No. 126014

In the

Supreme Court of Illinois

GUNS SAVE LIFE, INC., *et al.*,

Plaintiffs-Appellants,

v.

ZAHRA ALI, solely in her official capacity as Director of the Department of Revenue of Cook County, *et al.*,

Defendants-Appellees.

Appeal from the Appellate Court of Illinois
First Judicial District, No. 1-18-1846.
There on Appeal from the Circuit Court of
Cook County, Illinois, No. 15-CH-18217.
The Honorable David B. Atkins, Presiding

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Christian D. Ambler (ARDC No. 6228749)
Stone & Johnson, Chtd.
111 West Washington Street
Suite 1800a
Chicago, Illinois 60602
(312) 332-5656
cambler@stonejohnsonlaw.com

David H. Thompson (ARDC No. 6316017)*
Peter A. Patterson (ARDC No. 6316019)*
Cooper & Kirk, PLLC
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 220-9600
dthompson@cooperkirk.com
ppatterson@cooperkirk.com

*Appearance entered pursuant to Ill. S. Ct. Rule 707

Attorneys for Plaintiffs-Appellants

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INTRODUCTION

In *Boynton v. Kusper*, this Court held that when the government imposes a "special tax" that singles out "the exercise of a fundamental right," it must "meet the strict-scrutiny test." 112 Ill. 2d 356, 369 (1986). Since the right to keep and bear arms—and, therefore, to acquire them in the first place—is fundamental, under both the federal and Illinois Constitutions, the same principle must apply here. *See People v. Mosley*, 2015 IL 115872, ¶ 41; *McDonald v. City of Chicago*, 561 U.S. 742, 767–78 (2010). And Cook County's special tax on the purchase of firearms and ammunition obviously cannot satisfy strict scrutiny for the simple reason that the tax's professed goal—raising funds to pay for various crime-prevention programs—could just as readily be satisfied *without* burdening the right to keep and bear arms at all, "by taxing businesses generally." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 586 (1983). For all its discussion about the broad taxing authority of home-rule jurisdictions and the supposedly *de minimis* amount of the challenged taxes, the County *has no answer* to this logic that does not rely on the implicit assumption that the right to keep and bear arms is not, in fact, a fundamental right—an assumption that is flatly contrary to binding precedent.

That is the beginning and the end of this straightforward case.

ARGUMENT

This Court uses "a two-pronged approach" to analyze laws challenged as inconsistent with the right to keep and bear arms, asking whether the "law imposes a burden on conduct falling within the scope" of that right and, if so, whether it satisfies the appropriate "form of heightened scrutiny." *Wilson v. County of Cook*, 2012 IL 112026, ¶¶ 41–42. The challenged taxes are plainly unconstitutional under this twofold inquiry.

I. The Second Amendment Tax burdens the right to keep and bear arms.

A. The United States and Illinois Constitutions both protect the right to acquire firearms and ammunition.

As explained in our opening brief, courts have repeatedly held that "the right to possess firearms for protection implies . . . corresponding right[s]," *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011), including "the right to *acquire* a firearm," *Ill. Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 930, 938 (N.D. Ill. 2014), and "to obtain the bullets necessary to use [it]," *Jackson v. City & Cnty. of S.F.*, 746 F.3d 953, 967 (9th Cir. 2014). The County cannot dispute this point, and it does not try.

B. The challenged taxes plainly burden the right to acquire firearms and ammunition.

1. Because the right to purchase firearms and ammunition are constitutionally protected, the County's argument that the challenged taxes do not "burden any protected Second Amendment right," Appellees' Br. 17, is a non-starter. Those taxes single out the purchase of firearms and ammunition for a special $25-per-firearm and $0.05- to $0.01-per-round tax, respectively. *Id.* at 1. Accordingly, an Illinois citizen who wishes to purchase a firearm in Cook County must remit a special surcharge of $25 to the County, for no other reason than the item she wishes to buy is a firearm. Under *Wilson*'s holding that the first step of the two-pronged test is satisfied whenever "the challenged law imposes a burden on conduct falling within the scope of the second amendment guarantee," 2012 IL 112026, ¶ 41, that is the end of the matter, and the Court need not read any further to conclude that heightened constitutional scrutiny is required.

2. That is also the only conclusion that is consistent with the binding precedent from this Court, and the United States Supreme Court, striking down taxes that single out other types of constitutionally protected conduct. In *Boynton v. Kusper*, this Court struck

down a $10 tax on marriage licenses that went to fund "the Domestic Violence Shelter and Service Fund." 112 Ill. 2d at 359. As this Court explained, because that tax "singled out" and "impose[d] a *direct* impediment to the exercise of the fundamental right to marry," it was subject to strict scrutiny—scrutiny it was unable to survive. *Id.* at 369–70.

Similarly, in *Minneapolis Star & Tribune*, the U.S. Supreme Court struck down a state tax on the paper and ink used by newspapers. 460 U.S. 575. That tax, the Court reasoned, "singled out the press for special treatment," and "[a] tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest." *Id.* at 582; *accord Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227, 230, 231 (1987); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). The U.S. Supreme Court has employed the same reasoning in striking down a $1.50 poll tax, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 668 (1966), as well as taxes that target religious practice, *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943). All of these cases are based on the same fundamental insight: because "the power to tax involves the power to destroy," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819), 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).

