No. 129751

IN THE
SUPREME COURT OF ILLINOIS

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

REPLY BRIEF OF DEFENDANT-APPELLANT

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

115 South LaSalle Street
Chicago, Illinois 60603
(312) 814-3000

Attorneys for Defendant-Appellant

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

ORAL ARGUMENT REQUESTED

E-FILED
4/18/2024 4:50 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

TABLE OF CONTENTS

ARGUMENT

This Court should reverse or vacate the judgment for lack of standing. Defendant preserved this defense at every stage of the litigation, and plaintiffs' waiver argument lacks support. Accepting plaintiffs' position would eviscerate the standing requirement, allowing individuals to enjoin statutes and policies even when they would reap no relief if they prevailed. The Court should reverse on this threshold basis and need not reach any other issue.

Even if plaintiffs had standing, their claim became moot when their FOID cards were restored. Plaintiffs gesture at two mootness exceptions, but the criteria for these exceptions are absent: there is no widespread effect on the public from this statute, no conflicting precedent, and no likelihood that plaintiffs will face another revocation of their FOID cards. Applying either exception here would flout this Court's precedent and allow the exceptions to swallow the mootness rule.

Even if the merits were properly before this Court, it should still reverse. At the outset, plaintiffs concede that the State Police could revoke the FOID card of at least some people charged with felonies. This dooms their challenge to section 8(n) with respect to all felony defendants. In any event, the merits of their Second Amendment challenge wilts under United States Supreme Court precedent and the historical record. Separately, plaintiffs cannot establish irreparable harm by speculating that they may one day be charged with another felony. This Court should reverse.

I. Plaintiffs lacked standing to challenge section 8(n) because their FOID cards were restored before they brought suit.

Although plaintiffs' FOID cards were revoked for nearly a year, they waited to bring their lawsuit until after their FOID cards were restored, at which point they lacked standing. AT Br. 15-21. Plaintiffs try to escape the consequences of their delay by (1) arguing that defendant waived the standing defense, and (2) asking this Court to upend its precedents and expand standing law in dramatic fashion. Neither argument holds water.

A. Defendant did not waive standing.

Standing is an affirmative defense that a defendant can raise in a motion under section 2-619 of the Code of Civil Procedure. *See In re Est. of Schlenker*, 209 Ill. 2d 456, 461 (2004). Plaintiffs admit that defendant raised standing in a section 2-619 motion. AE Br. 7; *see* C93, C223-25. But plaintiffs contend that defendant waived that defense by not also raising it in his answer, AE Br. 7-8, which defendant filed after the circuit court denied that motion, C245, C269-76. Plaintiffs are wrong.

Section 2-619 permits a defendant to raise the affirmative defense of standing in either a motion to dismiss or in an answer. *See* 735 ILCS 5/2-619(d), (e) (2022); *Umrani v. Sindhi Ass'n of N. Am.*, 2021 IL App (1st) 200219, ¶ 22; *Trzop v. Hudson*, 2015 IL App (1st) 150419, ¶ 68; *see also Dever v. Simmons*, 292 Ill. App. 3d 70, 73-74 (1st Dist. 1997) (defendants could raise affirmative defense in motion to dismiss, even though they had not raised it in answer). Defendant's section 2-619 motion therefore sufficed to preserve the

standing defense. Regardless, plaintiffs forfeited this waiver argument by not objecting when defendant further preserved the standing issue by raising it again in his motion for summary judgment. *See* C493-94; *Donath v. Vill. of Plainfield*, 2020 IL App (3d) 190762, ¶ 18 (affirmative defense was not waived, even though not raised in answer, when it was raised in motion for summary judgment without objection); *In re Scarlett Z.-D.*, 2014 IL App (2d) 120266-B, ¶ 24 (party's "waiver argument has no merit" because "the issue of standing was clearly at issue and not a surprise").

