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
White County, Illinois, No. 17-CM-60.
The Honorable Mark R. Stanley, Presiding

BRIEF OF *AMICUS CURIAE* GUNS SAVE LIFE, INC. IN SUPPORT OF DEFENDANT-APPELLEE

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TABLE OF CONTENTS
AND
POINTS AND AUTHORITIES

INTERESTS OF AMICUS CURIAE

Amicus Guns Save Life, Inc. ("GSL") has challenged the same statute at issue in this case, which infringes on the Second Amendment rights of GSL's members. The Court of Appeals held that GSL was likely to succeed on the merits but denied a preliminary injunction for other reasons. *See Guns Save Life, Inc. v. Raoul*, 2019 IL App (4th) 190334 ("*GSL*"). That case is now on hold for this one. GSL submits this brief to vindicate its members' constitutional rights and to provide the Court with arguments developed over years of litigation for why Illinois's FOID card requirement is unconstitutional. GSL also submits this brief because this case's outcome likely will control or at a minimum have a substantial impact on the outcome of its own case challenging the FOID card requirement.

INTRODUCTION

Unlike forty-eight other states in the Nation, Illinois requires law-abiding, responsible citizens to obtain and maintain a government license—for a fee—to lawfully exercise the fundamental right to keep and bear arms, even for self-defense in the home. This requirement, codified in the Firearm Owners Identification Card Act, 430 ILCS 65/0.01 *et seq*. (hereinafter the "FOID Act"), is not only unconstitutional. It makes Illinois less safe. As the Cook County Public Defender recently wrote, "there is no Second Amendment on the South Side of Chicago," where restrictive regulations prevent potential victims, particularly in the African American community, from lawfully obtaining the firearms desperately needed for self-defense. *See* Sharone Mitchell, Jr., *There's No Second Amendment on the South Side of Chicago*, THE NATION (Nov. 12, 2021), https://bit.ly/3co8Ovm ("Mitchell"). The FOID requirement is one of those regulations—

one that only the law-abiding will abide, leaving many defenseless against the violent criminals who will not.

This requirement has no grounding in the history and tradition of firearms regulation in this Nation, and Illinois can offer no valid justification for subjecting its citizens to this burden on the right to keep and bear arms. Just as the State could not require its citizens to obtain a license to have a newspaper delivered to their homes or to say family prayers, it cannot require its citizens to obtain a license to exercise this similarly fundamental constitutional right. The Circuit Court was correct to hold that the FOID requirement is unconstitutional as applied to Appellee, because the requirement is unconstitutional in all of its applications. This Court should affirm on that basis.

ARGUMENT

The FOID requirement is unconstitutional for multiple reasons. First, it broadly restricts the exercise of Second Amendment rights and is thus categorically unconstitutional under binding precedent. Second, it imposes such a burden on Second Amendment rights that it must at least be subject to the strictest judicial scrutiny. And it cannot withstand strict scrutiny—indeed, it cannot withstand intermediate scrutiny, the lowest standard that could conceivably apply. Finally, and at a minimum, the FOID requirement is unconstitutional because it singles out the exercise of a constitutional right for special taxation.

I. The FOID Act violates the Second Amendment and Article I, Section 22 of the Illinois Constitution by requiring law-abiding citizens to obtain a license to own a firearm.

Both the Second Amendment of the U.S. Constitution and Article I, Section 22 of the Illinois Constitution protect the "pre-existing" right to keep and bear arms. *District of*

Columbia v. Heller, 554 U.S. 570, 592 (2008) (emphasis omitted). This Court has established a two-step approach to Second Amendment questions. First, courts must look first to history and precedent to determine whether the challenged law applies to "conduct that falls within the scope of the amendment." *People v. Webb*, 2019 IL 122951, ¶ 9. If so, the court then "must determine and apply the appropriate level of constitutional scrutiny." *Id.* At this second step, broadly prohibitory laws are categorically unconstitutional. *See id.* ¶ 21; *People v. Aguilar*, 2013 IL 112116, ¶ 21. Less restrictive laws are subject to heightened scrutiny, and the rigor varies with the "proximity [of] the restricted activity . . . to the core of the second amendment right and the [number of] people affected by the restriction." *People v. Chairez*, 2018 IL 121417, ¶ 45. Rational-basis review is never appropriate. *Id*. ¶ 32.

a. The FOID Act burdens conduct that falls well within the scope of the Second Amendment.

The conduct that the FOID Act burdens *is* the conduct that the Second Amendment protects: the right to keep and bear arms, including for self-defense in the home. The State does not dispute that this is Second Amendment conduct. Instead, the State suggests that the FOID Act only serves to "preven[t] felons or people with mental illness from possessing firearms." Br. of Pl.-Appellant at 7 (Oct. 14, 2021) ("Appellant's Br."). Yet the Act does so only by preventing virtually all Illinois citizens from lawfully possessing a firearm without obtaining (for a fee) and maintaining a state-issued license. After all, the State does not deny that it would prosecute otherwise law-abiding citizens for possessing a firearm without a FOID card, even if only for self-defense in the home. Indeed, that is what it has done in this case. The "right of law-abiding, responsible citizens to use arms in defense of hearth and home" is "the *central component*" (though not the only

component) "of the right." *Heller*, 554 U.S. at 599, 635. There can thus be no serious dispute that the conduct restricted by the FOID Act is protected by the Second Amendment.