The County attempts to sweep this extensive body of jurisprudence to the side, characterizing these cases as "unrelated doctrines interpreting other fundamental rights." Appellees' Br. 25. But "over 200 years of American jurisprudence," *id.*, are not so easily cast aside. Rather than each case applying "different rules and tests," *id.*, *all* of these precedents are based on the shared doctrinal principle that constitutional rights may not be singled out for special taxes and fees—as is evident from the fact that the cases repeatedly

rely upon one another. *See Boynton*, 112 Ill. 2d at 369–70 (citing *McCulloch* and *Minneapolis Star & Tribune* and holding that "the same rationale must be applied to our case"); *Harper*, 383 U.S. at 665 (citing *Murdock*). The County has provided *no reason whatsoever* why this "carefully-crafted jurisprudence" should not apply to the right to keep and bear arms, Appellees' Br. 25—except, that is, for its plainly insupportable argument before the Court of Appeals that "the Second Amendment is not a fundamental right." Oral Argument at 40:38 (1st Dist. Jan. 14, 2020), https://bit.ly/37RtieV.

Unable to rebut the principle articulated in all these cases, the County attempts to distinguish each case *seriatim*, through a succession of ad-hoc factual distinctions. It argues that *Boynton* is "inapplicable" because the $10 tax in that case "was not rationally related to funding shelters and services for domestic violence victims" while the taxes here serve "the important goal of offsetting the fiscal drain caused by gun violence." Appellees' Br. 27. But whether or not that argument could show that the taxes challenged here *survive* heightened scrutiny—and it cannot, as discussed below—it plainly has nothing to do with the question whether heightened scrutiny *applies in the first place*. Since the Second Amendment Tax "interferes with the exercise of a fundamental right" in precisely the same way as in *Boynton*, 112 Ill. 2d at 269, the answer is clear. The County also argues that *Boynton* is distinguishable because of *Heller*'s "acknowledgment that the right to keep and bear arms is not unlimited," Appellees' Br. 27 (quotation marks omitted), but the argument goes nowhere, since the right to marry *is also not unlimited*. *See Boynton*, 112 Ill. 2d at 369 ("Reasonable regulations . . . may be imposed.").[1]

[1] *See, e.g.*, 750 ILCS 5/212(a)(1) (prohibiting polygamy); *id.* 5/212(a)(2)–(4) (prohibiting marriage by close relatives); *id.* 5/203(1) (providing minimum ages).

The County argues that *Minneapolis Star & Tribune* is also irrelevant because it "found the tax violated the First Amendment because it not only singled out the press, but also targeted a small group of newspapers," while here the firearm and ammunition taxes "apply equally to all purchasers." Appellees' Br. 26–27 (cleaned up). That is incorrect. The Supreme Court could not have been clearer that Minnesota's tax was unconstitutional for *two separate and independent reasons*: *both* because it singled out the press as a whole *and* because it targeted particular newspapers. *See* 460 U.S. at 591 ("Minnesota's ink and paper tax violates the First Amendment *not only* because it singles out the press, *but also* because it targets a small group of newspapers." (emphasis added)); *see also id.* at 592–93. The fact that the taxes challenged here implicate one of these independently sufficient holdings but not the other obviously does not mean that the pertinent holding does not apply. *See Boynton*, 112 Ill. 2d at 369 (citing *Minneapolis Star & Tribune* as holding "that a special tax which singled out the press as an object of taxation could not be countenanced").

The County's efforts to distinguish *Harper* and *Murdock* are equally unavailing. It dismisses *Harper* as based on the rule that "introducing wealth or payment of a poll tax as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor," Appellees' Br. 28 (cleaned up), but it does not explain how wealth or payment of a tax can be *any more relevant* to the exercise of the right to keep and bear arms. And its only argument for distinguishing *Murdock* simply *ignores* that case's core holding that "a tax laid specifically on the exercise of [First Amendment] freedoms" is unconstitutional, 319 U.S. at 108, in favor of an irrelevant passage drawing an analogy to the limits on taxation of interstate commerce—a passage that, in fact, explains that States *may not* tax interstate commerce either directly or in a way that is "discriminatory," *id.* at 113.