Plaintiffs' cited authorities do not support waiver. Plaintiffs primarily rely on *Paulson v. Suson*, 97 Ill. App. 3d 326, 328-29 (1st Dist. 1981), in which the defendant raised the statute of limitations defense in a motion to dismiss, but did not raise it in the later-filed answer or present it to the jury at trial. The appellate court explained that the defendant did *not* waive the defense by not re-asserting it in the answer. *Id.* But the appellate court could not review the circuit court's denial of the motion to dismiss, because that decision had merged into the jury verdict, and the jury had not considered the statute of limitations affirmative defense. *Id.*

That situation is not present here. This Court is reviewing the circuit court's grant of summary judgment, and defendant preserved the standing defense in the summary judgment proceedings. C493-94. For that reason, plaintiffs' other cited authorities stating that the denial of a motion to dismiss merges into the final judgment are also irrelevant. *See* AE Br. 7-8; *Ovnik v.*

Podolskey, 2017 IL App (1st) 162987, ¶ 19; *In re Marriage of Sorokin*, 2017 IL App (2d) 160885, ¶ 22; *In re J.M.*, 245 Ill. App. 3d 909, 919-20 (2d Dist. 1993). If anything, these authorities underscore that this Court can and should reach the affirmative defense of standing. *See Ovnik*, 2017 IL App (1st) 162987, ¶¶ 15-22 (reviewing *res judicata* affirmative defense in the context of circuit court's grant of summary judgment to plaintiff, when defendants had raised defense in section 2-619 motion and again in opposition to summary judgment).[1]

B. Plaintiffs lacked standing to challenge section 8(n) because they are not currently injured by that statute, nor are they likely to be in the future.

Plaintiffs do not dispute that they held valid FOID cards when they brought this lawsuit. *See* AT Br. 17-19. And they do not contest that it is speculative to suggest that they will be charged with another felony, and thus have their FOID cards revoked again. *See id.* at 18. Instead, plaintiffs argue that the past revocation of their FOID cards confers standing, even though their FOID cards were restored months before they filed suit. AE Br. 8-9. Plaintiffs are incorrect. Although past injury may confer standing to seek damages (which are not available here), past injury is not enough to bring a declaratory judgment action or to enjoin a statute. Standing in that context requires more than "a wrong must have been committed and injury inflicted."

[1] Plaintiffs also contend that defendant waived a statute of limitations defense, AE Br. 7, but defendant has not invoked that defense in this case.

Vill. of Chatham v. Cnty. of Sangamon, 216 Ill. 2d 402, 420 (2005) (cleaned up). Rather, the injury must be ongoing or imminent; it cannot have already concluded. *See id.*; *cf. Mendez v. City of Chi.*, 2023 IL App (1st) 211513, ¶ 16 (plaintiffs lacked standing to challenge ordinance when they were not "currently subject" to ordinance).

To be sure, this Court has stated that a person has standing to challenge a statute if he or she "ha[s] sustained" or is "in immediate danger of sustaining" an injury from the statute's enforcement. *E.g., Vill. of Chatham*, 216 Ill. 2d at 420; *Messenger v. Edgar*, 157 Ill. 2d 162, 171 (1993). But plaintiffs misunderstand this language, *see* AE Br. 8, which merely reflects the longstanding rule that a plaintiff can have standing when injury is imminent, even if it has not yet commenced. *See, e.g., Vill. of Lake Villa v. Stokovich*, 211 Ill. 2d 106, 120 (2004); *Ill. Gamefowl Breeders Ass'n v. Block*, 75 Ill. 2d 443, 451-52 (1979). Indeed, the same cases maintain that a "wrong committed" and "injury inflicted" is not sufficient. *E.g., Vill. of Chatham*, 216 Ill. 2d at 420; *Messenger*, 157 Ill. 2d at 170. Plaintiffs do not cite any case, nor is defendant aware of any, where a court determined that a plaintiff had standing to challenge a statute based solely on a past injury that was unlikely to recur. *Cf. Messenger*, 157 Ill. 2d at 171 (plaintiff had standing to challenge statute that "was in effect against her").

Plaintiffs then quarrel with defendant's citation to *Cahokia Unit Sch. Dist. No. 187 v. Pritzker*, 2021 IL 126212. AE Br. 9. But *Cahokia* merely

illustrates the well-established principle that plaintiffs do not have standing when they would obtain no redress if they prevailed. *See* AT Br. 16, 17 (citing *Cahokia*). Plaintiffs do not, and cannot, dispute this principle, which forms the bedrock of standing doctrine. *E.g., In re Marriage of Rodriguez*, 131 Ill. 2d 273, 280 (1989) ("In deciding whether a party has standing, a court must look at the party to see if he or she will be benefitted by the relief granted.").