The State nevertheless argues that the FOID Act is a "longstanding" regulation that falls outside the Second Amendment's scope altogether. Appellant's Br. 16. As the State acknowledges, longstandingness depends for these purposes on whether "a Second Amendment right existed at the time of the *Second Amendment's* ratification," as opposed to the Fourteenth Amendment's. *Id*. at 10 (emphasis in original). The U.S. Supreme Court has made clear that the Second Amendment must be interpreted according to its original public meaning in 1791, *see Heller*, 554 U.S. at 576–77; *Gamble v. United States*, 139 S. Ct. 1960, 1975–76 (2019), and that the Second Amendment applies to the state in the same manner as to the federal government, *see McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010).

But the State's historical evidence is entirely lacking. The FOID Act itself dates back only to the 1960s, and purported analogues in other states date back to 1911 at the earliest. Ultimately, as will be shown, the FOID Act is an outlier restriction of a sort adopted over a century after the Founding in a small fraction of American jurisdictions. It cannot be called longstanding. *Cf. Heller*, 554 U.S. at 626 (noting that "the *majority* of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues" (emphasis added)).

1. While under *Heller* certain laws may receive a *presumption* of constitutionality, presumptions can be rebutted. *See, e.g.*, *Heller v. District of Columbia*, 670 F.3d 1244, 1253 (D.C. Cir. 2011) ("*Heller II*") ("A plaintiff may rebut this presumption by showing the regulation does have more than a de minimis effect upon his right."). In

Second Amendment cases, any presumption of constitutionality can be rebutted by showing that a law impinges on the right as understood in 1791. And the State's own evidence only illustrates that the requirement to obtain a license to possess any kind of firearm is an outlier both historically and today. It cannot plausibly be defended as one of the traditional types of regulation that have "long been accepted by the public." *Heller II*, 670 F.3d at 1253.

The State cites no analogous restriction that was on the books in any jurisdiction in 1791, which the State agrees is "the critical year for determining the [Second Amendment's] historical meaning." *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012). Amicus is likewise aware of none. The State accordingly proffers a handful of more recent laws that, as the State tacitly admits, would be insufficient even if they were analogous. *See, e.g.*, *Gamble*, 139 S. Ct. at 1975–76 (confirming that in *Heller* the Court looked for "the public understanding in 1791 of the right codified by the Second Amendment" and later sources "were treated as mere confirmation of that they Court thought had already been established"); *Heller II*, 670 F.3d at 1274 n.6 (Kavanaugh, J., dissenting) ("post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text"); *People v. Mosley*, 2015 IL 115872, ¶ 34.

In any event, the State's analogues are not analogous. In Amicus's challenge to the FOID Act, the State attempted to support the law by citing four purported analogues enacted "in the *early twentieth century*." *GSL* ¶ 56 (emphasis added). Here, the State mentions only two of those already scant statutes. *See* Appellant's Br. at 11–12. Even on the evidence in Amicus's case, the Court of Appeals found at the preliminary-injunction

stage that it was "reasonable for [Amicus] to argue four such laws are hardly representative of a longstanding, national tradition when compared to the 227-year history of the second amendment." *GSL* ¶ 57. Moreover, those laws "are easily distinguishable from the alleged blanket infringement of the second amendment caused by the FOID Act." *Id*. If anything, these supposed analogues only underscore what an outlier the FOID Act is. Montana's registration requirement, passed in 1918, *see* Appellant's Br. at 11–12, applied *after* acquiring a firearm; it did not prevent acquiring a firearm in the first place. And though, the State notes, "[i]t remains illegal in New York to possess a handgun without a valid license, even if the handgun remains in one's residence," *id*. at 12 (internal quotation marks omitted), the FOID Act applies to all firearms, not just handguns. New York's requirement therefore would not have supported the State's prosecution in this case, which is for possessing an unlicensed long gun.

"Even if modern laws alone could satisfy the longstandingness test, there presumably would have to be a strong showing that such laws are common in the states." *Drake v. Filko*, 724 F.3d 426, 450 n.16 (3d Cir. 2013) (Hardiman, J., dissenting). But things look no better for the FOID Act even today: only two States, Illinois and Massachusetts, currently impose such a restriction on keeping any common arms in the home. *See* MASS. GEN. LAWS ch. 140, § 129C; *see also GSL* ¶ 56. Requiring a license for mere home possession is and has always been a stranger to our constitutional tradition.

2. Without any Founding-era analogues, journal articles are the State's sole support for the assertion that "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." Appellant's Br. at 10. Even on their own terms, the articles give the State no support.

