No. 129751

IN THE
SUPREME COURT OF ILLINOIS

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

BRIEF OF PLAINTIFFS-APPELLEES

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Thomas G. Maag
Peter J. Maag
Maag Law Firm, LLC
22 West Lorena Avenue
Wood River, IL 62095

618-216-5291 (phone)
tmaag@maaglaw.com

Attorneys for Plaintiff-Appellees

ORAL ARGUMENT REQUESTED

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FACTS

Other than the single charge at issue in this case, Plaintiffs Aaron and Charles G. Davis, a father and son, have never been arrested, charged or convicted of any felony or misdemeanor charge, in this state, of any other. By nearly any standard, they are ordinary, generally law abiding and peaceable citizens of this state.

Of course, being human, they are not perfect. But then no mere human is perfect. For what Plaintiffs were arrested for, even if true, at worst shows no evil intent, but simply poor judgment. So much so that the state has issued them both Firearms Owners Identification Cards, allowing them to possess firearm, and actually returned the firearm itself.

That fact of non arrest and charge changed in July of 2016, when Plaintiffs were *charged* with (that is, accused of) recklessly endangerment, for *allegedly* shooting a rifle into the air over the Fourth of July weekend, a felony offense, (C48, C50). At the same time, all sorts of fireworks, probably many of them likely technically illegal in Illinois, were being discharged by neighbors.[1] At all times, including presently, Plaintiffs deny shooting *any* gun into the air, be it a rifle, or any other kind of firearm. No court, judge, jury, grand jury or tribunal of any kind ever found so much as an iota of evidence that

[1] Wood River, is a short drive to Missouri, which has both much more lenient fireworks laws than Illinois, and fireworks stands, just across the border, that cater to Illinois consumers. The use of firecrackers, bottle rockets and the like, technically illegal in Illinois, is common over the Fouth of July time period, in both Wood River, and other Metro East communities. While neighbors appear to have been using such fireworks, there is no indication in the record that Plaintiffs were discharging fireworks of any kind.

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Plaintiffs actually committed such an offense. No person was claimed to be injured by Plaintiffs. The charge was, and remains, simply an unsubstantiated allegation based on a police report, itself inadmissible, after the fact.

Shortly, as in about two months, after the arrest, apparently even the State's Attorney office apparently began to have grave doubts about the validity of the charge as they agreed to reduce the charges to a relatively minor misdemeanor charge of reckless conduct. (C49, C51, C333, C397). Mechanically, in Madison County, this is about how long it takes for a felony file to actually get an assigned prosecutor. About six and nine months later, respectively, Plaintiff's FOID cards were restored to them. (C337, C401). But Plaintiffs spent ten and thirteen months, respectively, unable to lawfully possess a firearm for any purpose, including lawful self-defense in the home, even after the felony charges were abandoned by the State. All based on an unsubstantiated allegation that no court or fact finder ever upheld.

As correctly stated by Defendant, at the time of their arrest, both Plaintiffs possessed valid FOID cards, (C337, C401) as required to possess firearms under Illinois law, 430 ILCS 65/2 (2022). A few *days* after Plaintiffs were charged, the State Police revoked their FOID cards, as is Defendant's standard practice. (C341, C405). No hearing or opportunity to be heard was presented to Plaintiffs, before their FOID cards were revoked.

Defendant argues that Plaintiff waived their preliminary hearings, as if this somehow substantiated the allegations, but the FOID cards were already revoked at that point. (C98, C104, C105, C146, C155, C190). Thus, the waiver of a preliminary hearing had no effect at all on the revocation of the FOID card, and is an irrelevant red herring

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that Defendant tries to make it look like Plaintiffs were somehow guilty of a felony, despite the trial court releasing both Plaintiffs on their own recognizance. (C146, C190). Whatever the evidence, or lack thereof, and whatever the validity of the charge, or lack thereof, Plaintiff's FOID cards were revoked based on a mere allegation, not conviction, not some contested hearing and without prior notice, and without any finding of fact or law by anyone.

The State Police acted under 430 ILCS 65/8(n) (2016), which purports to authorize it to revoke the FOID card of any individual who is prohibited from acquiring or possessing firearms under federal law. (C341-342, C405-406). And federal law — specifically, 18 U.S.C. § 922(n) — in turn prohibits individuals from *acquiring* firearms if they are charged with a felony. 18 U.S.C. § 922(n) (referring to indictment); see id. § 921(a)(14) (defining "indictment" as including "information").

Nothing under *federal* law, including 922(n), prohibits mere *possession* of any kind of firearm as a result of merely being *charged* or *accused* of a crime, 18 U.S.C 922(n) only prohibits *acquiring* arms or ammunition while being charged with certain felonies, a subject not at issue in this case.

Rather, it is the Illinois State law that mandated the revocation of the Plaintiff's FOID cards, and thus the inability of Plaintiffs to lawfully possess firearms, anywhere, of any type, for any purpose, without notice or opportunity to be heard, so it is the Illinois statute which was challenged in this case. Plaintiffs did not try to or desire to acquire additional arms during this time period, thus, the issue of 922(n) is not an issue.

Neither the ISP, nor anyone else, held any hearing on, or provided any prior notice to Plaintiffs that they were considering revoking their FOID cards, ISP just did it, *ipso*

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facto because someone charged Plaintiffs with a felony, it did not matter what felony was alleged, what the evidence was or what the stage of the felony case was, the mere fact of being *charged* was enough. As a result, Plaintiffs were disarmed, and stripped of their Second Amendment rights for between ten and thirteen months.

In the operative, First Amended Complaint, Plaintiffs challenged section 8(n), insofar as it purports to authorize the State Police to revoke the FOID cards of those charged with felonies, as unconstitutional under the Second Amendment. (C71-73). This is an as applied challenge. A renewed motion to dismiss was filed by Defendant, and following lengthy argument, denied by the trial Court, Judge Chapman. Thereafter, Defendant filed its answer.