Finally, Plaintiffs try to equate this lawsuit with those challenging abortion restrictions. AE Br. 6. But in the only case they cite, the plaintiff had standing because she was pregnant when she brought her lawsuit, and thus she was burdened by the relevant statute, unlike plaintiffs here. *See Roe v. Wade*, 410 U.S. 113, 124 (1973), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022). Indeed, that case concerned whether to apply a mootness exception, not whether the plaintiff had standing. *Id.* at 125. This citation reveals that plaintiffs, like the circuit court, continue to conflate standing and mootness. *See* AT Br. 19-20; AE Br. 6, 9. But this Court need not examine mootness or its exceptions, because plaintiffs lacked standing at the outset of this case. The Court should reverse or vacate the judgment for that reason alone. AT Br. 21; *see also People ex rel. Partee v. Murphy*, 133 Ill. 2d 402, 410 (1990) (refusing to apply mootness exception to case that lacked an actual controversy at the outset).

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

Plaintiffs do not dispute that, even if they did have standing, the issue presented in this case became moot upon the restoration of their FOID cards. AT Br. 21; *see* AE Br. 9-14. They instead ask the Court to apply two mootness exceptions. Neither is warranted.

A. The public interest exception does not apply.

None of the criteria required for the public interest exception are present. First, the question in this case is not of a public nature because it affects only a small group of people. AT Br. 22-24. Plaintiffs respond that this case involves a constitutional question, AE Br. 11, but this does not suffice, AT Br. 23. If it did, the public interest exception would swallow the mootness rule, contradicting this Court's precedent that the public interest exception is narrowly construed, as plaintiffs admit. *See* AE Br. 11. Nor is this criterion met because section 8(n) "potentially" affects all FOID card holders, *see id.*, most of whom will never be charged with a felony. Plaintiffs cannot rely on speculation to expand the group of people affected by the statute. *See In re Marriage of Donald B.*, 2014 IL 115463, ¶ 34 (parental visitation statute did not "broadly determined the rights of parents or their children").

Plaintiffs do not dispute that the second criterion — the need for an authoritative determination on the question presented — is satisfied only if the law is in disarray or conflicting precedent exists, nor do they dispute that this case presents an issue of first impression in Illinois. *See* AT Br. 24-25.

Instead, they again point to the constitutional nature of this case, AE Br. 11-12, but a constitutional issue does not signify conflicting precedent, *see Donald B.*, 2014 IL 115463, ¶¶ 35-36 (rejecting argument that public interest exception was needed to settle constitutional issue); *In re India B.*, 202 Ill. 2d 522, 531, 543 (2002) (no need to address moot constitutional claims when there was no conflicting precedent). Plaintiffs then suggest that this criterion is satisfied because some federal courts have held that a federal law (18 U.S.C. § 922(n), which plaintiffs do not challenge) is unconstitutional, AE Br. 12, but this also misses the mark. If a conflict among courts in other jurisdictions about a different statute were enough to satisfy this criterion, the exception would again overwhelm the rule.

As for the requirement that the question be likely to recur, it is true that the public interest exception does not require a likelihood that these particular plaintiffs will have their FOID cards revoked again. *See id.* But because plaintiffs are only challenging the law as applied to them, *see infra* Section III, the Second Amendment issue in this case is not merely whether the State Police can revoke the FOID card of any person charged with a felony, but rather whether they can revoke the FOID card of a person charged with recklessly endangering others with firearms. That question is unlikely to recur widely. AT Br. 26.

Finally, plaintiffs cite *Koshinski v. Trame*, 2017 IL App (5th) 150398, AE Br. 10, but they do not respond to defendant's argument that this case is factually distinct and conflicts with this Court's precedent, AT Br. 28-30.