First is an article by Saul Cornell, which the State cites for the specific proposition that some Founding-era laws allowed the government "to keep track of who had firearms" and "requir[ed] them to report for a muster or face stiff penalties." Appellant's Br. at 9 (quoting Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 505 (2004) ("Cornell")) (quotation marks omitted). But these militia laws required able-bodied men to procure firearms and present themselves and their arms for inspection at various times. Nothing about these laws suggests that the government could require someone to get permission before acquiring arms. Indeed, the laws were premised on people's ability to acquire arms *without* government permission. The article does note some licensing and permitting requirements from after the Civil War, but acknowledges that, even then, "the use of permits or licenses were less common" and "were usually used to target groups such as free blacks." Cornell at 516. Those laws should be condemned as racist abominations, not used by Cook County as support for modern-day legislation. The article cites no examples of any such law that applied to all citizens in a State before the Civil War.

Next is an article by Robert Spitzer, which the State cites for the proposition that "early gun laws also included measures that invoked gun confiscation for a wide range of reasons." Appellant's Br. at 9–10 (quoting Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 L. CONTEMP. PROBS. 55, 81 (2017) ("Spitzer")) (cleaned up). At face value, all of these laws provided confiscation for reasons (*e.g.*, improper storage of a firearm) arising *after* someone had already gained possession of a

firearm. *Id*. One must possess a firearm to have it confiscated, and these laws once again did not prevent anyone from possessing a firearm. This regime is in line with the original meaning of other constitutional protections, such as the First Amendment, which prohibits prior restraint but allows *post hoc* punishment in certain circumstances. *See Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931); *see also Ezell v. City of Chicago*, 651 F.3d 684, 706–07 (7th Cir. 2011) ("Both *Heller* and *McDonald* suggest that First Amendment analogues are . . . appropriate, and on the strength of that suggestion, we and other circuits have already begun to adapt First Amendment doctrine to the Second Amendment context." (internal citations omitted)).

Moreover, Spitzer's definition of "early" spans up to 1934, *see* Spitzer at 57, well outside of the Founding era. And the only antebellum licensing law cited in the data on which he relies is, again, a Virginia law targeting free persons of color by requiring them to obtain a license to possess a firearm—hardly appropriate historical support for a law that requires all citizens to obtain a license. *See* Mark Frassetto, *Firearms and Weapons Legislation Up to the Early Twentieth Century* 81 (Jan. 15, 2013), https://bit.ly/3Fo8n0r; Spitzer at 58 (relying on Frassetto). Spitzer does cite a few firearm taxes from before the Fourteenth Amendment, Spitzer at 76, but all three were from the South, all were enacted either soon before or soon after the Civil War, and two of these states (Georgia and Mississippi) passed these laws after the war but before being readmitted to the Union, making these laws dubious support at best for the proposition that our Constitution allows states to require citizens to pay for the exercise of a constitutional right.

The State itself admits that "licensing schemes . . . were not widely employed before the twentieth century." Appellant's Br. at 11. And the upshot of the State's own historical evidence is that such schemes were not employed at all in the Founding era.

3. The State also argues that the FOID requirement is of a similar vintage as federal restrictions on felons and the mentally ill. The difference, however, is that the latter restrictions are backed by Founding-era evidence that those who demonstrated dangerousness could have their rights to keep and bear arms restricted. *See, e.g.*, *Kanter v. Barr*, 919 F.3d 437, 454–58 (7th Cir. 2019) (Barrett, J., dissenting) (collecting evidence, such as the Pennsylvania Minority proposal and Samuel Adams's proposal to the Massachusetts constitutional convention, that "founding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety"); *Folajtar v. Att'y Gen. of the United States*, 980 F.3d 897, 914–15 (3d Cir. 2020) (Bibas, J., dissenting) (same). As just seen, the FOID Act lacks any similar support. Indeed, licensure requirements, where they existed, were reserved for those thought not to have equal rights, such as free persons of color.

To be sure, *Heller* described firearm restrictions for felons and the mentally ill as presumptively constitutional even though "the current versions of these bans are of mid-20th century vintage." Appellant's Br. at 11. Yet that does not show, as the State thinks, that a restriction dating back only that far is "longstanding." Rather, *Heller* blessed these restrictions because they were later-enacted outgrowths of restrictions right that did exist at the Founding. *See Heller*, 554 U.S. at 626–27; *Drake*, 724 F.3d at 450 (Hardiman, J., dissenting).

4. This Court's holding in *Mosley*, that 18-to-20-year-olds may be required to possess a FOID card while carrying firearms *in public*, does not decide this case for the State. The paragraph that the State cites is expressly predicated on the conclusion that "possession of handguns by minors is conduct that falls outside the scope of the second amendment's protection." *Mosley*, 2015 IL 115872, ¶ 36 (internal quotation marks omitted); *see* Appellant's Br. at 13. In any event, the case does not address whether law-abiding citizens can be required to possess a FOID card in order to possess a firearm even *in the home*.

