F.3d at 208; *Staten*, 666 F.3d at 167; *Skoien*, 614 F.3d at 642).

Johnson agrees that reducing and preventing incidents of gun violence are "important public purposes." AE Br. at 36. Nevertheless, she argues that section 922(g)(9) is unconstitutional as applied to her because there is a "lack of fit" between this legitimate purpose and her personal circumstances. *Id.* at 36-42. In particular, she argues that section 922(g)(9) is unconstitutional as

applied to her because (1) a long time has passed since her misdemeanor battery conviction; (2) she was a victim of domestic violence; and (3) she is not recidivist. *See* AE Br. at 40-42. But under intermediate scrutiny, there need only be a "reasonable fit" between the challenged government regulation and "the government's significant, substantial, or important objective," not an exact one; some over-inclusiveness is permissible. *Stimmel*, 879 F.3d at 207; *Staten*, 666 F.3d at 167.

Thus, when addressing arguments like Johnson's, both the Sixth and Ninth Circuits concluded that Congress did not intend for those with MCDV convictions to challenge section 922(g)(9) as applied to them based on individualized circumstances, including passage of time and absence of evidence of recidivism. *See Stimmel*, 879 F.3d at 198, 210 (reasoning that *Heller* would not "require an individualized hearing to determine whether the government has made an improper categorization"); *Fisher*, 855 F.3d at 1071 (same); *Chovan*, 735 F.3d at 1142 (same). Indeed, allowing an individualized challenge based on personal circumstances to section 922(g)(9)'s valid categorical disqualification would create a significant "exception to 922(g)(9) that Congress did not establish and would undermine Congress' [ ] judgment that risk or potential, not likelihood, probability or certainty of violence is sufficient." *Stimmel*, 879 F.3d at 211 (internal quotation marks omitted).

Johnson does not distinguish these precedents, nor can she, given that they squarely hold that she is not entitled to relief. Given Congress' "express

intent to establish a 'zero-tolerance policy' towards guns and domestic violence," *Chovan*, 735 F.3d at 1142, this Court should follow the Sixth and Ninth Circuits in concluding that an individualized determination based on circumstances is inappropriate when considering an as-applied challenge to section 922(g)(9).

Finally, Johnson argues that the means-end "fit" is lacking because, under the section 921(a)(33)(B)(ii) exception, domestic violence offenders who served time in jail may be treated differently, and more favorably, than those who did not. *See* AT Br. at 38. This argument ignores the history of section 922(g)(9). Prior to the enactment of section 922(g)(9), a loophole existed that allowed offenders who had pled down to a misdemeanor from felony domestic battery (and thus did not serve a term of imprisonment) to possess firearms. *See Skoien*, 614 F.3d at 642-43. Congress responded by promulgating section 922(g)(9), which, as Senator Lautenberg explained, closed this "dangerous loophole" that allowed those domestic abusers who engaged in spousal and child abuse — but were not convicted of felonies — from possessing firearms. *Id.* at 643 (citing 142 Cong. Rec. 22985-86 (statements of Sen. Lautenberg)). Thus, when addressing an argument that offenders sentenced to a term of imprisonment receive potentially more favorable treatment as compared to offenders who do not serve time in prison, the Supreme Court in *Logan* found that these disparities were consistent with Congressional intent, and, further,

that addressing any perceived inequity was a matter for the legislature, not the courts. 552 U.S. at 34-37; *see also supra* p. 10.

For these reasons, section 922(g)(9), and the FOID Act provisions that apply it, are constitutional as applied to Johnson. Thus, the circuit court's judgment should be reversed.

III. Johnson's as-applied Second Amendment challenge to section 922(g)(9), and the provisions of the FOID Act that incorporate it, is the only issue on review.

Johnson's as-applied challenge to ISP's decision to revoke her FOID Card is the only issue before this Court because it was the only claim she chose to bring in the circuit court. Thus, her first-time challenge before this Court to the FOID Act as a whole, including its requirement that individuals who wish to possess a firearm obtain a FOID Card, should not be considered.