Thereafter, the parties filed cross-motions for summary judgment. (C255, C447). The trial court, now assigned to Judge Foster, found 430 ILCS 65/8(n) (2016), unconstitutional, not facially, but *as applied.* (C588)(" The Court also finds that 430 ILCS 65/8(n) to be unconstitutional as applied to persons charged with a felony but not yet convicted of a felony."). The trial court awarded fees under 42 U.S.C. 1988, and this appeal ensued.

ARGUMENT

I. Plaintiffs Had Standing and the Case Should Not Have Been Dismissed As Moot.

Defendant's first actual argument is that Plaintiffs allegedly failed to meet both requirements for standing to bring a declaratory judgment action — that is, they did not present an actual controversy, nor show that they were interested in the controversy — and for similar reasons, they did not satisfy the requirement that their alleged injury be redressable by the requested relief.

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To that end, Plaintiffs will first address what relief was actually requested in the First Amended Complaint, and what the trial court actually ordered.

The First Amended Complaint requested the following relief:

A. Declare 430 ILCS 65/8(n), unconstitutional, as applied to persons who are merely charged with a felony, as opposed to being convicted of a felony, and

B. Enjoin Defendant from suspending FOID cards, pursuant to 430 ILCS 65/8(n), based on a person being charged (but not convicted of) a felony, and

C. Awarding Plaintiffs their costs and attorney fees, pursuant to 42 USC 1988, and

D. Such other, further and different relief as is allowed by law.

(C74)

Judge Foster's order, in relevant part, provides the following relief:

A. 430 ILCS 65/8(n), which states: "The Illinois State Police has authority to deny an application for or to revoke and seize a Firearm Owner's Identification Card … is hereby declared unconstitutional as applied to persons charged with a felony but not yet convicted of a felony.

B. Defendant Jeffrey Yenchko, in his official capacity as Chief of the Firearms Services Bureau of the Illinois State Police, as well as his successors in office and successors in authority to administer, are, effective immediately, enjoined from suspending Firearms Owner's Identification Cards, pursuant to 430 ILCS 65/8(n), persons charged with a felony but not convicted of a felony. Nothing in this order shall prohibit Defendant from denying a transfer request or authorization for firearms or ammunition, pursuant to 18 U.S.C. 922(g)(n), for persons with currently-pending felony charges at the time of the request.

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C. Plaintiffs have a claim for costs and attorney fees pursuant to 42 U.S.C. 1988.

Plaintiffs and Plaintiffs' counsel are granted 14 days from the date of this order to file an attorney fees and costs petition. ….

D. This order resolves all pending matters in this case, except attorney fees and costs.

This Court shall retain jurisdiction to enforce this order.

(C589, C590).

Thus, as an initial matter, it is clear that Judge Foster, the trial court, limited the relief awarded to what was actually asked for in the First Amended Complaint. Second, 430 ILCS 65/8(n), was not declared *facially* unconstitutional, but only *as applied*. (C588). No matter how many times Defendant repeats arguments about facial challenges, this is and was an as applied challenge.

A. **Standing**

To say that Plaintiffs lacked standing in this case, is akin to claiming that a woman who just gave birth lacks standing to challenge an abortion statute, because she is no longer pregnant, or even possibly not pregnant when the case was filed. *See Roe v. Wade,* 410 US 113, 124 (U.S. 1973)(overruled on other grounds).

The related doctrines of standing and ripeness "seek[] to insure that courts decide actual controversies and not abstract questions." *People v. $1,124,905 U.S. Currency & One 1988 Chevrolet Astro Van,* 177 Ill.2d 314, 328, 226 Ill.Dec. 627, 685 N.E.2d 1370 (1997).

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B. Defendant Waived Any Defenses Based on Lack of Standing

Under Illinois law, lack of standing is an affirmative defense, which is the defendant's burden to plead and prove. *Wexler*, 211 Ill.2d at 22-23, 284 Ill.Dec. 294, 809 N.E.2d 1240; *In re Estate of Schlenker*, 209 Ill.2d 456, 461, 464, 283 Ill.Dec. 707, 808 N.E.2d 995 (2004); *Greer v. Illinois Housing Development Authority,* 122 Ill.2d 462, 494, 120 Ill.Dec. 531, 524 N.E.2d 561 (1988). While a lack of subject matter jurisdiction cannot be forfeited (*M.W.*, 232 Ill.2d at 417, 328 Ill.Dec. 868, 905 N.E.2d 757), a lack of standing will be forfeited if not raised in a timely manner in the trial court (*Skolnick v. Altheimer & Gray*, 191 Ill.2d 214, 237, 246 Ill.Dec. 324, 730 N.E.2d 4 (2000).

It is conceded that Defendant raised the issue of standing in a Motion to Dismiss, raising only 735 ILCS 5/2-619, on this point. (C93). Lack of standing was not raised under 735 ILCS 5/2-615. Id. However, Defendant asserted no affirmative defenses in its answer. (C269). None. Not one.

While the fact that Defendant pleaded over by filing an answer may well have not waived the denial of the 2-619 standing motion, the failure to plead the 2-619 standing issue merged into the issues, but Defendant failed to have the court consider the issue because the affirmative defense of the statute of limitations was not pleaded. *Paulson v. Susan*, 97 Ill. App.3d 326 (1981). See also *Ovnik v. Podolskey,* 2017 IL App (1st) 162987 ("However, we need not address the merits of the defendants' arguments as the denial of a section 2-619 motion to dismiss is not generally reviewable on appeal as any error in the denial of the motion merges into the final judgment, which in this case was the summary judgment entered …, and it is from that final judgment that an appeal is taken."). See also *In re Marriage of Sorokin*, 2017 IL App (2d) 160885, ¶ 22, 416 Ill.Dec. 58, 83

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N.E.3d 556; In re J.M., 245 Ill. App. 3d 909, 919-20, 184 Ill.Dec. 754, 613 N.E.2d 1346 (1993).