The State next cites *Berron* for the proposition that, "if the state may set substantive requirements for ownership, which *Heller* says it may, then it may use a licensing system to enforce them." Appellant's Br. at 14 (quoting *Berron v. Ill. Concealed Carry Licensing Review Bd.*, 825 F.3d 843, 847 (7th Cir. 2016); cleaned up). But the conclusion does not follow from the premise. As discussed, the First Amendment might allow the government to set substantive requirements for speech (*e.g.*, prohibitions on fighting words, true threats, defamation). Still, the government may not pre-screen speech to ensure compliance with those requirements. Second Amendment history similarly indicates that licensing requirements like Illinois's would have been anathema at the Founding.

The State also cites *Cox v. New Hampshire*, 312 U.S. 569 (1941), and successive cases in support of the FOID fees. *See* Appellant's Br. 17–18. But *Cox* upheld a parade-permitting system because "regulation of the use of the streets for parades and processions is a traditional exercise of control by local government" and because the system *promoted* free speech rights through "prevent[ing] confusion by overlapping parades or processions." 312 U.S. at 574, 576. Neither rationale exists here: licensing firearm possession in the home

is not a traditional exercise of government power, and licensing is in no way needed here to avoid clashing exercises of the right.

Finally, the State argues that the Second Amendment's language, as compared to that of the First, somehow invites regulation. *See* Appellant's Br. at 19–20. The Second Amendment states that the right to keep and bear arms "shall not be infringed." U.S. CONST. amend. II. That language invites no more regulation than the command that Congress "shall make no law" abridging the freedom of speech. U.S. CONST. amend. I.

For these reasons, the FOID requirement is not a presumptively lawful, longstanding restriction on Second Amendment rights. But even if it were, that would not decide this case in the State's favor. To the contrary, this Court has held that even presumptively lawful, longstanding restrictions must be subject to heightened scrutiny. *See Chairez*, 2018 IL 121417, ¶ 30. As explained below, the FOID requirement fails any potentially applicable level of scrutiny.

b. The FOID Act is categorically unconstitutional under binding precedent.

Because the FOID Act cannot be squared with the text or history of the Second Amendment or Article I, Section 22, it is categorically unconstitutional.

Under binding precedent, a broadly prohibitory law that infringes Second Amendment conduct is unconstitutional *per se*. The *Heller* decision makes clear that, because the Second Amendment "elevates" its protections "above all other interests," infringements upon its most central protections must be held unconstitutional categorically. 554 U.S. at 634–35. This Court has likewise held that "a wholesale statutory ban on the exercise of a personal right that is specifically named in and guaranteed by the United States Constitution" is flatly impermissible. *Aguilar*, 2013 IL 112116, ¶ 21.

The Second Amendment makes sacred the right of law-abiding citizens to keep common arms in the home to defend themselves and their families. *See Heller*, 554 U.S. at 628, 630, 635. But the FOID Act requires that every citizen who wishes to exercise this right must first obtain the Government's permission and pay for the pleasure of doing so. Like the ban on keeping arms struck down as per se unconstitutional in *Heller*, 554 U.S. at 634–35, and the ban on bearing arms in public categorically struck down by this Court in *Aguilar*, 2013 IL 112116, ¶ 21, the FOID card requirement is flatly unconstitutional. The Second Amendment simply cannot be squared with this kind of "ask permission first" regime, and the regime must be categorically struck down.

c. The FOID Act fails any level of scrutiny that might apply.

Even if not categorically invalid, the FOID Act must be subjected to particularly rigorous scrutiny. But it cannot withstand any level of heightened scrutiny.

The level of scrutiny applied in Second Amendment cases depends on the "proximity [of] the restricted activity . . . to the core of the second amendment right and the [number of] people affected by the restriction." *Chairez*, 2018 IL 121417, ¶ 45. Here, the challenged restriction strikes at the Second Amendment's heartland, essentially acting as a prior restraint on the fundamental right to self-defense in the home. *Cf. N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (prior restraints carry a "heavy presumption against [their] constitutional validity"). And the restriction is as broad as possible: virtually every Illinois citizen who wishes to exercise the right to bear arms is governed and restrained by the FOID Act. Because of the severity and pervasiveness of this burden, the standard of review must be particularly rigorous, and the government must "bea[r] the burden of showing a very strong public-interest justification and a close fit between the government's means and its end." *Chairez*, 2018 IL 121417, ¶ 50. "If the State

cannot proffer evidence establishing both the law's strong public-interest justification and its close fit to this end, the law must be held unconstitutional." *Id.* at ¶ 45.

The FOID Act cannot survive this rigorous scrutiny—indeed, it cannot survive standard intermediate scrutiny. Under intermediate scrutiny, a law must be "narrowly tailored to serve a significant governmental interest." *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). Even granting that the State's proffered interest in public safety is significant, there is no evidence that the FOID requirement advances that interest at all.