3. The County next claims that heightened constitutional scrutiny does not apply because the challenged taxes are merely "*de minimis*." Appellees' Br. 17; *see also Guns Save Life, Inc. v. Ali*, 2020 IL App (1st) 181846, ¶ 59 (App. 17–18). Binding precedent has repeatedly rejected this very argument. In *Boynton*, this Court *acknowledged* "that the amount of the [$10] tax . . . does not . . . impose a significant interference with the fundamental right to marry," 112 Ill. 2d at 369—a point that the dissent drove home by noting that the plaintiffs there did not even "allege that their decision to marry, or that of anyone else, was affected by the license fee," *id.* at 372 (Miller, J., dissenting). But the Court held that this consideration was utterly irrelevant, since "[o]nce 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 (majority). The U.S. Supreme Court made precisely the same point in *Harper*, 383 U.S. at 668. ("The degree of the discrimination is irrelevant."). And it affirmed the principle again in *Minneapolis Star & Tribune*, holding that Minnesota's special tax on the press was unconstitutional even though it apparently resulted in the plaintiff newspapers bearing a *smaller* tax burden, overall, *see* 460 U.S. at 597–98 (Rehnquist, J., dissenting), because allowing "*differential* treatment" of the press would create "the possibility of subsequent differentially *more burdensome* treatment," *id.* at 588–90 (majority). The County has no answer to these cases.

Instead, the only authority the County cites for its "*de minimis*" rule is the federal Second Circuit's decision in *Kwong v. Bloomberg*, 723 F.3d 160 (2d Cir. 2013). *Kwong* cannot bear the weight of the argument for the reasons given in our opening brief: (1) *Kwong*'s discussion of whether New York's challenged fee was a merely "marginal" restriction was predicated on the application of a "substantial burden" Second Amendment

standard, *id.* at 167, that this Court has expressly rejected, *People v. Chairez*, 2018 IL 121417, ¶ 35 n.3; and (2) *Kwong* in fact *applied heightened scrutiny*, explicitly upholding the challenged fee only on the basis (irrelevant, here) that it was "designed to defray (and does not exceed) the administrative costs associated with [New York's handgun] licensing scheme." 723 F.3d at 166; *see also id.* at 168–69 & n.15.

The County does not respond to the second of these arguments at all. It says the first is "beside the point" because the Second Amendment Tax does not "impose *any* burden on [Plaintiffs'] right to keep and bear arms, much less a 'substantial' burden." Appellees' Br. 20. This is not so much a defense of the First District's reliance on *Kwong* as a confession of error—for the argument effectively *admits* that *Kwong*'s "substantial burden" discussion is irrelevant and inapplicable by claiming that the tax does not impose *any* burden. But the more fundamental problem with the argument is that it is obviously false. Whether or not a law-abiding citizen forced to pay a special $25 surcharge on the purchase of a firearm—or $2 for a $25 box of ammunition—has suffered a "substantial burden," the suggestion that they have not suffered "*any* burden" is plainly incorrect. *Id.* The only question is whether that burden may be ignored because of its amount. The County provides no justification for ignoring *Boynton*'s answer to that question.

4. The County also relies on a handful of miscellaneous cases upholding taxes of various kinds, but these do nothing to advance the ball. It first cites *Sonzinsky v. United States*, 300 U.S 506 (1937), which, it says, "upheld the [1934 National Firearms Act's] $200 licensing tax on certain firearms as a constitutional exercise of Congress's taxation power." Appellees' Br. 17–18. What the County fails to mention is that although the National Firearms Act's fee "was originally drafted to include all pistols and revolvers,"

Congress "amended its language to include only short-barreled shotguns, short-barreled rifles, machine guns, and silencers," due to the many comments "centered on legitimate uses for pistols and revolvers." *United States v. Gonzales*, 2011 WL 5288727, at *4 (D. Utah Nov. 2, 2011); *see also Sonzinsky*, 300 U.S. at 511. Accordingly, as the U.S. Supreme Court clarified in *Heller*, it upheld the Act's application to short-barreled shotguns only because "the type of weapon at issue was not eligible for Second Amendment protection." *District of Columbia v. Heller*, 554 U.S. 570, 622 (2008) (emphasis omitted).

The County next seeks to wrest support from the Washington Supreme Court decision in *Watson v. City of Seattle*, 401 P.3d 1 (Wash. 2017). The suggestion that *Watson* has bearing here is refuted by the County's own description of the case. *Watson*, it explains, "upheld the City of Seattle's firearms and ammunition tax . . . against a preemption challenge," but did not "raise[ ] Second Amendment concerns." Appellees' Br. 18. The reason that *Watson* did not "raise Second Amendment concerns," *id.*, was that *the plaintiffs in Watson did not bring any Second Amendment challenge*. *Watson*, 401 P.3d at 4.

Seeking to transform vice into virtue, the County argues that the lack of any "Second Amendment concerns" in *Sonzinsky* and *Watson* is itself "instructive." Appellees' Br. 18. Lead cannot be turned into precedential gold in this way. Even if an issue is *before* a court, if it declines to pass upon it, such a "drive-by" ruling has "no precedential effect." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). No alchemy can extract authority from a court's failure to discuss a claim *that the plaintiff did not even plead*.