B. The exception for cases that are capable of repetition, yet evading review does not apply.

This Court will apply the exception for cases that are capable of repetition, yet evading review, if two requirements are met: (1) the duration of the challenged action is too short to litigate the dispute, and (2) there is a reasonable expectation that the same plaintiffs will be subject to the same action again. *In re Alfred H.H.*, 233 Ill. 2d 345, 358 (2009). Like the public interest exception, this exception is "construed narrowly and require[s] a clear showing of each criterion." *India B.*, 202 Ill. 2d at 543. These requirements are not satisfied here.

First, plaintiffs' FOID cards were revoked for approximately a year, which is not too short a duration to litigate their challenge. Other constitutional challenges have been fully litigated in less than a year. *E.g., Caulkins v. Pritzker*, 2023 IL 129453; *Rowe v. Raoul*, 2023 IL 129248. And this Court typically applies the exception in cases involving far shorter time periods. *E.g., In re Craig H.*, 2022 IL 126256, ¶ 21 (90 days); *Alfred H.H.*, 233 Ill. 2d at 358 (same). Plaintiffs' cited authority involved a statute that could only apply for up to 180 days — roughly half as long as the time plaintiffs were without their FOID cards. AE Br. 14 (citing *In re Barbara H.*, 183 Ill. 2d 482, 491-92 (1998)).

Plaintiffs are also wrong that the duration of this action in the circuit court proves that it could not have been fully litigated before their FOID cards were restored. *See* AE Br. 13. Much of the delay was caused by plaintiffs' failure to respond to defendant's motions to dismiss, including before the Covid-19 pandemic. *See* C54-56, C59-62 (delay of more than two years); C92, C236-37, C246 (nine-month delay, despite court orders to respond). Plaintiffs cannot invoke this mootness exception when the delay in resolving this case was due in part to their own inaction. *See India B.*, 202 Ill. 2d at 543 (exception not satisfied when party could have acted to obtain meaningful review of case). And the time for appellate review also does not mean that a year is inherently too short to litigate this dispute. As noted, appellate review of other constitutional challenges has been completed in less than a year. *Supra* p. 9.

Second and independently, this exception also does not apply because it is not likely that plaintiffs' FOID cards will be revoked again. *See* AT Br. 18; *supra* p. 4. Plaintiffs argue that their FOID cards will be revoked again "if" they are charged with another felony, and that "[n]othing stops" a future felony charge. AE Br. 14. But plaintiffs cannot bypass this requirement by simply assuming they will be charged again. The exception requires that "the same statutory provision will *most likely* be applied in future cases involving the same party." *Alfred H.H.*, 233 Ill. 2d at 360 (emphasis added) (cleaned up). Accepting plaintiffs' argument would balloon this exception, because it is

virtually always true that a person's FOID card will be revoked "if" they are charged with a felony. *See* AE Br. 14; *cf. India B.*, 202 Ill. 2d at 543 (exception is construed narrowly).

Plaintiffs then suggest that a future felony charge is a mere "detail" that need not recur. AE Br. 14. While plaintiffs need not establish that they will be subjected to an "identical" future action, they must show that they will likely experience a future action with "a substantial enough relation" to this case that a decision here would affect the outcome of that future case. *Alfred H.H.*, 233 Ill. 2d at 359. But a decision in this case will not impact plaintiffs unless they are charged with another felony. This mootness exception thus does not apply. The Court should reverse or vacate the circuit court's judgment.

III. The circuit court erred in declaring section 8(n) unconstitutional with respect to all individuals charged with felonies.

The circuit court held section 8(n) unconstitutional with respect to every person charged with a felony. C589; *see* AT Br. 30-32. This was error — regardless of the merits of the Second Amendment claim — because plaintiffs and the circuit court agreed that in some circumstances, a person charged with a felony could have their FOID card revoked without running afoul of the Second Amendment. AT Br. 31-32. Thus, even if the Court affirms the Second Amendment analysis (which it should not, *see id.* at 32-59 and *infra* Section IV), the circuit court's judgment should be reversed to the extent it

held section 8(n) constitutional with respect to any person other than plaintiffs. AT Br. 32. Plaintiffs, for their part, admit that they have brought only an as-applied challenge. AE Br. 15-16. Taking plaintiffs at their word, the Court must, at a minimum, limit the judgment to these two plaintiffs. *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 498 (2008) ("if a plaintiff prevails in an as-applied claim, he may enjoin the objectionable enforcement of a statute *only* against himself") (emphasis added).