1. The FOID Act is unlikely to have any effect on public safety because most criminals will simply ignore it. "[M]ost of the methods through which criminals acquire guns and virtually everything they ever do with those guns are *already* against the law." James D. Wright & Peter H. Rossi, ARMED AND CONSIDERED DANGEROUS xxxv (2d ed. 2008), http://bit.ly/2XAu4bj; *see also* NATIONAL RESEARCH COUNCIL, *Firearms and Violence: A Critical Review* 88 (Charles F. Wellford, John V. Pepper & Carol V. Petrie eds. 2005), http://bit.ly/2N9N7oN (empirical studies "show fairly consistently that many guns [used by criminals] are stolen or borrowed, rather than purchased in the primary market"); BUREAU OF JUSTICE STATISTICS, *Source and Use of Firearms Involved in Crimes: Survey of Prison Inmates, 2016* 1 (2019), http://bit.ly/2NcGqm8 ("Seven percent [of prisoners who had possessed a firearm during their offense] had purchased it under their own name from a licensed firearm dealer.").

It blinks reality to suggest that criminals bent on committing violent, unlawful acts will first submit an application, pay the $10 fee, and wait 30 days before acquiring their crime guns. No, the burden of the FOID Act falls disproportionately *on the law-abiding*. And that burden is significant. As revealed in a recent audit, the FOID approval process "is

inefficient and vulnerable to potential mistakes or oversights," and the "timeliness of processing FOID . . . applications decreased significantly from 2018 to 2019," with almost 30% of FOID applications taking longer than the statutorily mandated 30 days to process in 2019. *Management Audit of the Firearm Owner's Identification Card and Concealed Carry License Programs*, at i–ii, ILL. AUDITOR GENERAL (Sept. 29, 2021), https://bit.ly/3wXA6C5 ("FOID Audit"). Meanwhile, "very few FOID . . . applications were denied." *Id*. at i. Thus, the FOID regime has left tens of thousands of law-abiding citizens unable to exercise their constitutional right to self-defense for long stretches of time.

Most likely, then, the Act has the perverse effect of undermining public safety, making it more difficult for law-abiding citizens to defend themselves from violent crime. *See* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 164 (1995) (noting that armed self-defense is extremely common, and that "each year in the U.S. there are about 2.2 to 2.5 million [defensive uses of guns] of all types by civilians against humans."); NATIONAL RESEARCH COUNCIL, *supra*, at 103 ("At least 19 other surveys have resulted in estimated numbers of defensive gun uses that are similar (i.e., statistically indistinguishable) to the results found by Kleck and Gertz"); *see also* William English, *2021 National Firearms Survey* 10–11 n.9 (2021), https://bit.ly/3oIACjA (2021 survey concluding "that the true number of defensive gun uses" in the United States is "perhaps as high as 2.8 million per year").

The State claims not to need empirical evidence to the contrary, *see* Appellant's Br. at 22–23, despite bearing the burden to show the proper fit between the FOID Act and its

purported interest. *See Chairez*, 2018 IL 121417, ¶ 50. Nevertheless, the State offers some. The flaws in most of this evidence were addressed in the State's Attorneys' amicus brief the last time this case was before this Court. *See* Br. of Amici Curiae State's Attorneys et al. 33–54 (May 31, 2019) ("SA Amicus Br."). All this evidence is of little relevance to begin with because it concerns (1) other types of firearm laws (2) outside of Illinois. For example, Daniel Webster's research focuses on licenses to purchase rather than licenses to possess. However effective the former might be at "deter[ing] straw purchasers," Appellant's Br. at 24, they cannot prove that the different and broader restriction imposed by the FOID Act is necessary for public safety. Moreover, as the State's Attorneys point out, Webster relies on firearm trace data from the ATF, *see* 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, 185 (2001), even though the ATF itself is congressionally required to announce that such data are inappropriate for drawing conclusions about the illicit flow of guns. *See* SA Amicus Br. at 35–35.

The State also makes unsupported claims about the impact of firearm laws in Connecticut. First it claims that Connecticut's requirement for purchase permits—again, not possession permits—caused a 40% decline in gun homicides. More precisely, the cited article estimates that such homicides would have been 40% higher without the law. And as the State's Attorneys have shown, that contention is dubious. The authors reached the conclusion by comparing Connecticut to a "synthetic" state, without accounting for differences between the states out of which it was synthesized. *See* SA Amicus Br. at 47–48. By comparing Connecticut to a real state, however, the State's Attorneys found that

Connecticut's law had no statistically significant impact on firearm homicide rates. *See id*. at 48–49.

The State next relies on a Connecticut study for the proposition that firearm licensing laws "reduce suicides." Appellant's Br. at 26. But unfortunately, any reduction in firearm suicide was replaced by suicides through other means. *See* 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, 47 (2015). Moreover, in a national survey, the State's Attorneys found weak evidence that purchase permits reduce even firearm suicide, with no reduction in overall suicide. *See* SA Amicus Br. at 54. As for the State's other suicide study, which focused on handguns, the authors made clear that their "results should be considered within the context of their limitations." Michael D. Anestis et al., *Association Between State Laws Regulating Handgun Ownership and Statewide Suicide Rates*, 105 AM. J. PUB. HEALTH 2059 (2015); *see id*. ("It was also not possible to rule out other plausible but more difficult to measure explanations for our findings.").