To that end, it is respectfully suggested that Defendant's standing argument is waived.

C. Even if Not Waived, Plaintiffs Have Standing

Even assuming *arguendo* that Defendant did not waive any objection to standing by failing to plead same in its answer as an affirmative defense, it still failed to prove same. Granted, Defendant asserted lack of standing in its response to Plaintiffs Motion for Summary Judgment (C493). But even this argument was substantively less than what they argue on appeal.

In response to summary judgment, though they did not plead it as an affirmative defense, Defendant argues that "speculative allegations of future harm do not establish standing." (C493). However, the actual law says, "[t]o have standing to challenge the constitutionality of a statute, one must *have sustained* or be in immediate danger of sustaining a direct injury as a result of enforcement of the challenged statute. *Messenger v. Edgar*, 157 Ill.2d 162, 191 Ill.Dec. 65, 623 N.E.2d 310 (1993). It is undisputed that Plaintiff's FOID cards were revoked as a result of the challenged statute. Promptly so after being charged. Thus, under current law, Plaintiffs have standing as they have actually sustained direct injury. The U.S. Supreme Court is in accord, as it has stated to qualify as a party with standing to litigate, a person must show, first and foremost, "an invasion of a legally protected interest" that is "concrete and particularized" and "`actual or imminent.' " *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560 (1992) (quoting *Whitmore v. Arkansas*, 495 U. S. 149, 155 (1990)).

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It is not the public at larges' FOID cards that were wrongfully revoked. It is the actual Plaintiffs in this case, who were actually disarmed, by virtue of being actually wrongfully charged with a felony, and then actually wronged again by having their FOID cards revoked by the ISP on the basis of the challenged statute. This is not some academic exercise by two people who opened a statute book looking for statutes that offended the Second Amendment, though if they were, they could have found plenty in the Illinois Statute books easier to challenge that this case. Quite the opposite, the ISP utilized this exact statute to disarm Plaintiffs.

To that end, assuming *arguendo* that Defendant has not waived standing, which again the lack of which must be pleaded and proved, their complaint is not really a lack of standing, but a mootness argument, which will be separately addressed.

In addition, as to the Defendant's argument citing *Cahokia Unit Sch. Dist*., 2021 IL 126212, it is inapposite simply because the substantive holding in that case was the governor was the wrong defendant, nothing more, nothing less, and as it was the wrong defendant, there was no standing as against the governor, as he did not control what was being challenged. *Supra,* p. 246. There is no allegation or argument anywhere in the record of this case that the Defendant in this case is the wrong defendant.

There is no error from the trial court related to standing.

II. Mootness Does Not Justify Dismissal

How does a court, especially a court of review, hear a challenge to an abortion statute when a human pregnancy lasts only about nine months? It is because, as noted in *Roe v. Wade*, cited Supra, there are exceptions to the mootness doctrine.

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Defendant makes an argument that the circuit court's decision should be reversed or vacated because plaintiffs' claim became moot upon the restoration of their FOID cards. Defendant suggests that a case is moot when intervening events have made it impossible for the reviewing court to grant the plaintiff relief. *Benny M*., 2017 IL 120133, ¶ 17.

The leading case in Illinois on this topic, in this fact scenario, *Koshinski v. Trame*, 2017 IL App (5th) 150398, a unanimous decision of the Illinois Appellate Court, written by now Supreme Court Justice Overstreet, and followed by the 2nd District (See *McHenry Township Road District v. Pritzker,* 2021 IL App (2d) 200636, as well as numerous other cases. *Koshinski* is, despite the Defendant's protestations to the contrary, a logical, well reasoned decision, well rooted in well established law.

As noted in *Koshinski,* generally, a party resisting dismissal for mootness has the burden to show an exception to the mootness doctrine on at least one of three grounds:

1. that the case involves an issue of great public importance, or
2. that the case falls into the category of one that is capable of repetition but evading review, or
3. that there are collateral consequences of the order appealed from such that it could return to plague the complainant in some future proceedings or could affect other aspects of the complainant's life.

People v. Madison, 2014 IL App (1st) 131950, ¶ 12, 384 Ill.Dec. 860.

A, Public Importance Exception

One of these three exceptions, the public importance exception, was analyzed in *Koshinski*, on similar facts and applies here. "The public interest exception to the

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mootness doctrine permits review of an otherwise moot question when the magnitude or immediacy of the interests involved warrants action by the court." *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 2016 IL 118129, ¶ 12, 402 Ill.Dec. 36, 51 N.E.3d 788. "The public interest exception to the mootness doctrine applies only when `(1) the question presented is of a public nature; (2) an authoritative determination of the question is desirable for the future guidance of public officers; and (3) the question is likely to recur.'" Id. (quoting *In re Shelby R.*, 2013 IL 114994, ¶ 16, 374 Ill.Dec. 493, 995 N.E.2d 990). "The public interest exception is narrowly construed and requires a clear showing of each of its criteria." Id. ¶ 13. "If any one of the criteria is not established, the exception may not be invoked." Id.

Applying those three standards, it is clear that, at least, the public interest exception applies.

First, the question presented is of a public nature. This case involves the constitutionality of how a state employee administers the licensing regime for a fundamental constitutional right. This case is clearly not a dispute between private litigants, it is a dispute of citizens with the Illinois State Police, or at least one of its higher-level officials concerning the application of a fundamental constitutional right to an Illinois Statute, that potentially could affect more than 2.4 million FOID card holders. A more public nature of a question cannot be imagined.