Johnson's operative section 10 petition was the basis for her as-applied challenge, in which she alleged that section 922(g)(9); the provisions of the FOID Act that incorporate section 922(g)(9) — 430 ILCS 65/8(n), 10(b), (c)(4), and 20 Ill. Admin. Code § 1230.20 (which also applies section 922(g)(9) through subsection (h) — were unconstitutional as applied to her. C334-37. Johnson did not challenge the FOID Act as a whole, either facially or as applied under the United States or Illinois Constitutions. *See id.* Nor did she raise this challenge in any prior section 10 petition, *see* C16-21, C221-24, C334-37, or during her as-applied hearing, *see* C734-911.

Thus, addressing the claims presented in Johnson's section 10 petition, the circuit court held that section 922(g)(9), and the provisions of the FOID Act that incorporate it, was unconstitutional as applied to her, *see* C499-523 (A40-64), and this appeal ensued by virtue of this Court's authority to directly review a final judgment "in cases which a statute of the United States or of this state has been held invalid," Ill. S. Ct. R. 302(a).

This Court should decline to address Johnson's new claim — that the FOID Act, including its requirement of a FOID Card, as a whole is unconstitutional — for at least two reasons. First, as explained, Johnson never pled or raised this claim in the circuit court. In that regard, Johnson is distinguishable from the defendant in *People v. Brown*, No. 124100, *see* AE Br. at 43, who initiated her challenge to the constitutionality of the FOID Act's requirement that she obtain a FOID Card in the circuit court. Because Johnson did not press this claim in the circuit court, she cannot now amend her cause of action. *See, e.g., Hough v. Kalousek*, 279 Ill. App. 3d 855, 860-61 (1st Dist. 1996); *Westshire Ret. & Healthcare Ctr. v. Dep't of Pub. Aid*, 276 Ill. App. 3d 514, 523-24 (1st Dist. 1995); *see also People v. Whitfield*, 228 Ill. 2d 502, 525 (2007) ("we decline to consider here an argument that was not presented in the proceedings below and is raised here as an afterthought"); *Dineen v. City of Chi.*, 125 Ill. 2d 248, 266 (1988) (court will not reach new issue in case that was "not discernible from an examination of the proceedings in the courts below"); *see also Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525,

536 (1996) ("[i]t is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal").

Second, Johnson's argument that the FOID Act is unconstitutional is not an "independent" ground for affirmance, contrary to her claim, *see* AE Br. at 42, because a declaration that the FOID Act is unconstitutional would not give Johnson the relief she seeks. If the FOID Act is unconstitutional (and thus unenforceable), Johnson could not obtain the FOID card she purports to desire. *See* AE Br. at 13. And Johnson would remain federally prohibited from possessing firearms under section 922(g)(9).

Thus, this Court should not consider Johnson's completely new cause of action, because it is unrelated to the issues she pled and argued in the circuit court and cannot bring her the relief she seeks.

CONCLUSION

For these reasons and those in its opening brief, Respondent-Appellant Illinois State Police requests that this Court reverse the circuit court's judgment.

Respectfully submitted,

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November 4, 2019

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) statement of points and authorities, the Rule 314(c) certificate of compliance, the certificate of service is 5,288 words.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 4, 2019, I electronically filed the foregoing **Reply Brief of Respondent-Appellant** with the Clerk of the Illinois Supreme Court, by using the Odyssey eFileIL system.

I further certify that the other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

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I further certify that another participant in this appeal, named below, is not a registered service contact on the Odyssey eFileIL system, and has not designated an e-mail address of record for service, and thus was served by placing a copy in an envelope bearing proper prepaid postage and directed to the address indicated below, and depositing the envelope in the United States mail at 100 West Randolph Street, Chicago, Illinois, 60601, before 5:00 p.m. on November 4, 2019.

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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.

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