The remaining cases relied upon by the County are even further afield. It cites *Coverdale v. Arkansas-Louisiana Pipe Line Co.*, 303 U.S. 604 (1938), and *Bowman v. Continental Oil Co.*, 256 U.S. 642 (1921), but those irrelevant cases concern the

constitutional limits on state taxation imposed by the dormant commerce clause. And while the County cites the discussion of the right to travel in *United States v. Guest*, 383 U.S. 745 (1966), precisely the same rule discussed above applies in that context: a State may impose taxes that defray the costs of facilities that "aid[ ] rather than hinder[ ] the right to travel," *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 714 (1972), but a tax or fee that *singles out* interstate travel for the purpose of *raising general revenue* is unconstitutional, *see Crandall v. Nevada*, 73 U.S. (6 Wall) 35, 43–46 (1867); *see Wallach v. Brezenoff*, 930 F.2d 1070, 1072 (3d Cir. 1991). And in this context, yet again, the *amount* of the discriminatory tax is irrelevant; for "if the State can tax a railroad passenger one dollar, it can tax him one thousand dollars." *Crandall*, 73 U.S. at 46.

C. The challenged taxes cannot be upheld as qualifications on the commercial sale of firearms.

The Appellate Court invoked the passage in *Heller* suggesting that "laws imposing conditions and qualifications on the commercial sale of arms" are "presumptively lawful," 554 U.S. at 626–27 & n.26; *see Guns Save Life*, 2020 IL App (1st) 181846, ¶ 56 (App. 16–17), but as we explained in our opening brief, the Second Amendment Tax is not such a law for the simple reason that it explicitly falls *on purchasers*, not *sellers*. COOK CNTY. CODE OF ORDINANCES ch. 74, art. XX, sec. 74-668. The County's only response to this dispositive point is to call it a "squabble over . . . semantics." Appellees' Br. 18. But if the crucial fact that a restriction *is not even borne by sellers* is not enough place it outside the category of laws regulating "the commercial sale of arms," it is hard to imagine what limits the category has. And in any event, characterizing a restriction as limiting "the commercial sale of arms" has no talismanic significance; if it did, then "there would be no constitutional defect in prohibiting the commercial sale of firearms"—a result plainly "untenable

under *Heller*." *United States v. Marzzarella*, 614 F.3d 85, 92 n.8 (3d Cir. 2010); *see also Firearms Retailers*, 961 F. Supp. 2d at 930, 937. The County has no answer to this point.

D. The challenged taxes are not longstanding.

The County also fails to rehabilitate the Appellate Court's suggestion that the Second Amendment Tax is a presumptively lawful "longstanding prohibition[ ]." *Guns Save Life*, 2020 IL App (1st) 181846, ¶ 56 (App. 16–17). The U.S. Supreme Court has explained that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them," *Heller*, 554 U.S. at 634–35, and that evidence from the 19th century and later has relevance only as "mere confirmation" of "the public understanding in 1791 of the right codified by the Second Amendment," *Gamble v. United States*, 139 S. Ct. 1960, 1975–76 (2019). Accordingly, a "longstanding" restriction can be deemed "presumptively lawful" *only* if it "is fairly supported by [a] historical tradition" rooted in the Founding. *Heller*, 554 U.S. at 626–27 & n.26.

There is nothing like that here. Taxes that single out firearms and ammunition are historically novel and even today are extraordinarily unusual; the only other such tax of which Plaintiffs are aware is the one in Seattle, Washington. *See Watson*, 401 P.3d 1. The County asserts that "taxes on firearms or ammunition are . . . sufficiently 'longstanding,' " but its only authority for that proposition is an unadorned cite to the 1934 National Firearms Act. Appellees' Br. 18. That is woefully insufficient. In addition to the fact that the NFA was enacted *nearly a century and a half* after the Second Amendment was ratified, the tax imposed by the Act, as explained above, *was deliberately limited* to firearms deemed to be outside the scope of the Second Amendment—and was understood to be constitutional *only because of this limitation*. *See Heller*, 554 U.S. at 622, 624.

E. The County's home-rule taxing authority is utterly irrelevant.

Finally, the County argues that the challenged taxes fall within its "broad home rule powers." Appellees' Br. 13. That is akin to arguing that there could be no constitutional problem with a federal ban on all political TV ads favoring Democrats because the regulation of interstate airwaves falls squarely within Congress's authority under the Commerce Clause. Under settled law, the Government cannot use even "the broadest [taxing] powers possible," *id.*, in a way that "single[s] out" the "exercise of a fundamental right" unless it satisfies strict scrutiny, *Boynton*, 112 Ill. 2d at 369.

Accordingly, the County's contention that a tax targeting the right to keep and bear arms should be treated the same as such "routine exercises of home rule taxing authority" as sales taxes on alcohol, cigarettes, gambling machines, or cars, Appellees' Br. 13–15, asks for nothing less than either: (1) the repudiation of this Court's decision in *Boynton*, or (2) the repudiation of the decisions holding that the right to keep and bear arms is fundamental, *see Mosley*, 2015 IL 115872, ¶ 41; *McDonald*, 561 U.S. at 767–78.

II. The Second Amendment Tax is unconstitutional under the Second Amendment and Article I, Section 22 of the Illinois Constitution.