Second, an authoritative determination of the question is desirable for the future guidance of public officers. The conduct and statute, as being interpreted and applied by Defendant, is either constitutional, or it is not. In recent years, firearms prohibition statutes, ranging from the now stricken Chicago ban on handguns (See *McDonald v. City*

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of Chicago, 561 U.S. 742 (2010); to Illinois ban on public carry of handguns (See *Moore v. Madigan*, 702 F. 3d 933 (7th Circuit 2012), *People v. Aguilar*, 2013 IL 112116); to modern weapons being protected (*Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016); to the Supreme Court's most recent pronouncement in *New York State Rifle & Pistol Assn, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), have fallen to the wayside.

Several federal trial courts have held 18 U.S.C. 922(n), the federal statute that triggers the challenged statute herein, itself, unconstitutional. See e.g. *United States v. Quiroz*, 629 F. Supp. 3d 511 (WD Texas 2022); *United States v. Stambaugh*, No. CR-22-00218-PRW-2, 2022 WL 16936043 (W.D. Okla. Nov. 14, 2022). But again, Plaintiff in this case does not raise this issue or challenge the federal statute, but it certainly shows that the law, at least, in in somewhat of a dispute, needing resolution, of at least, the interplay of Illinois law with the statute.

Third, the question is likely to recur. The role of the Defendant, as Chief of the Firearms Services Bureau, in executing the provisions of the firearm suspension statutes is a recurring question. *Koskinski v. Trame,* 2017 Ill. App. 5th 150398, para. 29. Nothing in the record suggests this is a rare or unusual event. Per official ISP statistics, there are over 2.4 million FOID card holders in Illinois. Defendant argues that it might be unlikely that this incident happen to Plaintiffs again, which can be disputed, but in any event it is, again, an irrelevant red herring, as "[t]he public-interest exception considers potential recurrences to *any* person, not only the complaining party." *In re Christopher P.*, 2012 IL App (4th) 100902, ¶ 20 (citing *Holly v. Montes*, 231 Ill. 2d 153, 158 (2008) ("Unlike in the recurrence exception, the public interest exception considers potential recurrences to any entity, not only the complaining party.")).

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To that end, this case is subject to, at least one, mootness exception.

B. Capable of Repetition But Escaping Review

A second exception to the mootness doctrine exists for cases involving events of short duration that are "`"capable of repetition, yet evading review."'" *In* re A Minor, 127 Ill.2d 247, 258, 130 Ill.Dec. 225, 537 N.E.2d 292 (1989), *quoting Madison Park Bank v. Zagel*, 91 Ill.2d 231, 236, 62 Ill. Dec. 950, 437 N.E.2d 638 (1982), quoting *Sosna v. Iowa*, 419 U.S. 393, 399-400, 95 S.Ct. 553, 557, 42 L.Ed.2d 532, 540 (1975).

For this exception to apply, there must be a reasonable expectation that the same complaining party would be subject to the same action again and the action challenged must be of such short duration that it cannot be fully litigated prior to its cessation. *In re India B*., 202 Ill.2d 522, 543, 270 Ill.Dec. 30, 782 N.E.2d 224 (2002). Plaintiff will address these elements in reverse order.

First shortness of duration such that it cannot be fully litigated. In this case, as cited *Supra,* Plaintiffs' FOID cards were invalid for 10 and 13 months, respectively. Under the Illinois Speedy Trial Act, 725 ILCS 5/103-5, unless tolled, a criminal defendant must generally be taken to trial in 120 to 160 days, depending on the facts. In this case, Plaintiffs' felony charges were resolved in about two months. (C49, C51, C333, C397). It took more than 160 days for Defenant to get its opening brief on file, just from the date that the Notice of Appeal was filed. Granted, much of the time the underlying case was pending in the trial court, the courts were operating under Covid 19 limitations, but it still took about 5 years to litigate the action in the trial court. Even if these numbers were cut by two thirds or more, it is clear that an action like this could not possibly be litigated in less than thirteen months, especially on appeal. This court has

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held that "[t[hese periods are far too brief to permit appellate review." *In Re Barbara H,* 183 Ill.2d 482, 485 (IL 1998). "To apply the mootness doctrine under these circumstances would mean that [persons merely charged with felonies] would be left without any legal recourse for challenging the [revocation orders]; Id. The first element is met.

The second element is that there is a reasonable expectation that the same complaining party would be subject to the same action again. Granted, Plaintiffs are generally law abiding people, who prior to this situation had never been arrested, and to this day have no felony convictions. But if they are arrested again, and charged with felonies, the odds are close to 100% that Defendant will again revoke their Firearm Owners Identification Cards, unless the statute is repealed or declared unconstitutional. That is at least a reasonable expectation that the same party would be subject to the same action again, if charged with a felony.

Is it necessary that there be a reasonable expectation that Plaintiffs again be charged with felonies? "Requiring repetition of every "legally relevant" characteristic of an as-applied challenge — down to the last detail — would effectively overrule this statement by making this exception unavailable for virtually all as-applied challenges." *Fed. Election Com'n v. Wisc. Right to Life*, 127 S.Ct. 2652, 2663 (2007). Plaintiffs still live in the same place. Fireworks are still shot on the 4th of July. Nothing stops some annoyed neighbor from again, making an accusation, resulting in an arrest, and a formal criminal accusation.

This a second mootness exception applies.

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III. The Illinois Statute is Itself, Unconstitutional

A. Defendant Improperly Conflates Facial and As Applied Challenges

Defendant improperly conflates facial and as applied challenges. So that Plaintiffs are crystal clear, Plaintiffs are making an *as applied* challenge. The reason is simple, Plaintiffs acknowledge that there are at least some persons that are barred from possessing or acquiring firearms, such as a person finally convicted of a serious violent felony, who can constitutionally be so deprived, at least for some time, and thus, there is no constitutional infirmity with depriving those persons a FOID card. But that is not at issue in this case.

On the other hand, merely being charged or merely being accused of committing a felony crime, without more, is not enough, as it proves nothing. Being charged with a felony, preferably a violent one, *plus something else*, might well be enough, but the challenged statute has no "something else" requirement. For instance, at a bond hearing on felony case, nothing stops a trial court from imposing, in an appropriate circumstance, such as a serious violent crime, that a given defendant refrain from possessing arms when there is some reasonable likelihood, other that simply being charged, that he might misuse them, or, drinking alcohol or going within 2,000 feet of an alleged victim's home. But these bond conditions may well make no sense if the felony charge is a technical Class 4 felony involving no actual or threatened violence, like a bounced check.

The trial Court entered a very narrow and targeted order allowing 430 ILCS 65/8(n) to continue to function is nearly every situation, except the one at issue. The trial court even specifically excepted from the injunction any requirement to approve a firearm

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transfer that would violate 18 U.S.C. 922(n), the federal statute that triggered the Illinois statute being interpreted as triggering 430 ILCS 65/8(n)'s revocation requirements.

As 430 ILCS 65/8(n) is being interpreted, and being applied by Defendant under the facts of this case, is simply unconstitutional, again, as applied. No facial challenge is being made to 430 ILCS 65/8(n), and the trial Court did not declare same facially invalid.

B. The Statute, As Applied, Cannot Withstand *Bruen*

Illinois has long held to the precept that one is innocent until proven guilty beyond a reasonable doubt. See 720 ILCS 5/3-1)("Every person is presumed innocent until proved guilty. No person shall be convicted of any offense unless his guilt thereof is proved beyond a reasonable doubt."). In fact, the presumption of innocent, until *proven* guilty, is not one of recent creation or design, it is ancient in origin and practice. See generally *Coffin v. United States*, 156 US 432 (1895). Even the Universal Declaration of Human Rights, Article 11, which was signed in 1948 by the General Assembly of the United Nations notes:

> "Everyone charged with a penal offence has the right to be presumed innocent until proven guilty."

Defendant's interpretation and application of 430 ILCS 65/8(n) turns this ancient presumption on its head, and instead, presumes persons merely charged with a crime, without more, guilty enough to revoke fundamental constitutional rights, even without a hearing.

The simple and inescapable fact of the matter is, that 430 ILCS 65/8(n), as is being applied to persons charged with, but not convicted of any and all kinds of felonies,

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is unconstitutional, under the Second Amendment, as it violates the plain text of the Amendment, and there is no comparable historical analog to same.

1. The Second Amendment *Prima Facia* Applies

Under *Bruen*, there are two steps, none of which involves any sort of interest balancing. Per the words of the U.S. Supreme Court, interest balancing is "one step to many." *New York State Rifle & Pistol Assn, Inc. v. Bruen*, 142 S. Ct. 2111, 2118 (U.S. 2022). Thus, even if some legislature or court somewhere thinks it a good idea, it may well be barred by the Constitution.

Instead, the first step is to see if the plain text of the Second Amendment protects the conduct in question. Id. at 2134. In this case, the proposed conduct is simply retaining arms and ammunition that they already had, at home for lawful purposes, such as self defense in the home. Under Bruen, "Courts "must first ask whether [the challenged law] governs conduct that falls within the plain text of the Second Amendment. Only if the answer is yes[should courts] proceed to ask whether [the challenged law] fits within America's historical tradition of firearm regulation." *Bruen,* supra. *Heller* makes clear that there is an individual right to keep and bear arms, in the home. *D.C. v. Heller,* 128 S.Ct. 2783 (U.S. 2008). Thus, the first step is satisfied, and the Second Amendment *prima fascia* applies. Of course, this is not the end of the inquiry.

2. No Relevant Historical Analog

Once past the first step, "[t]he burden then falls on [the State] to show that [the ban] is consistent with this Nation's historical tradition of firearm regulation." *Bruen* at 2119. It must also not be a kind of historical regulation that we would not tolerate today,

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such as a ban on certain racial or ethnic groups or religious believers bearing arms, as many of the original gun control laws were.

a. Pretrial Release

To try to satisfy this historical analog, Defendant argues this nation has a historical tradition of detaining subjects prior to trial. (Def. Brief, p. 40). Aside from the fact that Illinois has adopted the SAFE-T Act, (See Generally *Rowe v. Raoul*, 2023 IL 129248), if the State of Illinois really wishes to hold, in pre-trial detention, all persons charged with felonies, they had better allocate a significant sum to building new holding facilities. But the wisdom, or lack thereof, of holding a given individual charged with a crime, pending trial, is an issue separate and apart from Second Amendment issues.

It is a fundamental tenet of the American criminal justice system that an individual charged with a crime is presumed innocent until proven guilty. *Ford v. Peery*, 999 F.3d 1214, 1224-1225 (9th Cir. 2021). The Supreme Court has called this presumption "axiomatic and elementary," "vital and fundamental," and foundational to "the administration of our criminal law." Id. (*citing Coffin v. United States*, 156 U.S. 432, 453 (1895), *Estelle v. Williams*, 425 U.S. 501, 503 (1976), and *Reed v. Ross*, 468 U.S. 1, 4-5 (1984)). Criminal defendants or arrestees, such as Plaintiff, only lose the presumption of innocence once they have been convicted by a jury beyond a reasonable doubt. Id. To treat a felony arrest as evidence of a felony conviction turns this principle on its head. See *United States v. Scott*, 450 F.3d 863, 874 (9th Cir. 2006) ("Defendant is, after all, constitutionally presumed to be innocent pending trial, and innocence can only raise an inference of innocence, not of guilt.").

Be that as it may, this nation has a long tradition of pre-trial release.

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> "From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46 (a) (1), federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. See *Hudson v. Parker*, 156 U. S. 277, 285 (1895). Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."

Stack v. Boyle, 342 US 1, 4 (U.S.1951).

As noted Supra, Illinois has furthered this goal with the passage of the SAFE-T Act. See Supra.

The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. Id. citing *Ex parte Milburn*, 34 U.S. 704, 9 Pet. 704, 710 (1835).

While, yes, this nation has a long history of pre-trial detainment, it also has a long history of releasing persons pending trial. Defendant fails to cite any historical analog conflating the right to bail and bond with the right to keep and bears arms.

b. Dangerous Persons

Unlike Defendants' bond discussion, at least this argument bears serious discussion. Plaintiffs *concede* that actually dangerous persons can be disarmed in many circumstances. Examples given by the State actually include enslaved persons and

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Native Americans. (Def. Brief at p.43). It goes without saying that Slavery and discrimination against Native Americans should not and would not be tolerated today. Thereafter, Defendant goes through a laundry list of said dangerous persons, including, "the idiot, the lunatic, and the felon." (Def. Brief, p. 45).

The issue before this Court is not one of mental illness, so the somewhat obsolete terms of idiot and lunatic have no bearing on this case, though there is no dispute that a person actually adjudicated as having some serious mental illness can be barred the use of arms. The outer limits of that issue is for another case.

What is a felon and can they be constitutionally barred from having firearms? Apparently the ban on felons, as a class, possessing firearms, is of relative new vintage. See C. Kevin Marshall, Why Can't Martha Stewart Have a Gun?, 32 Harv. J.L. & Pub. Pol'y 695, 708 (2009) (noting "ban on convicts possessing firearms were unknown before World War I" and "compilation of laws in mid-1925 indicated that no State banned possession of long guns based on a prior conviction; that only six banned possession of concealable weapons on such basis; that, except for New York, ... even those laws dated from 1923 or later").

In *Heller v. District of Columbia*, 670 F. 3d 1244, 1248 (Dist. of Columbia Circuit 2011), the D.C. Circuit Court of Appeals makes reference to a "felony conviction" not a felony arrest, as being disqualifying.

Not one citation by Defendant shows a historical analogue to disqualifying a person from possessing arms, simply by virtue of being charged or alleged to have committed a crime or any kind, sans a conviction. More than one court has recently rejected the notion that a blanket ban on actual convicted felons possessing arms is

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constitutional. If it is, such would likely require a conviction of what was a felony at the time of the founding, English common-law felonies consisted of murder, rape, manslaughter, robbery, sodomy, larceny, arson, mayhem, and burglary. *Jerome v. United States*, 318 U.S. 101, 108 n.6, 63 S.Ct. 483, 87 L.Ed. 640 (1943); Wayne R. LaFave, Criminal Law, § 2.1(b) (5th ed. 2010). So if the Founders intended to allow disarmament of so called unvirtuous convicted felons, that intent would have necessarily been limited to individuals convicted of one of those nine felonies. Even if actually convicted of what was originally charged, that would not include Plaintiffs.

But this Court need not decide those issues, as, in this case Plaintiffs have not only been *convicted* of nothing, no court even had an opportunity to rule on anything related to the Plaintiff's, under any standard, with any burden of proof. The FOID cards were revoked prior to any preliminary hearing even being possible. But even if one took place, there is an old expression about being able to indict a ham sandwich. As a practical matter, the same prosecutor that might indict a ham sandwich could likely convince a trial court of enough evidence to get the charges against a ham sandwich through a preliminary hearing, because, as a practical matter, to get past a preliminary hearing, all it takes is a police officer to testify that someone told him that the defendant committed some crime.

Plaintiffs' rights were revoked by the state not because of any preliminary hearing, or waiver thereof, but by operation of Plaintiff's being charged, and the Wood River police department sending a letter to that effect to the State.

Plaintiff agrees, persons who are *dangerous* persons can be denied firearms. This statute denies firearms whether or not a person charged is dangerous. Bad check writers,

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persons whose pet rabbit was alleged to have chewed carpet[2], and other non dangerous felonies are lumped into this.

C. The Circuit's Court's Second Amendment Analysis Was In Complete Accord with the United States Supreme Court

Defendant argues that the Circuit Court's Second Amendment analysis was flawed. (Def Brief, p. 53). The truth of the matter is that the Defendant is simply in denial as to what the law is and requires.

Defendant is critical of the statement of the trial court, in which it stated that "totally disarming all persons merely charged with a felony implicates Second Amendment rights." (C585). Yet, this statement is true and correct. Totally disarming *anyone,* or *any class* of persons, arguably *implicates* Second Amendment rights. The initial problem with the Defendant's argument, is they apparently do not understand the meaning of the word, "implicate."

Per Black's Law Dictionary, 7th Ed., p. 757, "implicate" is defined as "to show to be involved in … To be involved or affected." Even the most rabid anti Second Amendment advocate would have to admit disarming some group, whatever the basis, involves or affects Second Amendment rights. It might not *violate* them, much as a Terry Stop might not violate Fourth Amendment rights, but it does involve or affect them, obviously.

[2] Counsel for Plaintiff actually defended a felony charge, in Illinois, wherein the substantive allegation was a former tenants per rabbit chewed carpet.

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1. Plain Text Analysis

Defendants also complaint that he circuit court stated that plaintiffs had satisfied their plain text burden based on Heller and Bruen. C585. But that in doing so, the circuit Court allegedly "ignored that both decisions recognized that the right to keep and bear arms was understood as extending only to law-abiding, responsible citizens."

Aside from the fact, once again, at the time their FOID cards were revoked, they were only *charged* with a crime, no court or jury had done anything substantive on the file, Defenant is conflating the two *Bruen* steps into one. As noted by the Circuit Court, the first step issue is, "[d]oes the Second Amendment's plain text cover the right to possess a firearm somewhere, under some sort, or set, of circumstances, even if charged with a felony of some kind?" (C585).

Bruen first requires that courts determine whether the text of the Second Amendment applies before the historical burden transfers to the Government. See, e.g., *Range v. Att'y Gen.,* 69 F.4th 96, 101 (3d Cir. 2023) (en banc) (citing Bruen, 142 S. Ct. at 2134–35). In this case, the plain text of the Second Amendment applies to Plaintiff's FOID cards, as they are what allows them to lawfully possess firearms in Illinois, under state law.(Even with their FOID cards revoked, no federal law prohibited Plaintiffs from continuing to keep their firearms). The Second Amendment's plain text covers the conduct proscribed generally, which, with a revoked FOID card, is possession of firearms. The Second Amendment protects "the right of the people to keep and bear Arms." U.S. Const. Amend. II.

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The U.S. Supreme Court has repeatedly held that "the people" protected under the Second Amendment includes "all Americans." See *Bruen*, 142 S. Ct. at 2156 ("The Second Amendment guaranteed to 'all Americans' the right to bear commonly used arms"); *Heller*, 554 U.S. at 581 ("[T]he Second Amendment right is exercised individually and belongs to all Americans."); *United States v. Verdugo–Urquidez*, 494 U.S. 259, 265 (1990) ("'[T]he people' protected by the Fourth Amendment, and by the First and Second Amendments . . . refers to a class of persons who are part of a national community . . . ."); *Kanter v. Barr*, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting) ("Neither felons nor the mentally ill are categorically excluded from our national community). In addition, the term "'[k]eep arms' was simply a common way of referring to possessing arms."' *Heller,* 554 U.S. at 583. Thus, the Second Amendment's plain text covers the possession of firearms by all Americans, including Plaintiffs who are natural born citizen of the United States. Accordingly, such conduct (the continued possession of existing arms in their possession) is presumptively lawful. By suspending their FOID cards, Illinois criminalizes this presumptively lawful conduct. This statutory provision makes it an offense for a person to simply possess a firearm their already owned, simply because they were *accused* of a crime. Aside from flying in the face of a presumption of innocence, under *Bruen*, the Defendant must show that the statute is consistent with the United States' historical tradition of firearm regulation in order to be constitutional under the Second Amendment. *Bruen* makes clear that the first step is one based solely on the text of the Second Amendment to determine if it presumptively protects an individual's conduct—a presumption that the governmental entity in question can *then* rebut with history and tradition. Here, because the Second Amendment's plain

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text covers plaintiffs' conduct—possessing firearms at home self-defense—"the Constitution presumptively protects that conduct." See *Bruen*, 142 S. Ct. at 2129-30. Thus, the Circuit Court made no error saying as much.

2. Historical Inquiry

In making its historical inquiry, Defendant makes reference to disarming those that would not take loyalty oaths, slaves, Native Americans, and the like. *Heller* itself notes that in England, at various times, Catholics banned Protestants and Protestants banned Catholics from possessing arms. The bottom line is, history dictates, seemingly, there is always *someone* that wants to oppress someone else by taking away their rights, and while often couched in terms of public safety, national security or the like, generally has nothing to do with any of that.

As noted by the Defendant, to be sure, laws discriminating based on race or ethnicity are repugnant and would be unconstitutional today on equal protection or other grounds. (Def. Brief. P. 43). But then they were unconstitutional then as well, whether or not any court then would admit it.

History does not support a ban applying to all persons merely charges with felony crimes. If it did, the Second Amendment would be meaningless, as any local prosecutor could disarm anyone they wished, just by charging them with a technical felony.

Although people faced felony charges, and even convictions, when the Second Amendment was ratified in 1791, it is not enough to show disarming them addresses a "general societal problem that has persisted since the 18th century." *Bruen*, 142 S. Ct. at 2131. When laws address a "longstanding" problem like a general societal problem, the Supreme Court clarified that the historical inquiry is demanding: "the lack of a distinctly

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similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." Id. at 2133; 2131 (emphasis added). If "the Founders themselves could have adopted" a particular regulation "to confront [the longstanding] problem" but did not do so, then the law today is unconstitutional. Id. at 2131.

First, there is no historical tradition from the time of the founding of the United States disarming persons merely charged with a crime. In fact, one strains to find a statute from the time of the revolution disarming persons even following a conviction.

a. Surety Laws

Defendant argues that a historical analogue in so called "surety laws" existed. What Defendant does not admit, however, is that these surety laws were not restrictions on possession, they were restrictions on carriage, not an issue in this case.

These statutes can be traced to the mid-19th century. See *Bruen*, 142 S. Ct. at 2148 ("In the mid-19th century, many jurisdictions began adopting surety statutes"). Although these laws were not "bans on public carry," they did restrict it. Id. at 2149. For instance, in 1836, Massachusetts enacted a law which "required any person who was reasonably likely to breach the peace ... to post a bond before publicly carrying a firearm." Id. at 2148 (internal citation omitted). From 1838 to 1871, "nine other jurisdictions adopted variants of the Massachusetts law." Id. However, none of these statutes prohibited the keeping of said arms, simply the carriage.

The Court in *Bruen* declined to hold that these surety laws represented a well-established historical analogue to the New York law at issue. Id. at 2148-50. The surety laws restricted an individual's carrying (not possession of them) of arms "only when

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`attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them.'" Id. (quoting William Rawle, A View of the Constitution of the United States of America 126 (2d ed. 1829)).

The difference is equivalent to a ban on public concealed carry without posting a bond, and a ban on keeping a firearm at home under any and all circumstances.

The surety statutes generally provided that an individual's Second Amendment right "could be burdened only if another could make out a specific showing of reasonable cause to fear an injury, or breach of *the* peace." *Bruen*, 142 S. Ct. at 2148 (internal citation omitted).

The restriction imposed by § 922(n) is narrow. In fact, § 922(n) is arguably less restrictive than the surety laws discussed, as the surety laws required those "reasonably accused" to "show a special need in order to avoid posting a bond" before carrying. *Bruen*, 142 S. Ct. at 2149. Section 922(n) *does* not prevent an individual from publicly carrying; it simply limits an individual's r ight to receive a firearm during the pendency of an indictment. Illinois, however, goes a step further, a total ban on possession by persons merely charged, no matter how weak the evidence, no matter what bond might conceivably be provided, no matter what. This is beyond what historically allowed, and, even if *historically* allowed, it would and does fly in the fact of the concept of innocent until proven guilty.

b. Irreparable Harm

Defendant argues that Plaintiffs did not show irreparable harm, thus, an injunction against the statute, per the Defense argument, was erroneous. The argument itself defies well settled constitutional law.

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For some kinds of constitutional violations, irreparable harm is presumed. See 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). On Second Amendment cases, the U.S. Court of Appeals for the Seventh Circuit is in accord. *Ezell v. City of Chicago*, 651 F. 3d 684, 700 (7th Circuit 2011)("The Second Amendment protects similarly intangible and unquantifiable interests. *Heller* held that the Amendment's central component is the right to possess firearms for protection. 554 U.S. at 592-95, 128 S.Ct. 2783. Infringements of this right cannot be compensated by damages."). In fact, damages would be prohibited in this case, as the Eleventh Amendment bars claims for damages that are brought by private parties against a state, a state instrumentality, or a state employee who is sued in his or her official capacity. See *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021) ("Generally, States are immune from suit under the terms of the Eleventh Amendment and the doctrine of sovereign immunity.").

If violation of a constitutional right is generally sufficient to show irreparable injury, and the 11th Amendment forecloses suits for damages, it is unclear what "adequate remedy at law" Plaintiffs would have under any circumstance, and Defendant suggests none.

Unlike in *Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983), where the allegation was that the police department "routinely appl[ied]" policy of placing arrestees in chokehold fell "far short" of alleging that plaintiff would be arrested and placed in chokehold

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again in the future, as it was replete with what "might" happen, in this case, it is not a "might" that Plaintiff's FOID cards will be revoked if charged again with a felony of some kind, any kind, whether innocent or not, it is an absolute certainty, as certain to have their FOID cards revoked as the sun will rise in the East and set in the West.

CONCLUSION

The bottom line in this case is that the Second Amendment is not a second class right. *New York State Rifle & Pistol Assn, Inc. v. Bruen*, 142 S. Ct. 2111, 2121 (2022). It is granted and understood that certain firearms restrictions are *politically* popular with certain political entities in Illinois. In fact, the State of Illinois filed an *amicus curia* brief defending Chicago's then total ban on possession of handguns by anyone in *McDonald!* Some of these statutes are probably actually constitutional. Some of them are clearly not. But the fact that certain elected politicians are in favor of a given statute or policy, does not make that policy or statute constitutional.

At its core, the Second Amendment protects the right of citizens to keep and bear arms for self-defense in the home. *District of Columbia v. Heller*, 554 U.S. 570, 635, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). In *McDonald v. City of Chicago*, 561 U.S. 742, 778, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), the United States Supreme Court stated that "it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." See also *Johnson v. Department of State Police*, 2020 IL 124213, ¶ 37, 443 Ill.Dec. 37, 161 N.E.3d 161 ("the second amendment right recognized in *Heller* is a personal liberty guaranteed by the United States Constitution and the fourteenth amendment" (citing *McDonald*, 561 U.S. at 791, 130 S.Ct. 3020)).

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In this case, Plaintiff is not challenging a firearms prohibition for *anyone* who has actually been convicted of an actual crime of some kind (that is for another case), or the suspension or revocation of firearm rights following some actual hearing with notice and an opportunity to be heard (again another case). So it is clear, Plaintiff is merely challenging the revocation of a FOID card, without prior notice, simply because a person or persons has been *accused* of a crime that is a felony, without something more. In a system, such as ours, where the right to keep and bear arms is a fundamental right and the presumption of innocence prevails, this should not be a difficult decision. And again, nothing stops a Court, or a legislature, in an appropriate case, whatever might be an appropriate case, to make an appropriate bond condition, following a hearing, or for a dangerous person to have their FOID revoked following an actual hearing with notice. But that is not this case.

The trial court should be affirmed.

Respectfully Submitted,

By: s/Thomas G. Maag
Thomas G. Maag
Peter J. Maag
Maag Law Firm. LLC
22 West Lorena Avenue
Wood River, IL 62095

618-216-5291 (phone)
tmaag@maaglaw.com

Attorneys for Plaintiffs-Appellants

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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 to be appended to the brief under Rule 342(a), is 30 pages.

sThomas G. Maag

Thomas G. Maag
Maag Law Firm. LLC
22 West Lorena Avenue
Wood River, IL 62095

618-216-5291 (phone)
tmaag@maaglaw.com

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CERTIFICATE OF FILING AND SERVICE

I certify that on February 15, 2024, I electronically filed the foregoing Brief of Plaintiffs-Appellees, with the Clerk of the Illinois Supreme Court, 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.

LEIGH J. JAHNIG
Assistant Attorney General
115 South LaSalle Street
Chicago, Illinois 60603

CivilAppeals@ilag.gov (primary)
Leigh.Jahnig@ilag.gov (secondary)

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/ Thomas G. Maag
Thomas G. Maag
Maag Law Firm, LLC
22 West Lorena Avenue
Wood River, IL 62095

618-216-5291 (phone)
tmaag@maaglaw.com

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