Plaintiffs then appear to suggest that they can bring an as-applied challenge on behalf of every person charged with a felony. AE Br. 15-16; *see id.* at 5-6. But such a challenge would necessarily be facial. *See* AT Br. 31; *In re Marriage of Lappe*, 176 Ill. 2d 414, 420-21 (1997) (although circuit court purported to hold statute unconstitutional as-applied, order's effect was to declare provision unconstitutional on its face); *Doe v. Gainer*, 162 Ill. 2d 15, 18 (1994) (similar).[2] And as explained, a facial challenge must fail because plaintiffs conceded in the circuit court that the State Police can revoke the FOID card of a person charged with a felony in some circumstances without violating the Second Amendment, AT Br. 30-32, a concession that they do not dispute on appeal, *see* AE Br. 15, 19. Thus, regardless of whether the Court construes plaintiffs' challenge as facial or as-applied, the circuit court erred by

[2] In *Lappe*, the Court suggested that its jurisdiction under Rule 302(a) extended only to findings of facial unconstitutionality. But this Court later clarified that Rule 302(a) also covers as-applied challenges. *See People v. Fuller*, 187 Ill. 2d 1, 10 (1999).

declaring the statute unconstitutional with respect to all persons charged with a felony.

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

The Second Amendment allows governments to temporarily prohibit those under felony indictment — or at least those indicted for recklessly endangering others with a weapon, as plaintiffs were — from possessing firearms. Section 8(n) passes muster at both steps of *Bruen*, AT Br. 32-52, and the circuit court erred by neglecting *Bruen*'s framework, *id*. at 53-59. Plaintiffs' response flouts precedent and ignores the historical evidence.

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

The first step of the *Bruen* analysis asks whether "the Second Amendment's plain text covers an individual's conduct." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2129-30 (2022). That Amendment protects "'the right of law-abiding, responsible citizens to use arms' for self-defense." *Id.* at 2131 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)); AT Br. 33-35. This does not encompass those who have been charged with felonies, AT Br. 35-37, and certainly not those who were charged with recklessly endangering others with firearms, as plaintiffs were, *id.* at 37-38. The circuit court ignored this limitation on the Second Amendment's scope, and conducted no analysis about whether plaintiffs were law-abiding and responsible. *Id.* at 53.

Plaintiffs urge this Court to do the same, suggesting that it need not consider whether they are law-abiding. *See* AE Br. 17, 22-23 (contending that step one is satisfied because section 8(n) relates to possessing firearms), 24 (arguing that the Second Amendment applies to "all Americans"). But this fails to grapple with the Supreme Court's decisions holding that Second Amendment protections extend to law-abiding and responsible citizens only. AT Br. 34-35. Plaintiffs first gesture at the Second Amendment's language, AE Br. 23, ignoring that *Heller* undertook a detailed textual analysis, 554 U.S. at 576-603, and concluded that the Amendment protects "the right of *law-abiding, responsible* citizens to use arms in defense of hearth and home," *id.* at 635 (emphasis added), a conclusion the Court echoed in *Bruen*, *see* AT Br. 34 n.5. Next, plaintiffs quote *Heller*'s statement that the right to keep and bear arms belongs to "all Americans," AE Br. 24, but this passage concluded only that the right was an individual one, not a collective right belonging to a militia, *Heller*, 554 U.S. at 579-81. Indeed, *Bruen* also quoted this passage, *see* AE Br. 24, and on the very same page, reiterated that the Second Amendment allows "law-abiding, responsible citizens" to use firearms for self-defense, *see Bruen*, 142 S. Ct. at 2156 (citing *Heller*, 554 U.S. at 581).

Plaintiffs then point to the First Amendment, which like the Second Amendment applies on its face to "the people." AE Br. 24 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)). But this buttresses defendant's argument. The First Amendment, like the Second, is not

unlimited, *see United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (*en banc*); *Bruen*, 142 S. Ct. at 2128, and speech rights can accordingly be restricted for those charged with serious crimes, *see Bell v. Wolfish*, 441 U.S. 520, 550 (1979). It stands to reason that firearms possession can likewise be temporarily restricted for the same individuals. *See* AT Br. 36-37. Finally, the dissenting opinion in *Kanter v. Barr*, *see* AE Br. 24, has never been controlling law and contradicts the Supreme Court's cases, *see* AT Br. 54-55.