A. The challenged taxes must be subjected to strict scrutiny.

The cases discussed above also establish that the challenged taxes, if not struck down categorically under *Heller*'s text-and-history approach, must be analyzed under "the 'strict scrutiny' test applicable to fundamental rights." *Boynton*, 112 Ill. 2d at 368. In *Boynton*, this Court analyzed the $10 marriage license tax under strict scrutiny—and struck it down—because it "singled out" and "impose[d] a *direct* impediment to the exercise of the fundamental right to marry." *Id.* at 369–70. As *Boynton* recognized, *id.* at 369, that application of strict scrutiny is in accord with *Minneapolis Star & Tribune*, which likewise

evaluated—and invalidated—Minnesota's tax "singl[ing] out the press" under strict scrutiny. 460 U.S. at 585; *see also Harper*, 383 U.S. at 670.

The County nonetheless insists that "intermediate scrutiny must apply." Appellees' Br. 21. But its only support for that proposition—apart from a reference to the federal Second Circuit's decision in *Kwong*, which is inapplicable for the reasons already given—is the contention that it "conforms with the Seventh Circuit's review of other legislation that imposed much greater burdens on one's Second Amendment rights." *Id.* at 22. The County is wrong to claim that the burdens on Second Amendment conduct at issue in the cases it cites were higher than the burden here, since those restrictions were all upheld, in part, on the basis that they targeted conduct *outside* the Second Amendment's scope. *See Culp v. Raoul*, 921 F.3d 646, 654 (7th Cir. 2019) (licensing restrictions served to prevent "felons and the mentally ill" from carrying firearms); *United States v. Skoien*, 614 F.3d 638, 639–40 (7th Cir. 2010) (reasoning that "[p]eople convicted of domestic violence" fall outside the Second Amendment"); *United States v. Redwood*, 2016 WL 4398082, at *3 (N.D. Ill. Aug. 18, 2016) ("some prohibitions, including those in sensitive places such as schools, are presumptively lawful") (cleaned up). The same cannot be said here.

More fundamentally, the relevant precedents here are not the cases analyzing *regulations* of the Second Amendment, but rather those addressing the use of *the taxing power* to target constitutionally protected conduct. And *those* cases *apply strict scrutiny*.

The County's other efforts to help itself to a more relaxed level of scrutiny also fail. It asserts that its firearm and ammunition taxes should be "presumed constitutional," Appellees' Br. 15, but it is "well settled" that "if a law impinges upon a fundamental right explicitly or implicitly secured by the Constitution it is presumptively *unconstitutional*."

Harris v. McRae, 448 U.S. 297, 312 (1980) (cleaned up) (emphasis added). Nor does the "facial" nature of Plaintiffs' challenge to the Second Amendment Tax affect the analysis. Yes, a law may be struck down on its face "only if no set of circumstances exists under which it would be valid." *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 306 (2008). But *there is* "no set of circumstances," *id.*, in which the Government may impose a tax that singles out fundamental, constitutional rights—and that is not necessary to serve a compelling interest. *Boynton*, 112 Ill. 2d at 369.

B. The taxes fail any level of heightened constitutional scrutiny.

In the end, however, the Second Amendment Tax is plainly unconstitutional under either strict or intermediate scrutiny. The County's defense of the challenged taxes is based entirely on the contention that because "[t]he County directs all revenue from the Taxes to the Public Safety Fund," they serve "to raise revenue to offset the costs of funding important public safety operations designed to combat gun violence." Appellees' Br. 6, 23. As an initial matter, this contention is simply false. The plain text of the Ordinance establishes that *only the proceeds of the Ammunition Tax* must be "directed to the Public Safety Fund," COOK CNTY. CODE OF ORDINANCES ch. 74, art. XX, sec. 74-677. *Nothing* in Cook County law requires that the proceeds of the Firearm Tax must be directed to the same fund. (The County cites Section 74-668(a), Appellees' Br. 7, but that is merely the provision creating the Firearm Tax; it says nothing about the tax's proceeds.)

In any event, even if the proceeds of both taxes could only be used to fund public-safety programs, both taxes would still fail intermediate scrutiny. Once again, that is the only conclusion consistent with *Boynton*. There, too, the challenged tax went to fund programs serving an interest "long recognized . . . [as] a compelling governmental objective," Appellees' Br. 22: curbing "the serious problem of domestic violence." 112 Ill.

2d at 367. But the tax nonetheless failed even "the rational-relation test" because "the relationship between the purchase of the marriage license and domestic violence [is] too remote." *Id.* at 366, 367. *Minneapolis Star & Tribune* employed similar logic. While the interest in "the raising of revenue" is "critical to any government," it "cannot justify" a tax singling out a constitutional right, "for 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." 460 U.S. at 586.

The Second Amendment Tax flunks intermediate scrutiny under the very same reasoning. To pass muster under that standard, a restriction must be "narrowly tailored," and it cannot stand if it "burden[s] substantially more [constitutionally protected conduct] than is necessary to further the government's legitimate interests." *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). And the brute fact is that the County's interest in raising revenue can be fully served without burdening *any* Second Amendment protected conduct "by taxing businesses generally." *Minneapolis Star & Tribune*, 460 U.S. at 586.