That leaves the State with its one article suggesting that certain gun-control measures caused a decline in attacks on police. *See* 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). The State omits, however, that right-to-carry laws "showed *no* association with fatal assaults" in the study, while "*[n]either* the passage of Connecticut's [permit-to-purchase] law . . . nor the repeal of Missouri's [permit-to-purchase] law . . . were significantly associated with" fatal assaults, and Missouri's repeal was only "marginally associated" with an increase in a certain type of attack (nonfatal with a handgun). *Id*. at 276–77 (emphasis added). These authors also cautioned about

"limitations" in the data set and difficulties controlling for other variables that could "result in mis-specification and biased estimates of the policies' effects." *Id*. at 277.

In short, these studies have several flaws of their own. And whatever they might show, they could not support the public-safety necessity of a firearm regulation that is different from the ones they analyze.

2. Importantly, if the FOID Act did advance public safety, it would still burden far more constitutionally protected conduct than necessary in the process. Even under intermediate scrutiny, a challenged restriction cannot burden substantially more constitutionally protected conduct than necessary to achieve the State's interest. In *McCullen*, for example, the U.S. Supreme Court struck down a Massachusetts "buffer zone" law forbidding certain types of speech outside of abortion clinics, reasoning that the State had failed to show that substantially less restrictive measures were not just as "capable of serving its interests." 573 U.S. at 494. Massachusetts's law was "truly exceptional," and the State was able to "identify no other" comparable law, raising the "concern that the Commonwealth has too readily forgone options that could serve its interests just as well." *Id.* at 490. That concern proved fatal because the State must "sho[w] that it seriously undertook to address the problem with less intrusive tools readily available to it," or at the least "that it considered different methods that other jurisdictions have found effective." *Id.* at 494. This requirement "prevents the government from too readily sacrificing speech for efficiency." *Id.* at 486 (cleaned up).

Recent reports have shown the problems of such sacrifices in the Second Amendment context and in Illinois particularly. As noted, the State's restrictive firearm regulations are preventing Illinois citizens, particularly those from poor minority

communities, from exercising their constitutional right to self-defense, *see* Mitchell, *supra*, and the burdens imposed by the FOID Act have proven even more severe than the Act allows, *see* FOID Audit, *supra*. The racial impact of overbreadth in the Second Amendment context is also powerfully illustrated in an amicus brief filed by public defenders supporting a Second Amendment challenge to a New York licensing scheme that is currently pending before the U.S. Supreme Court. *See* Br. of the Black Att'ys of Legal Aid et al., *New York State Rifle & Pistol Ass'n v. Bruen*, No. 20-843 (U.S. July 20, 2021). Those attorneys explain that, just as on the South Side of Chicago, "New York's licensing regime renders the Second Amendment a legal fiction" for their predominantly minority clients, as they show with examples drawn from their experiences defending clients who were prosecuted merely for exercising Second Amendment rights. *Id*. at 5.

The FOID Act flunks intermediate scrutiny under the same reasoning as *McCullen*, which applies equally in Second Amendment cases. *See Drummond v. Robinson Twp.*, 9 F.4th 217, 222 (3d Cir. 2021) (applying *McCullen* to vacate dismissal of Second Amendment claim against restrictions on locations of shooting ranges). The sheer unusualness of the FOID Act suggests that it is substantially overbroad. Forty-eight States—forty-one of which have lower murder rates than Illinois, CENTERS FOR DISEASE CONTROL & PREVENTION, *Homicide Mortality by State*, https://bit.ly/2BBgqcI—rely on some combination of less-burdensome measures to keep firearms out of the hands of violent criminals and the mentally infirm. Only two states (Illinois and Massachusetts) require a license to possess any kind of firearm in the home. "The first and most important sign that something is amiss comes from the ordinance's outlier status," because "[t]he more 'exceptional' a rule, the more likely the government has overlooked less burdensome

'options that could serve its interests just as well.'" *Drummond*, 9 F.4th at 222 (quoting *McCullen*, 573 U.S. at 490). Indeed, the very fact that only Illinois and one other State rely on a blanket licensing requirement shows that this requirement is not necessary. "It would be hard to persuasively say that the government has an interest sufficiently weighty to justify a regulation that infringes constitutionally guaranteed Second Amendment rights if the Federal Government and the states have not traditionally imposed—and even now do not commonly impose—such a regulation." *Heller II*, 670 F.3d at 1294 (Kavanaugh, J., dissenting). Illinois cannot credibly claim that only it and Massachusetts have happened upon the single, necessary means of achieving this end.

As in *McCullen*, the State has far less-restrictive means available to achieve its professed goals. It is *already* against the law for convicted felons, for example, to possess firearms, and there are a variety of mechanisms for enforcing those laws that are less burdensome than imposing a licensing requirement on the entire law-abiding citizenry. Federal law already requires firearm dealers to run background checks to ensure that they do not sell firearms to prohibited purchasers. *See* 18 U.S.C. § 922(t). Illinois also can supplement these measures by, for example, requiring individuals convicted for the first time of a violent felony or adjudicated mentally incompetent (and sufficiently dangerous) to surrender any firearms they own. In addition, and without conceding the constitutionality of any alternatives—which a challenger need not do, *see Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 732 (2014)—if on-going monitoring for disabling conditions is a concern, the State could have considered requiring people to disclose themselves within some period of time after becoming a gun owner (which would not require registering for each firearm) or implementing systems to ensure that people are disarmed upon a

disqualifying felony conviction or involuntary commitment, both of which involve contact with government officials. These methods might be more costly or less convenient. But it does not matter that nakedly suppressing constitutionally protected conduct is "the path of least resistance"; intermediate scrutiny's tailoring requirement is designed precisely to "preven[t] the government from too readily sacrificing [constitutional rights] for efficiency." *McCullen*, 573 U.S. at 486 (cleaned up).

Illinois has not shown that it even considered these alternatives, which have been embraced and proven effective in virtually every other jurisdiction in the Nation. As in *McCullen*, the State accordingly "has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it. Nor has it shown that it considered different methods that other jurisdictions have found effective." *McCullen*, 573 U.S. at 494; *see also Bruni v. City of Pittsburgh*, 824 F.3d 353, 371 (3d Cir. 2016). That alone would be fatal to the FOID Act, if the Act were not categorically unconstitutional.

II. The FOID Act also violates the Second Amendment and Article I, Section 22 of the Illinois Constitution by requiring law-abiding citizens to pay for a license to own a firearm.

Even if the State could require its citizens to *apply* for a license before exercising their Second Amendment rights, under well-settled law it cannot additionally require them to *pay* for it. This is a purely legal question, and the Court "may affirm for any basis presented in the record." *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 258 (2006); *see also People ex rel. Dep't of Hum. Rts. v. Oakridge Healthcare Ctr., LLC*, 2020 IL 124753, ¶ 36.

The power to tax is the power to destroy. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 327 (1819). Recognizing as much, both the U.S. Supreme Court and this

Court have consistently struck down special taxes on the exercise of constitutional rights. As the U.S. Supreme Court put the point in 1944, law-abiding citizens cannot "be required to pay a tax for the exercise of . . . a high constitutional privilege." *Follett v. Town of McCormick*, 321 U.S. 573, 578 (1944). Accordingly, where a tax or fee "single[s] out" constitutionally protected conduct "for special treatment," it "cannot stand unless the burden is necessary to achieve an overriding governmental interest." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 582 (1983). More fundamentally, such a tax on Second Amendment rights is categorically unconstitutional under Article I, Section 22 of the Illinois Constitution, which provides that the right to keep and bear arms is "[s]ubject *only* to the police power," not the tax power. ILL. CONST. art. I, § 22 (emphasis added); *see Guns Save Life, Inc. v. Ali*, 2021 IL 126014, ¶ 46 (Burke, J., specially concurring).

Even putting that aside, because a tax is "a powerful weapon against the taxpayer selected," *Minneapolis Star*, 460 U.S. at 585, courts have "carefully and meticulously scrutinized" taxes on the exercise of fundamental rights, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 667 (1966). In *Harper*, the U.S. Supreme Court struck down a $1.50 poll tax, *i.e.*, a payment required to vote. *See id*. at 664 n.1. "Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax," the Court said, yet the tax made "the affluence of the voter or payment of [a] fee an electoral standard." *Id*. at 666. Thus, the Court held, the tax infringed on citizens' fundamental rights to equal protection and to vote. *See id*. at 666, 670. Although a state is generally free to "exact fees from citizens for many different kinds of licenses," such as driver's licenses and other

privileges granted by the state, a state may not exact fees for the exercise of fundamental, constitutional rights. *Id*. at 668.

The principles applied in *Harper* apply equally to other freedoms. In *Minneapolis Star & Tribune*, the Court struck down a state law that singled out the press by imposing a tax on paper and ink. Even though the law did not clearly make newspapers' tax burdens greater than other businesses', and even though no direct evidence suggested that it was enacted for the purpose of suppressing speech, *see* 460 U.S. at 586–89, the Court held that it violated the First Amendment. The existence of the tax alone "suggest[ed] that the goal of the regulation [wa]s not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Id.* at 585. Not long after, the Court struck down another state tax that "targeted a small group of newspapers," reiterating that "[a] tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228, 234 (1987) (alteration in original) (quoting *Minneapolis Star & Tribune*, 460 U.S. at 592–93). The Court has likewise struck down taxes that targeted religious practice. *See Follett*, 321 U.S. at 577; *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943); *see also Jimmy Swaggart Ministries v. Board of Equalization of Calif.*, 493 U.S. 378, 386 (1990) (observing that "flat license taxes that operat[e] as a prior restraint on the exercise of religious liberty" have been held unconstitutional). Although these decisions arose out of many different constitutional provisions, they are united in their holdings that "[a] state may not impose a charge for the enjoyment of a right granted by the federal constitution" absent a compelling justification. *Murdock*, 319 U.S. at 113.

This Court applied the same principles and level of scrutiny under Illinois's constitution in *Boynton v. Kusper*, where it found that a $10 fee on marriage licenses, which was used to fund programs for victims of domestic violence, imposed an unconstitutional burden on the right to marry. *See* 112 Ill. 2d 356, 369 (1986). The Court expressly declined to apply so-called "rational-relation" review, instead applying strict scrutiny because the tax "impose[d] a *direct* impediment to the exercise of [a] fundamental right." *Id*. at 369. Under that standard of review, the Court concluded, it made no difference that the legislature had found a relationship between marriage and domestic violence. On the same "cause-and-effect" logic, "other worthy social problems can be found that are just as closely and reasonably related to marriage as is domestic violence, if not more so." *Id.* at 367–68. Thus, "countless other social welfare programs would qualify for monies obtained by imposing a similar tax on those who apply for marriage license." *Id*. at 367. The amount of the tax is likewise irrelevant. "Once it is conceded that the State has the *power* to . . . single out marriage for special tax consideration, there is no limit on the amount of the tax that may be imposed." *Id*. at 369–70. Coupled with that inherent danger was the likelihood that "some people will be forced by the tax imposed to alter their marriage plans and will have suffered a serious intrusion into their freedom of choice." *Id*. at 370 (cleaned up). These risks were enough to render the tax unconstitutional.

The same principles and legal standards apply to the right to keep and bear arms as apply to the right to vote, speak, and marry. No less than with other rights, "[t]he power to tax the exercise of [this] privilege is the power to control or suppress its enjoyment," *Murdock*, 319 U.S. at 112; "wealth or fee paying has . . . no relation" to the qualifications for exercising the right to keep and bear arms; and the core right of lawful, armed self-

defense is too precious and fundamental to be burdened in this way, *Harper*, 383 U.S. at 670. To apply any lesser standard than strict scrutiny when the target of the State's taxing power is the right to keep and bear arms would thus be to render it a "second-class right," an approach the U.S. and Illinois Supreme Courts have rejected. *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality); *see also Aguilar*, 2013 IL 112116, ¶ 21. Accordingly, the FOID Act, which single out the exercise of Second Amendment rights for special fees and surcharges, must be weighed under strict scrutiny, which it cannot survive.

Any interest the State has in maintaining the FOID program can be funded in any number of ways—including by a general revenue-generating measure that does not single out the exercise of a fundamental right. That dooms the fees under any level of heightened scrutiny. *See, e.g.*, *Minneapolis Star & Tribune*, 460 U.S. at 586 (tax on paper and ink not justified by interest in raising revenue because "an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally"). To be sure, in the First Amendment context, the U.S. Supreme Court has permitted fees on the exercise of constitutional rights when the fee is "not a revenue tax, but one to meet the expense incident to the administration of the [licensing law] and to the maintenance of public order in the matter licensed." *Cox*, 312 U.S. at 577 (internal quotation marks omitted). But as explained, this line of cases shows why the FOID Act is unconstitutional. The Act does not *facilitate* the exercise of the right to keep and bear arms, since that right does not suffer from a "tragedy of the commons" akin to the one at work in the First Amendment parade context. Instead, it *restricts* the right of law-abiding citizens merely to exercise their right to possess

their own firearms for self-defense in the home. Nor is the FOID requirement a neutral time, place, and manner restriction. Under the Act, there is no time in which a law-abiding citizen can bear arms, no place he can keep them, and no manner in which he can exercise the fundamental right to armed self-defense without first obtaining a FOID card and paying a recurring $10 fee for the pleasure of doing so.

The FOID Act also cannot be upheld because its $10 fee is a modest amount for some citizens. As the courts have repeatedly held, "[t]he degree of the discrimination is irrelevant," *Harper*, 383 U.S. at 668, since if the power of the Government to condition the exercise of Second Amendment freedoms on the payment of a fee is acknowledged, "there is no limit on the amount of the tax that may be imposed," *Boynton*, 112 Ill.2d at 370. Indeed, Illinois lawmakers have already attempted to heighten the burdens imposed by the FOID Act. *See* Bill Status of SB1966, *101st Gen. Assembly*, ILL. GEN. ASSEMBLY (Jan. 13, 2021), https://bit.ly/3HyDicr (bill that would have quadrupled the fees to $20 every five years, imposed additional fees for defraying the costs of a background check, and required the submission of fingerprints along with the application for up to an additional $30 payment).

This Court can and should affirm the decision below because both the FOID-card requirement itself unduly burdens the exercise of Second Amendment rights. But at the very least, the Act is unconstitutional for the separate and additional reason that it requires law abiding citizens to pay for the privilege of exercising their fundamental Second Amendment rights.

CONCLUSION

The decision below should be affirmed because the FOID Act's licensing requirement and attendant fees are facially unconstitutional.

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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 or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters appended to the brief under Rule 342(a) is 26 pages.

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