Plaintiffs next contend that they cannot be considered non-law-abiding because they have not been convicted of a crime. AE Br. 23. But nothing in *Bruen* or *Heller* suggests that only convicted felons are considered not "law-abiding" and "responsible." To the contrary: *Heller* described prohibiting felons and the mentally ill from possessing firearms as non-exhaustive "examples" of "presumptively lawful" measures that the Second Amendment's plain text did not cover. 554 U.S. at 626-27 n.26.

Plaintiffs then dispute that a felony charge renders a person not "law-abiding" for Second Amendment purposes, arguing that such a conclusion would conflict with the principle that those charged with crimes are presumed innocent. AE Br. 16, 24. But the "presumption of innocence" is a trial right, "'an inaccurate, shorthand description'" of the government's burden to prove guilt beyond a reasonable doubt. *Bell*, 441 U.S. at 533 (quoting *Taylor v. Kentucky*, 436 U.S. 478, 484 n.12 (1978)); *see Estelle v. Williams*, 425 U.S. 501, 503 (1976). It does not apply to an indicted person's liberties "before his trial

has even begun." *Bell*, 441 U.S. at 533; *see also United States v. Now*, No. 22-CR-150, 2023 WL 2717517, at *5 (E.D. Wis. Mar. 15, 2023), *report and recommendation adopted*, 2023 WL 2710340 (E.D. Wis. Mar. 30, 2023); *United States v. Jackson*, 661 F. Supp. 3d 392, 403-04 (D. Md. 2023), *appeal filed*, No. 24-4114 (4th Cir.). And plaintiffs' suggestion that a felony indictment has no evidentiary value lacks support. *See* AE Br. 21, 25. To the contrary: a felony charge is serious enough that it can, consistent with the Constitution, allow the government to restrict the liberties of, and even detain, the accused. AT Br. 36-37.

The Second Amendment thus does not cover the possession of firearms by those under felony indictment. Plaintiffs' challenge collapses at *Bruen*'s first step.

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

Even if the Court proceeds to the second step, plaintiffs misstate defendant's historical burden in two ways. They first argue that section 8(n) addresses a longstanding societal problem, and therefore defendant must present a "'distinctly similar historical regulation.'" AE Br. 25-26 (quoting *Bruen*, 142 S. Ct. at 2131). But in the founding era, it was common to detain those who had been charged with serious crimes before trial, AT Br. 40-41, and so governments had no reason to regulate their firearms possession. Only upon the more widespread use of pretrial release — which plaintiffs admit is a

recent practice, *see* AE Br. 18-19 — did governments need to address this problem. Historical analogy therefore requires "a more nuanced approach." *Bruen*, 142 S. Ct. at 2132.

Second, plaintiffs repeatedly complain that defendant has not presented an identical historical law disarming those under felony indictment. AE Br. 20, 26, 27. But defendant need only "identify a well-established and representative historical *analogue*, not a historical *twin*." *Bruen*, 142 S. Ct. at 2132 (emphasis in original). Defendant's three categories of historical analogues each satisfy this burden. *See* AT Br. 40-52.

1. Pretrial detention is analogous.

Plaintiffs first suggest that pretrial detention is not analogous to section 8(n) because detention is less common today than it was historically. *See* AE Br. 18. Plaintiffs misunderstand the analogy. The relevant questions are whether pretrial detention "impose[d] a comparable burden on the right of armed self-defense" to the burden imposed by section 8(n) on felony defendants, and "whether that burden is comparably justified." *Bruen*, 142 S. Ct. at 2133. The answer to these questions is yes: section 8(n) and pretrial detention both temporarily prohibit a person charged with a serious crime from possessing weapons while charges are pending, at least partially for public safety reasons. AT Br. 49, 51-52; *see United States v. Perez-Garcia*, 96 F.4th 1166, 1182-86 (9th Cir. 2024) (historical practice of pretrial detention is analogous to prohibiting person under indictment from possessing firearms).