The challenged taxes also fail heightened scrutiny because they were enacted for the illegitimate purpose of *deliberately suppressing* conduct protected by the Second Amendment. *See, e.g.*, Meeting of the Cook Cnty. Bd. of Comm'rs at 1:18:56 (Nov. 2, 2012), https://bit.ly/34BRbFh (R. C291) ("At least we can make it difficult for people to have guns . . . . If you can't afford it, you won't buy it."). The County decries this as a "legislative history theory," Appellees' Br. 24, but the Tax's unconstitutional purpose is evident from the preamble of the ordinance, which proclaims that the "presence . . . of firearms in the County . . . detracts from the public health, safety, and welfare." (R. C150).

C. The taxes are *per se* unconstitutional under Article I, Section 22.

In addition to failing constitutional scrutiny for all of the reasons just discussed, the Second Amendment Tax also violates Article I, Section 22 for the alternative reason that this provision does not allow "the right of the individual citizen to keep and bear arms" to be limited under *the taxing power at all*. ILL. CONST. art. I, § 22. To the contrary, that clause expressly states that the right is "[s]ubject only to the police power." *Id.*

The County's responses do not persuade. It argues first that Section 22 is not even implicated because "a *de minimis* tax" does not "infringe" the right it protects. Appellees' Br. 29–30. We have already explained why that argument fails. *Supra* Part I.B.3.

Next, the County contends that our argument "would bring about the untenable result wherein a home rule entity can substantially infringe the right to bear arms pursuant to the police power, yet cannot impose a *de minimis* tax." Appellees' Br. 30. As an initial matter, the result is hardly "untenable," since while "the safety and good order of society" may justify reasonable *regulation* of the right to keep and bear arms, *id.* (quoting *Kalodimos v. Village of Morton Grove*, 103 Ill.2d 483, 491–92 (1984)), it does not require that the right also be subject to discriminatory taxation. And anyway, even if this result did not "stand to reason," *id.*, it is a limitation that is clear from the plain text of Section 22.

Finally, the County struggles to find some implication in the FCCA and FOID Acts that the right to keep and bear arms may be subject to differential taxation. The County claims that "Plaintiffs do not, and cannot, explain why the General Assembly would specifically preserve for home rule units a power to tax handguns [in these Acts] if Article I, Section 22 of the Illinois Constitution prohibits such taxation." Appellees' Br. 31–32. There are so many problems with this convoluted argument that it is difficult to know where to begin. First, these laws did *not* "specifically preserve" the power to tax—all they

did was specifically *take away* the power *to regulate*. "Not every silence is pregnant." *People v. Eppinger*, 984 N.E.2d 475, 489 (Ill. 2013). Second, the "expla[nation]" why these Acts preempt "handgun regulations, not handgun taxes," Appellees' Br. 31, is obvious: the Constitution *only allows* the legislature to preempt regulations, not taxes, *see* ILL. CONST. art. VII, § 6, so that is all the Acts preempted. And third, even if these Acts *did* intend to "specifically preserve for home rule units a power to tax handguns," that would *still* not somehow show that "*the framers of the 1970 Illinois Constitution* intended to authorize home rule taxation of firearms." Appellees' Br. 31–32 (emphasis added).

III. The Second Amendment Tax also violates the Uniformity Clause.

Finally, the Second Amendment Tax is also unconstitutional under the Uniformity Clause. ILL. CONST. art. IX, § 2. This, too, follows from *Boynton*, which held that the relationship between the tax on marriage licenses and the interest asserted to justify it not only flunked strict scrutiny but was also "too remote to satisfy the rational-relation test." 112 Ill.2d at 366. The County argues that here the relation "is not so attenuated" because the "proceeds go towards the County's Public Safety Fund" to support "agencies that deal directly with gun violence and its consequences." Appellees' Br. 35. But even setting aside the fact (discussed above) that the proceeds of the *Firearm* Tax *need not* flow into the Public Safety Fund, this point distinguishes *Boynton* not at all. For *in that case too*, the tax went into a special "Domestic Violence Shelter and Service Fund," yet the Court found the relationship between the tax's burdens and benefits "too remote." 112 Ill. 2d at 359, 366.

Here, too, the relationship between taxing firearms and ammunition and addressing the problem of violent gun crime is "too remote" to withstand constitutional scrutiny. That is so, first, because the challenged taxes are *wildly underinclusive*—failing almost completely to affect those who *are actually* responsible for gun violence. As explained in

our opening brief, the vast majority of guns used in crime are not acquired by the consumers of licensed retailers who pay Cook County's taxes; according to the most recent data, nearly 95 precent of guns used for crime in Chicago were not purchased by the criminal directly from retail. CITY OF CHICAGO, GUN TRACE REPORT 11 (2017), https://bit.ly/3eHeSBd; *see also* BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS, CRIME GUN TRACE REPORTS (2000): *Chicago* 8 (July 2002), https://bit.ly/34EJTRb (97 percent). The County contends that "the well-documented fact that thousands of guns are stolen every year" somehow justifies the measure, but it never explains how it makes any sense to respond to this problem by *taxing the victims but not the thieves*. Appellees' Br. 38.

The challenged taxes are also *wildly overinclusive*, since the vast majority of Illinois residents who lawfully purchase firearms or ammunition within the County do *nothing* to contribute to the problem of violent crime. The County tries to minimize this problem in a variety of ways, but none of them is persuasive—and none of them is able to get around this Court's reasoning in *Boynton*. It argues, first, that the law-abiding citizens who pay the challenged taxes are "victims—or even potential victims of gun crimes," so they benefit from the programs funded by the tax just like "all Cook County residents." Appellees' Br. 36. But it is precisely because those who pay the tax benefit from these programs (if at all) in a way that is *indistinguishable* from "all Cook County residents," *id.*, that the County's decision to *single them out* for special taxation fails scrutiny under the Uniformity Clause.

This point also suffices to dispose with the County's reliance on *Marks v. Vanderventer*, 2015 IL 116226. In *Marks*, this Court upheld a tax on the recordation of real-estate deeds, the proceeds of which went to fund a program designed to improve property values. The Court explained that "[i]t is reasonable to conclude that parties who

have a legal interest in real estate will benefit from the stable and improved property values created by the program, in ways that the general public may not." *Id.* at ¶ 21. The same simply cannot be said of the general way in which gun owners benefit from less crime.

Grand Chapter, Order of Eastern Star of State v. Topinka, 2015 IL 117083, also does not support the County's position. *Grand Chapter* dealt with a bed tax on nursing homes designed (in part) to fund Medicaid-related expenditures. No one disputed that such a tax was, in general, a rational one, given that many nursing homes were responsible for Medicaid costs. Rather, the question in the case was whether the State needed to *further* distinguish "*within* the class of those who are taxed, namely between nursing homes that participate in the Medicaid program and nursing homes that do not." *Id.* at ¶ 11. This Court held that it did not, *id.* at ¶ 15, but that holding has no application here.

The County, finally, claims that the tax is rational because "legal gun ownership rates are . . . tied to domestic homicide rates." Appellees' Br. 37. But the study cited by the County does *not* show that gun owners are more likely to engage in homicide; rather, it merely finds that *States* that have higher gun-ownership rates also had higher domestic homicide rates (though not higher rates of non-domestic homicide).[2] And in any event, this type of vague association is no different than the "relation between the procurement of a marriage license and domestic violence" that this Court rejected as insufficient in *Boynton*. 112 Ill. 2d at 367. For similar reasons, the fact that *some* "valid FOID card holders commit gun crimes," Appellees' Br. 37, obviously does not suffice to distinguish *Boynton*, since *some* married people commit domestic violence, too.

[2] Aaron J. Kivisto, *et al.*, *Firearm Ownership & Domestic Versus Nondomestic Homicide in the U.S.*, 57 AM. J. PREVENTATIVE MED. 311 (2019), https://bit.ly/3bMyl1K.

IV. If the Second Amendment Tax is understood as a regulatory measure, it is preempted by the FOID Card Act and the Firearm Concealed Carry Act.

Because Cook County cannot constitutionally impose a discriminatory *tax* on the purchase of firearms and ammunition, the challenged Ordinance could only be upheld if it were construed as an attempt to *regulate* the purchase of firearms and ammunition through an exercise of the County's police power. The County disclaimed any such interpretation of the challenged provisions below, the Appellate Court accepted that position, and the County has now reaffirmed it. Appellees' Br. 33. The reason is obvious: the FOID Card Act and the Firearms Concealed Carry Act expressly preempt Cook County from engaging in the "regulation, licensing, possession, and registration of handguns and ammunition for a handgun." 430 ILCS 65/13.1(b); *see also* 430 ILCS 66/90.

V. Maxon has standing to challenge both taxes.

Finally, though the Court need not reach the issue, the Appellate Court also erred in holding that Plaintiff Maxon lacks standing, and the County has not shown otherwise.

Maxon has standing under the settled rule that a vendor of constitutionally protected goods or services may vindicate the constitutional rights of its customers. We cite a handful of the federal Supreme Court and appellate cases establishing this rule in our opening brief, and it is "firmly established" in many others. 13A CHARLES ALAN WRIGHT ET AL., FED. PRAC. & PROC. § 3531.9.3 (3d ed. 2020). The County attempts to distinguish a few of these cases, Appellees' Br. 40–42, but it never comes to grips with the overarching rule.

A vendor plaintiff must still show "injury in fact," but Maxon is tangibly injured by the taxes in three separate ways. First, it is injured by the very fact of having to collect the taxes. *See Springfield Rare Coin Galleries, Inc. v. Johnson*, 115 Ill. 2d 221, 229 (1986). The County claims the retailer plaintiff in *Springfield* had standing only because it "had

tax liability" under the challenged provision. Appellees' Br. 42. But the whole point in *Springfield* was that the retailer could *pass that liability on*, such that it would "suffer[ ] no real increase in tax liability"—yet the Court *found standing anyway*. 115 Ill. 2d at 229–30.

Second, Maxon is injured because it is forced to spend many hours each month tabulating the information necessary to comply with the challenged taxes. (R. C438–39). Like the Appellate Court, the County attempts to dismiss these hefty compliance costs on the theory that Maxon "operates a module program that automatically tracks the County Taxes' required sales data," Appellees' Br. 39–40, but as sworn and uncontradicted affidavit testimony in the record establishes, this program does not eliminate the compliance costs at issue because it tracks sales of *boxes* of ammunition, not sales of individual *rounds*, as the challenged ordinance requires. (R. C439). The County never explains how the First District acted property in ignoring this evidence, which has *never been rebutted* and is *flatly contrary* to its conclusion that Maxon's costs are zero.

Finally, Maxon is also, and independently, injured by the challenged taxes because they place it at a competitive disadvantage compared to out-of-county retailers, resulting in substantial lost revenue. (R. C1055–56). The Appellate Court failed to even acknowledge this argument. So does the County.

CONCLUSION

For these reasons, this Court should reverse the decision of the First District and remand with instructions to enter summary judgment in favor of Plaintiffs on all claims.

Dated: March 23, 2021

Respectfully submitted,

By: /s/ Christian D. Ambler
Christian D. Ambler
One of the Plaintiffs' Attorneys

Christian D. Ambler (ARDC No. 6228749)
STONE & JOHNSON, CHTD.
111 West Washington Street
Suite 1800
Chicago, Illinois 60602
(312) 332-5656
cambler@stonejohnsonlaw.com

David H. Thompson (ARDC No. 6316017)*
Peter A. Patterson (ARDC No. 6316019)*
COOPER & KIRK, PLLC
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 220-9600
dthompson@cooperkirk.com
ppatterson@cooperkirk.com

*Appearance entered pursuant to Ill. S. Ct. Rule 707

Certificate of Compliance

Pursuant to Supreme Court Rule 341(c), I hereby certify that this Brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 20 pages.

/s/ Christian D. Ambler
Christian D. Ambler

Certificate of Service

I, Christian D. Ambler, an attorney, certify that this Brief was served via the File & Serve Illinois system with consent of the recipient where permissible under Ill. Sup Ct. R. 11, at the e-mail address indicated below before 5:00 p.m. on March 23, 2021. Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct.

Martha-Victoria Jimenez
Supervisor - Municipal Litigation
Civil Actions Bureau
Cook County State's Attorney's Office
500 Richard J. Daley Center
Chicago, IL 60602
Email: MarthaVictoria.Jimenez@CookCountyil.gov

/s/ Christian D. Ambler
Christian D. Ambler

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No. 126014
In the
Supreme Court of Illinois

GUNS SAVE LIFE, INC., *et al.*,
Plaintiffs-Appellants,
v.
ZAHRA ALI, solely in her official capacity as Director of the Department of Revenue of Cook County, *et al.*,
Defendants-Appellees.

Appeal from the Appellate Court of Illinois
First Judicial District, No. 1-18-1846.
There on Appeal from the Circuit Court of
Cook County, Illinois, No. 15-CH-18217.
The Honorable David B. Atkins, Presiding

NOTICE OF ELECTRONIC FILING

To: **Martha-Victoria Jimenez -** MarthaVictoria.Jimenez@CookCountyil.gov
Supervisor - Municipal Litigation
Civil Actions Bureau
Cook County State's Attorney's Office
500 Richard J. Daley Center
Chicago, IL 60602

PLEASE TAKE NOTICE that on March 23, 2021, the Plaintiffs-Appellants submitted for filing by electronic means **REPLY BRIEF OF PLAINTIFFS-APPELLANTS**, with the Supreme Court of Illinois.

Christian D. Ambler – ARDC #6228749
STONE & JOHNSON, CHARTERED
111 West Washington St. - Suite 1800
Chicago, Illinois 60602
Telephone (312) 332-5656

David H. Thompson - ARDC # 6316017*
Peter A. Patterson – ARDC # 6316019*
Cooper & Kirk, PLLC
1523 New Hampshire Ave., N. W.
Washington, D. C. 20036
(202) 220-9600
*Appearance entered pursuant to Ill. S. Ct. Rule 707

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, except as to matters therein stated to be on information and belief as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

/s/ Christian D. Ambler

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CERTIFICATE OF SERVICE BY E-MAIL

To: **Martha-Victoria Jimenez** - MarthaVictoria.Jimenez@CookCountyil.gov
Supervisor - Municipal Litigation
Civil Actions Bureau
Cook County State's Attorney's Office
500 Richard J. Daley Center
Chicago, IL 60602

I, Christian D. Ambler, state that on March 23, 2021, I served the foregoing **REPLY BRIEF OF PLAINTIFFS-APPELLANTS** upon counsel listed above by e-mail.

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, except as to matters therein stated to be on information and belief as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

/s/ Christian D. Ambler

Christian D. Ambler – ARDC #6228749
STONE & JOHNSON, CHARTERED
111 West Washington St. - Suite 1800
Chicago, Illinois 60602
Telephone (312) 332-5656

David H. Thompson - ARDC # 6316017*
Peter A. Patterson – ARDC # 6316019*
Cooper & Kirk, PLLC
1523 New Hampshire Ave., N. W.
Washington, D. C. 20036
(202) 220-9600

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