The presumption of innocence, *see* AE Br. 18, does not erode that analogy, *see supra* pp. 15-16. If anything, the historical practice of pretrial detention reflects that the nation's founders understood that liberties could be temporarily restricted before trial without running afoul of the Constitution.

Plaintiffs then dispute that pretrial detention was historically prevalent, citing federal law providing pretrial release for "'non-capital'" offenses. AE Br. 18-19 (quoting *Stack v. Boyle*, 342 U.S. 1, 4 (1951)). But in the founding era, "non-capital" offenses were not equivalent to felonies. Rather, crimes "'that we recognize as felonies today'" were described as "'capital'" offenses. AT Br. 41 (citation omitted). The practice of pretrial release for less serious offenses is irrelevant.

2. Laws that disarmed those considered dangerous or untrustworthy are analogous.

Defendant identified numerous historical laws that disarmed groups and individuals who were perceived to be not law-abiding, or otherwise dangerous. AT Br. 41-46. Plaintiffs do not dispute that these laws existed, or that they are analogous to section 8(n). *See id.* at 49-50, 51-52. Instead, plaintiffs echo the circuit court's assertion that history supports disarming only those who have been convicted of "English common-law felonies." AE Br. 20-21; *see id.* at 26. This assertion lacks any support in law or history, and contradicts *Heller*. AT Br. 57-58.

Plaintiffs also argue that some of these historical laws could not be enforced today, because they would violate equal protection. AE Br. 19-20, 25.

But whether an analogue is impermissibly discriminatory is not a relevant "metric" for a *Bruen* comparison. *See* 142 S. Ct. at 2132; *see also United States v. Rowson*, 652 F. Supp. 3d 436, 466 (S.D.N.Y. 2023) ("the Second Amendment's inquiry into historical analogues is not a normative one"). Rather, these laws reflect that governments could ban firearms possession for entire groups — including those without criminal convictions — without running afoul of the Second Amendment. AT Br. 43-44, 55-56 (citing cases). This history also shows that a government need not conduct individual hearings, *see* AE Br. 2-3, 15-16, 30, to conclude that individuals are "dangerous," *see id*. at 19, 21-22, 30, before temporarily prohibiting them from possessing firearms, AT Br. 55-56.[3]

In any event, plaintiffs ignore the historical laws that confiscated the weapons of individuals found to be dangerous or unlikely to obey the law. *See* AT Br. 44-46; 1 The Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay 52-53 (1869) (1692 statute); Acts and Laws of His Majesty's Province of New Hampshire in New England; with Sundry Acts of Parliament 1-2 (1761) (1701 statute); An Act for constituting a Council of Safety, § 20, Ch. XL, 1776-1777 N.J. Laws, 90 (Rutgers, New Jersey Session Laws Online) (1777 law); *see also Skoien*, 614 F.3d at 640 (discussing Second

[3] Although plaintiffs complain that their FOID cards were revoked without notice and a hearing, *see* AE Br. 2-3, 16, 30, these arguments are irrelevant because they have not brought a due process claim, *see People v. Deleon*, 2020 IL 124744, ¶ 7 (notice and opportunity to be heard are elements of a due process claim).

Amendment precursor recognizing that government could disarm those who presented a "danger of public injury"). Such laws are analogous to disarming those who, like plaintiffs, are charged with recklessly endangering the safety of others with firearms. *See* AT Br. 49-52; *cf. Perez-Garcia*, 96 F.4th at 1186-91.

Plaintiffs also suggest that their conduct was not dangerous, *e.g.*, AE Br. 1-2, 21-22, but this contention ignores the facts of this case. Plaintiffs were charged with recklessly shooting a semi-automatic rifle 19 times in a residential area. AT Br. 6. And the fact that plaintiffs did not receive a preliminary hearing before their FOID cards were revoked is of no moment, *see* AE Br. 21, because plaintiffs admitted that these charges were supported by probable cause, *see* AT Br. 37-38, 56-57. After this concession, they cannot now contest that there was at least some evidence that their conduct was dangerous.

3. Surety laws are analogous.

Plaintiffs' attacks on the surety law analogy also fail. They first urge the Court to reject this analogy based on the blanket assertion that most surety laws restricted carriage, not possession. But plaintiffs ignore that at least some founding-era surety statutes allowed authorities to confiscate arms, not merely to prohibit public carriage. *See* Acts and Laws of His Majesty's Province of New Hampshire in New England 1-2 (1761) (1701 statute); 1 The Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay 52-53 (1869) (1692 statue); *see also Rowson*, 652 F. Supp. 3d at 468

(discussing surety laws that "did not address the return of the confiscated weapons upon the payment of such surety"). Regardless, even if there are "substantive differences" between surety laws and section 8(n), these laws are relevantly similar because they "impose comparable procedural hurdles" before temporarily restricting a person's firearms rights while he or she stands accused of a felony. *United States v. Baker*, No. CR-23-130-G, 2024 WL 24088, at *5 (W.D. Okla. Jan. 2, 2024); *see* AT Br. 50.

Plaintiffs then point to *Bruen*'s determination that surety laws were not analogous in that case, AE Br. 26, but that is irrelevant here. *Bruen* concerned a very different law, which required a person to show "a special need for self-defense" before publicly carrying a firearm. 142 S. Ct. at 2122. Unlike that law, surety statutes and section 8(n) both "'presume that individuals have the right to bear arms,' but limit that right upon a showing that a person poses a risk to public safety." AT Br. 50 n.7 (citation omitted).

Finally, plaintiffs note that federal law does not prohibit all felony indictees from possessing firearms, AE Br. 27; *see id.* at 3, 23, but as defendant explained, this is irrelevant to the *Bruen* historical analysis, AT Br. 58. There is no historical evidence that one current federal law, 18 U.S.C. § 922(n), is the outer limit of a historically permissible firearms restriction. Indeed, a federal court of appeals has held that the Second Amendment tolerates laws that prohibit people from possessing firearms while charges are pending. *Perez-Garcia*, 96 F.4th at 1191-92.

In sum, the historical evidence shows that the Second Amendment allows a government to temporarily restrict firearms possession for those considered not law-abiding, without a conviction or an individual finding of dangerousness. Section 8(n) does just that. Each of defendant's historical analogues shows that section 8(n) is constitutional.

V. Plaintiffs did not show irreparable harm.

Plaintiffs did not show that they would suffer irreparable harm without a permanent injunction because they are not currently subject to section 8(n), and they have not shown that they likely will be again. AT Br. 59-60.

Plaintiffs respond that irreparable harm is presumed for constitutional injuries. AE Br. 28. Even if this were true (and plaintiffs cite no controlling authority), it does not address defendant's argument. Plaintiffs are not experiencing any Second Amendment injury because they hold valid FOID cards, as they did when they filed suit. *See* AT Br. 7; *Kirsner v. Johnson & Johnson Prod., Inc.*, 118 Ill. App. 3d 564, 565-56 (1st Dist. 1983) (plaintiffs who no longer possessed allegedly defective product could not obtain injunction requiring information about product because they did not show "a threat of irreparable injury").

Plaintiffs then try to dodge this result by arguing that "if" they are charged with another felony, it is "certain" that their FOID cards would be revoked. AE Br. 29. But "the damage sought to be enjoined must be *likely* and not merely *possible*." *Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk & W.*

Ry. Co., 195 Ill. 2d 356, 371 (2001) (emphasis added). Plaintiffs' "speculative possibility of injury" does not meet their burden. *Smith v. Dep't of Nat. Res.*, 2015 IL App (5th) 140583, ¶ 27 (cleaned up); *see* AT Br. 60.

CONCLUSION

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

Respectfully submitted,

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

Attorneys for Defendant-Appellant

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

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 5,760 words.

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

CERTIFICATE OF FILING AND SERVICE

I certify that on April 18, 2024, I electronically filed the foregoing **Reply Brief of Defendant-Appellant** with the Clerk of the Court for the Supreme Court of Illinois by using the Odyssey eFileIL system.

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

Thomas G. Maag
tmaag@maaglaw.com

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

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

E-FILED
4/18/2024 4:50 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK