No. 124213

IN THE

SUPREME COURT OF ILLINOIS

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

BRIEF OF PETITIONER-APPELLEE

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ISSUES PRESENTED FOR REVIEW

The FOID Act requires lawful gun owners to obtain licenses in order to purchase or possess firearms or ammunition. The Act incorporates federal firearms laws and, since 2013, has prohibited circuit courts from granting relief from firearms disabilities when doing so would contravene federal law. The issues presented are:

1. Whether the federal ban on gun possession by domestic violence misdemeanants applies to an individual who has lost and then regained her gun rights under Illinois law?

2. If not, whether the perpetual inability to obtain relief from a domestic violence misdemeanor conviction violates Petitioner's Second Amendment rights?

3. If not, whether the FOID Act is unconstitutional in its requirement that an individual obtain a license in order to merely keep and bear arms at home?

STATEMENT OF FACTS

Petitioner's Battery Conviction

Petitioner Shawna Johnson separated from her former husband Michael Korstick after he assaulted her on February 11, 2001, resulting in criminal charges. C389-96, C753-54, C789-90, SUP E 11. When Korstick threatened to move back in, Petitioner obtained an order of protection. C375-88, C753-54, C789-90. However, Petitioner then dismissed the order of protection, at her employer's request, because it prevented Korstick from working at the same location as Petitioner. C375, C790-91. Shortly thereafter, on March 25, 2001, Korstick filed a report with Mount Carmel police alleging that Petitioner had struck him at a party earlier that morning. C397-408, C791-93, SUP E 12. Petitioner did not remember hitting Korstick, but testified that she had tried to get away from him at the party. C791, SUP E 12. Police arrested Petitioner on the charge of domestic battery that same day. C791, SUP E 12. Korstick later returned to the police station and "asked if there was anyway to back this off. [Police officer Steve Perry] told him there was not." SUP E 12; C791-93.

At the time, Petitioner was a single mother raising four children with limited financial means. C793-94. She was never offered a public defender. C793-95. She felt her only realistic option was to meet with the State's Attorney and "get a deal," and she agreed to plead guilty to

the lesser charge of misdemeanor battery in violation of 720 ILCS 5/12-3(a). C401, C795-96. Before pleading guilty, Petitioner asked the State's Attorney how a guilty plea would impact her ability to own guns, and the State's Attorney told her that it would "maybe" prevent her from having a FOID Card for "a short time," but that she would be able to obtain one in the future. C796. At the time, there was a general understanding in the community that a guilty plea to a charge of battery (vis-à-vis domestic battery) would not preclude firearms ownership. C767-69. The Wabash County Circuit Court convicted her on June 7, 2001, imposing a $150 fine, counseling and a sentence of time served (her initial arrest). C402-04, C796.

Revocation of Petitioner's FOID Card

Petitioner, now remarried, obtained a FOID Card in 2010. C799-800. When applying, she asked Sheriff Joe Keeling how she should respond to a question about domestic violence convictions, and he told her she should answer "no." C799-800. However, Respondent ISP revoked Petitioner's FOID Card on June 27, 2012, after learning that the 2001 battery conviction had concerned her former husband. C801-03; SUP E 13. Petitioner called ISP after receiving its letter and sent a letter requesting a hearing, but she received no response. C617, C802-05, C804-05, SUP E 8. Petitioner intended to return her FOID Card immediately, but misplaced it, and did not remember to return it until

ISP sent her a follow-up letter. C803-04, C806-08, C857-58, SUP E 9. Petitioner applied to the Governor for a pardon in 2012 and, in January 2016, the Governor denied her request. C814-16, SUP E 4.

Legal Background

Illinois law has prohibited the possession of firearms in the absence of a license ("FOID Card") since 1967. 430 ILCS 65/2(a); *see* 1967 Ill. Laws p. 2,600. The FOID Act makes ISP responsible for approving and denying applications, as well as for suspending and revoking FOID Cards. *See* 430 ILCS 65/5(a), 65/8.2, 65/8.3. Section 8 prohibits the licensure of individuals with (*inter alia*) various disqualifying criminal convictions and directs ISP to deny applications, or revoke issued FOID Cards, when those convictions are present. *See* 430 ILCS 65/8.

Federal law also prohibits certain individuals from possessing firearms or firearm ammunition. *See* 18 U.S.C. §922(g). Since 1996, federal law has prohibited gun possession by anyone "who has been convicted in any court of a misdemeanor crime of domestic violence." *Id*. §922(g)(9); *see* 110 Stat. 3009, 3380-81 (1996). The federal government enacted this prohibition subject to several exceptions. Notably, it would not apply to anyone "if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the

loss of civil rights under such an offense)[.]" 18 U.S.C. §921(a)(33)(B). Furthermore, federal law authorizes the United States Attorney General to grant relief from a federal firearms disability if "the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. §925(c). However, the federal government has not allocated funds for this program since 1992, meaning that relief is effectively unavailable. *See Coram v. State*, 2013 IL 113867, ¶30 (citations omitted) (op. of Karmeier, J.).

In 1997, the Illinois legislature amended Section 8 of the FOID Act to direct ISP to deny licensure to anyone "who is prohibited from acquiring or possessing firearms or firearm ammunition . . . by federal law." 430 ILCS 65/8(n); *see* 1997 Ill. Laws 130, §20. In that same year, the legislature also amended the Act to permanently prohibit the licensure of anyone with a domestic battery conviction "committed on or after the effective date of" the amendment. *See* 1997 Ill. Laws 493, §5. However, if a domestic battery conviction concerned conduct from before the effective date, then it would only prohibit licensure for five years. *See id.* A conviction for battery, alone, did not (and does not) disqualify an individual unless "a firearm was used or possessed." *See* 430 ILCS 65/8(k). In 2011, the legislature amended the Act to prohibit

ISP from issuing FOID Cards to individuals who had been charged with domestic battery, but had then pleaded guilty to lesser charges if there is a determination that the federal domestic violence bar applies. *See* 430 ILCS 65/8(l); 2011 Ill. Laws 1131, §15.

Section 10 of the FOID Act provides review rights for individuals who have a FOID Card "denied," "revoked or seized." 430 ILCS 65/10(a). An aggrieved individual files a petition in their local circuit court when the action "was based upon a . . . domestic battery," *inter alia*. *See id.* Otherwise, individuals apply for review before ISP. *See id.* The Act provides that a circuit court "shall determine whether substantial justice has been done," and if it "has not been done, the court shall issue an order directing [ISP] to issue a [FOID] Card." 430 ILCS 65/10(b).

Section 10 provides that a circuit court (or ISP) "may grant . . . relief" if a petitioner meets several stated criteria. First, the petitioner must serve the state's attorney, and next, he or she cannot have been convicted or confined for a forcible felony within the past 20 years. *See* 430 ILCS 65(c)(0.05)-(1). After meeting these two thresholds, a petitioner needs to then show that "the circumstances regarding a criminal conviction, where applicable, the applicant's criminal history and his reputation are such that the applicant will not be likely to act in a manner dangerous to public safety," and that "granting relief would

not be contrary to the public interest." 430 ILCS 65(c)(2)-(3). Finally, since 2013 section 10 has also provided that a court may not grant relief if a petitioner is "prohibited . . . under federal law" or if it would "be contrary to federal law." *See* 2012 Ill. Laws 1131, §15; *see also* 430 ILCS 65/10(b), (c)(4). Prior to this amendment, circuit courts could grant relief to individuals who still faced federal prohibitions. *See Coram*, 2013 IL 113867 at ¶104 (Burke, J., concurring).

Procedural History

Petitioner filed a petition for judicial review pursuant to 430 ILCS 65/10 on August 15, 2013. C16. Petitioner named ISP as a respondent and served the State's Attorney with notice. C22-23. At the first hearing, on November 7, 2013, the State's Attorney advised that the Attorney General had agreed to handle the matter and that the State's Attorney did not plan to present argument. C588.

ISP filed a motion to dismiss on September 3, 2013, which the circuit court denied on February 25, 2014. C24-27, C83-87. ISP then filed a motion for summary judgment on April 25, 2014. C94-96. On September 9, 2014, Petitioner filed an amended petition that added the claim that the "perpetual denial of Petitioner's right to possess and use firearms" was unconstitutional. C223. ISP filed a motion to dismiss this amended petition on October 1, 2014. C227-30. All of ISP's motions

contended that federal law prevented the court from granting relief to Petitioner. C25, C94, C228-29.

On November 5, 2015, the circuit court denied ISP's motion for summary judgment and dismissed the amended petition and its constitutional claim as "unnecessary at this time." C296-317. The court's rationale was that Petitioner's sentence to "time served" made the "civil rights restored" exception applicable because Petitioner would have lost and then regained her right to vote. C309-16. ISP moved for reconsideration on the ground that Petitioner had "never served a sentence of imprisonment as a result of and after her conviction," and thus, "her civil right to vote . . . could not have been restored." C320. The court granted reconsideration and vacated its prior ruling on December 21, 2015. C327-33, C501-02. The court also granted Petitioner leave to re-plead her constitutional claim, and she accordingly refiled the amended petition on December 28, 2015. C333, C334-39, C501-02. ISP moved to dismiss this amended petition on January 11, 2016, and the circuit court denied this motion on January 20, 2016, the same day it held an evidentiary hearing. C347-49, C370-74.

At the evidentiary hearing, the court heard testimony from multiple witnesses. C502-08, C734-912. These included Petitioner, Petitioner's husband, people who knew Petitioner personally and current law enforcement officers in the Mount Carmel area. C502-08,

C734-912. As to "the circumstances regarding [Petitioner's] criminal conviction," her "criminal history and [her] reputation," 430 ILCS 65/10(c)(2), multiple witnesses testified that Petitioner's former husband had been physically abusive, resulting in multiple calls to the police, and that he was a convicted felon. C788-89, C813-14, C825-26, C837-38, C843-44, C852-56, C884, C899-900. One witness, a retired law enforcement officer, testified that he had reviewed the file for Petitioner's 2001 arrest and did not feel police had adequately investigated the report that Petitioner's ex-husband filed in 2001. C779-81. And as to whether Petitioner would be "likely to act in a manner dangerous to public safety," 430 ILCS 65/10(c)(2), multiple witnesses testified that Petitioner was not likely to endanger public safety. C759-63, C778-79, C826-30, C839-43, C856-62, C870, C883-89, C894.

On October 9, 2018, after taking the matter under advisement for over two years, the circuit court granted relief to Petitioner. C499-523. Regarding the circumstances of Petitioner's conviction, the court found that "Petitioner was herself a victim of domestic violence and in an abusive relationship with the alleged victim of her crime." C518. Petitioner married her former husband "after she became pregnant with his child when she was 14 years old and [he] was 24 years old." C518. The court found that Petitioner has an "impeccable and impressive reputation in the community for her honesty, reasonable and agreeable

disposition, good character, trustworthiness, dependability, and law-abiding nature." C518. "Moreover, there has never been any allegation nor any scintilla of evidence to even hint that Shawna Johnson has ever threatened any violence with or any other illegal or any inappropriate use of any firearm." C519. The court continued that "[t]he public at large would not be in any increased danger if Shawna Johnson had guns." C519. The court found it significant that the State's Attorney "told Johnson . . . that Johnson might lose her FOID Card for a period of time (5 years) but that she would be able to have her FOID Card restored thereafter." C520. The current and retired law enforcement officers who testified all "lived in and served Mt. Carmel, Wabash County and the community where Shawna Johnson lived, worked, [and] been the victim of a very abusive relationship." C521. In the incident giving rise to her guilty plea and conviction, Petitioner "was not the aggressor or abuser." C521-22. Rather, "[s]he was fighting-off and trying to flee from her abuser" and "was also the victim of a cursory (at best) investigation following the incident." C522. The court found that Petitioner "is precisely NOT the type of person who those laws were meant to bar from owning and possessing firearms." C522. The court found the Petitioner's ongoing inability to obtain a FOID Card to be unconstitutional as-applied. C522-23. This appeal followed.

ARGUMENT

After carefully reviewing the facts and circumstances of Petitioner Shawna Johnson's 2001 battery conviction and her life since then, the circuit court found that she was not likely to act in a manner dangerous to public safety and that granting her a FOID Card would not be contrary to the public interest. Thus, as a matter of Illinois law, Petitioner was entitled to a FOID Card but for one thing—a 2013 amendment to the FOID Act that prohibits a court from granting relief when it "would . . . be contrary to federal law." 430 ILCS 65/10(c)(4). Because Petitioner's 2001 misdemeanor conviction concerned her former husband, the federal domestic violence prohibition convictions catches her in its sweep. *See* 18 U.S.C. §922(g)(9). Bizarrely, it would not catch her if she had served even an hour in jail, nor would it catch her if she had pleaded guilty to a non-forcible felony. But, as someone who pleaded guilty to only a misdemeanor and received only a minimal (non-custodial) sentence, Petitioner faces a ban on her ability to keep and bear arms that, in Illinois, is perpetual—at least as construed by the federal government.

The circuit court was correct to conclude that the perpetual application of this ban to a person who is unlikely to act against public safety in the future is a denial of that person's constitutional right to keep and bear arms. However, this court "can sustain the decision of the circuit court on any grounds which are called for by the record regardless of whether the circuit court relied on the grounds and regardless of whether the circuit court's reasoning was correct."

People v. Cornelius, 213 Ill. 2d 178, 192 (2004) (*quoting Bell v. Louisville & Nashville R.R. Co.*, 106 Ill. 2d 135, 148 (1985)); *see also Brunton v. Kruger*, 2015 IL 117663, ¶90 (*citing People v. Burnett*, 237 Ill. 2d 381, 391 (2015)). And in particular, this Court can affirm the circuit court's judgment on the ground that the restoration of Petitioner's right to keep and bear arms under Illinois law is a restoration of her "civil rights" so as to make the federal prohibition inapplicable. The circuit court had no choice but to reject this claim in light of *Connour v. Grau*, 2015 IL App (4th) 130746, ¶¶24-28. C750-51. But as we explain, there is a compelling case that gun rights are among the "civil rights" that can be "restored" so as to remove the federal bar on gun possession. As a matter of constitutional avoidance, this Court should find that the restoration of Petitioner's gun rights under state law is a restoration of Petitioner's civil rights that makes the federal prohibition inapplicable.

If the Court does reach the constitutional issue, then there are two grounds on which this Court can, and should, grant relief. First, the Court can find that the ongoing application of the domestic violence misdemeanor ban to Petitioner is unconstitutional as-applied because the State has failed to show a sufficient justification for applying the ban in the circumstances presented. Beyond that, the FOID Act is unconstitutional in its attempt to condition the right to keep and bear arms in the home on a government-issued license. The Second Amendment elevates the core right to armed home defense "above all other interests." *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). Yet the State of

Illinois, unlike almost every other State in the Nation, requires virtually all of its citizens to possess a government license to exercise this absolute fundamental right. Just as the State could not require its citizens to obtain a license to read bedtime stories to their children or say family prayers, the State cannot require its citizens to obtain a license to exercise this similarly fundamental constitutional right.

Before reaching these meritorious issues, we address the State's claim that the Attorney General of the United States is a necessary and indispensable party. This red herring is meritless. Petitioner seeks a FOID Card (or a determination that the FOID Card requirement is unconstitutional), and it is Respondent ISP—not the United States Attorney General—that issues and revokes FOID Cards. The United States Attorney General did not take any action to revoke or deny a FOID Card to Petitioner, and as such, sovereign immunity would preclude making this federal officer a party to these proceedings in the first place. This Court's ruling will not bind the United States Attorney General by means of either stare decisis or res judicata, so this official has no direct interest in this matter, and certainly not enough of an interest to become an indispensable party.

I. The United States Attorney General is Not Indispensable and Could Not be Joined as a Party

ISP's claim (pp. 27-34) is ill-conceived and baseless. As a federal officer performing official duties, the United States Attorney General is immune from suit unless an exception to sovereign immunity applies. *See, e.g., Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949); *Marshall v. Elward*, 78

Ill. 2d 366, 370 (1980). The only exception from sovereign immunity that could possibly apply here is the judicially created *Bivens* action. *See generally Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). But no *Bivens* claim would lie because a *Bivens* action (like an action under 42 U.S.C. §1983) is only available against an official who "through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). The State does not even attempt to identify any actions that the United States Attorney General took with respect to Petitioner's FOID Card. And indeed, there is no apparent way the United States Attorney General could have taken such action, as the FOID Act vests jurisdiction to issue and revoke FOID Cards in ISP, not the federal government. Accepting ISP's tongue-in-cheek argument would amount to nothing more than divesting the courts of Illinois of jurisdiction and leaving Petitioner without relief. This Court has previously recognized that the dismissal of "indispensable" parties that cannot be joined as defendants has the potential to "lead to an untoward result." *Feen v. Ray*, 109 Ill. 2d 339, 348 (1985).

Significantly, ISP never raised its indispensable party argument in the court below. But, "where objection to nonjoinder is not made until the final stage of the proceeding it will receive little favor by the courts, and in such case, to be of avail, it must appear that the decree or order will have the effect of depriving the party omitted of some material rights without a hearing." *Boddiker v. McPartlin*, 379 Ill. 567, 575 (1942) (*citing Chicago, Burlington & Quincy R.R. v. Commerce Comm'n*, 364 Ill. 213 (1936); *Gulick v. Hamilton*, 287 Ill. 367 (1919)); *see*

also Emalfarb v. Krater, 266 Ill. App. 3d 243, 247-48 (2d Dist. 1994) (citations omitted). And this very clearly is not the case here. Since this Court's decision will not require action by (or otherwise bind) the United States Attorney General, that official's only "interest" would be the tangential and indirect one of making arguments about how this Court ought to rule. And this interest is one that the United States Attorney General can protect (if it is so inclined) by seeking to submit an *amicus curiae* brief or to otherwise intervene in this case.[1]

A. The Only Necessary Party is the Illinois State Police

The only party that is necessary and indispensable is ISP, which is already a party to this proceeding. ISP is indispensable because it "has an interest in the subject matter of the suit which may be materially affected by a judgment entered in the [its] absence." *People ex rel. Sheppard v. Money*, 124 Ill. 2d 265, 281 (1988) (citations omitted). A judgment in Petitioner's favor could require ISP to take action—specifically, to issue Petitioner a FOID Card. "The indispensable-party rule reflects a long-standing policy against affecting the rights and interests of absent parties who do not have an opportunity to protect their interests." *Feen*, 109 Ill. 2d at 346 (*citing Shields v. Barrow*, 58 U.S. (17 How.) 130 (1854)).

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[1] Supreme Court Rule 19 requires litigants to provide notice of claims of unconstitutionality or federal preemption when "the State or the political subdivision, agency, or officer affected is not already a party." ISP is a political subdivision of the State, and so the Illinois Attorney General is clearly on notice of Petitioner's constitutional claim. *See People v. Croom*, 2012 IL App (4th) 100932, ¶12. To whatever extent this Court might construe Rule 19 to require notice to the federal government—even though the Rule does not say so—Petitioner respectfully requests leave to provide such notice. *See U.S. Bank Trust Nat'l Ass'n v. Junior*, 2016 IL App (1st) 152109, ¶22-25; *see also Village of Lake Villa v. Stokovich*, 211 Ill. 2d 106, 118-19 (2004).

There is no dispute that ISP, rather than the United States Attorney General, revoked Petitioner's FOID Card. Nothing in the record or the parties' statements of facts indicates that the United States Attorney General took action against Petitioner's FOID Card. This is not surprising, for the FOID Act expressly provides that "[t]he Department of State Police has authority to deny an application for or to revoke and seize a Firearm Owner's Identification Card previously issued under this Act." 430 ILCS 65/8; *see also* 430 ILCS 65/8.2, 65/9. Nothing in the FOID Act purports to vest any authority to issue or revoke FOID Cards in anyone other than ISP. *Cf. Rhein v. Coffman*, 825 F.3d 823, 825 (7th Cir. 2016) ("The Director of the State Police, not the Chief of the Bureau of Firearms Services, is responsible for deciding whether to restore a Card[.]").

B. The United States Attorney General is Not a Necessary and Indispensable Party

In marked contrast to ISP, the United States Attorney General does not have an interest that would be materially affected by this Court's judgment because the United States Attorney General does not issue FOID Cards. Moreover, a judgment of this Court would not bind the federal government. Since the federal government is not a party to this proceeding, res judicata would not attach to this Court's judgment with respect to any actions the United States Attorney General (or any other federal actor) might choose to take in the future. *Cf. People ex rel. Scott v. Dravo Corp.*, 10 Ill. App. 3d 944, 951 (5th Dist. 1973) (an Illinois judgment as to whether an island was in Illinois or Kentucky would not

bind Kentucky courts). Accordingly, there is no interest of the federal government that this Court's judgment will determine.

ISP's grounds for claiming that the United States Attorney General ought to be a party are vacuous. ISP provides no authority for its claim (p. 27) that the United States Attorney General is a necessary and indispensable party because "[t]his case hinges on the interpretation and application of section 922(g)(9), a federal statute." As a point of fact, this case actually concerns state laws that incorporate federal laws, but in any event, it is frivolous to suggest that state courts cannot interpret federal statutes unless the United States Attorney General is a party. Rather, "state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Tafflin v. Levitt*, 493 U.S. 455, 458-59 (1990) (citations omitted). Likewise, ISP's claim (p. 31) that the United States Attorney General is a necessary and indispensable party because, pursuant to 18 U.S.C. §925(c), "he can grant [Petitioner] . . . relief" is also unsupported and meritless. The United States Attorney General cannot actually grant relief because (as ISP knows) Congress has defunded §925(c) for years, and the Supreme Court of the United States has upheld that practice. *See United States v. Bean*, 537 U.S. 71, 74-75 (2002); *Coram v. State*, 2013 IL 113867, ¶¶30, 38 (op. of Karmeier, J.). Were one to accept the premise that anyone who can potentially provide relief on some independent basis must be made a party, then it would actually be Congress that needed to be joined. Or, alternatively, it could be the Illinois legislature, since that body *could*

repeal 430 ILCS 65/10(c)(4), or for that matter, the entire FOID Act. The bottom line is that someone's potential ability to provide relief on an independent ground does not make that person a necessary party in a proceeding that does not rely on that ground.

A brief review of the caselaw confirms this. In *Ragsdale v. Superior Oil Co.*, 40 Ill. 2d 68 (1968), the plaintiff owned one of 45 tracts of land that an oil company "pooled and operated as a single unit" under various lease agreements *See id.* at 69. The plaintiff's claim that it was the true owner of other pooled wells made "all owners and lessees" necessary and indispensable because, were the plaintiff successful in its claim, "the practical effect . . . would be to void the lease upon the disputed tract. The effect on the remaining owners of the unit would be direct and substantial." *Id.* at 71. Likewise, when a party asserts the existence of a trust, all of the potential beneficiaries of that trust are necessary and indispensable because each "would be equally interested in the alleged trust" and accordingly are "substantially interested in the subject matter and in the result." *Oglesby v. Springfield Marine Bank*, 385 Ill. 414, 429 (1944).

The situation presented here is not analogous to these circumstances at all. This Court's ruling will not require the federal government to do anything, nor will it preclude the federal government from doing anything. And while the federal government may have an indirect or tangential interest in the legal issues in this case, indirect and tangential interests are not enough. *People ex rel. Sheppard v. Money*, 124 Ill. 2d 265 (1988), for example, concerned the

constitutionality of state laws that (*inter alia*) authorized the State to garnish wages from one parent's employer when it was providing public aid benefits to the other parent. *See id.* at 268-69. This Court concluded that an employer receiving a garnishment notice was not necessary and indispensable because "[t]he employer-payor has no judgment entered against it. No court has determined that an employer owes the State any sums of money . . . [and] the payor is merely stakeholder or custodian of the funds sought to be reached." *See id.* at 282. Of course, the employer did have an indirect or tangential interest in the controversy because it had received garnishment notices that required its compliance. And notably, even though the State would use the garnished wages "to reimburse itself *and the Federal government* for benefits paid to the custodial parent," *id.* (emphasis added), it does not appear that anyone even thought to argue that this indirect interest might make the federal government an indispensable party. In that case, as here, an indirect interest was not enough.

II. The Restoration of Gun Rights is a Restoration of "Civil Rights" That Makes §922(g)(9) Inapplicable

The most expedient way to resolve this case is to find that restoration of Petitioner's gun rights under state law is a restoration of "civil rights" that makes the prohibition on domestic violence misdemeanors inapplicable because of the "civil rights restored" exception to the federal definition. *See* 18 U.S.C. §921(a)(33)(B)(ii). There are compelling and substantial reasons to conclude that Congress intended "civil rights" to include gun rights, but federal courts rejected this proposition years ago on the rationale—now unsupportable—that there is no

individual right to own a gun. The federal courts have continued to adhere to this questionable conclusion on the ground of stare decisis, but at least one court considering the matter anew has found just the opposite. *See DuPont v. Nashua Police Dep't*, 113 A.3d 239, 247, 167 N.H. 429, 439 (2015). It does not appear that this Court considered this precise issue when it decided *Coram*.

A. The "Only Three Rights" Approach Developed Prior to *Heller* and is Premised on the Errant View that the Second Amendment does not Secure an Individual Right

The ban on gun possession by domestic violence misdemeanants does not apply to anyone who "has had civil rights restored." 18 U.S.C. §921(a)(33)(B)(ii). Congress first enacted a "civil rights restored" exception in 1986, to provide relief from the federal law that (generally stated) prohibits convicted felons from possessing guns. *See* 100 Stat. 449, 450 (May 19, 1986), *codified at* 18 U.S.C. §921(a)(20)(B); *see also* 18 U.S.C. §922(g)(1). When Congress enacted the prohibition on domestic violence misdemeanors in 1996, it incorporated this same substantive language to create a parallel exception. *See* 110 Stat. 3009, 3372 (Sept. 30, 1996), *codified at* 18 U.S.C. §921(a)(33)(B)(ii). But, Congress never defined the term "civil rights." The federal appellate courts wrestled with the language for a few years before deciding, universally, that only three rights would be pertinent: voting; holding public office; and serving on a jury. *See, e.g.*, *United States v. Williams*, 128 F.3d 1128, 1134 (7th Cir. 1997); *United States v. Caron*, 77 F.3d 1, 2 (1st Cir. 1996), *later proceeding at* 524 U.S. 308 (1998); *McGrath v. United*

States, 60 F.3d 1005, 1007 (2d Cir. 1995); *United States v. Essig*, 10 F.3d 968, 975 (3d Cir. 1993); *United States v. Dahms*, 938 F.2d 131, 133 (9th Cir. 1991).

This "only three rights" view traces to *United States v. Cassidy*, 899 F.2d 543 (6th Cir. 1990), where the Sixth Circuit bluntly declared—without any citation to supporting authority—that the pertinent "civil rights" would "include the right to vote, the right to seek and hold public office and the right to serve on a jury." *Id.* at 549. The court rejected the argument that firearms rights were "civil rights" by reasoning that "there is no individual right to possess a firearm." *Id.* at 549 n.12. Obviously, this reasoning is no longer sustainable. Yet, even after the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the federal courts have continued to follow this line of authority, generally on the weight of stare decisis. *See United States v. Clegg*, 654 Fed. Appx. 686, 688 (6th Cir. 2016); *Enos v. Holder*, 855 F. Supp. 2d 1088, 1095-96 (E.D. Cal. 2012), *aff'd*, 585 Fed. Appx. 447 (9th Cir. 2014). The Supreme Court of New Hampshire, in contrast, considered the issue anew in the post-*Heller* world—and concluded that gun rights are indeed among the "civil rights" that can be "restored" so as to remove the bar on gun ownership. *See DuPont*, 113 A.3d at 247, 167 N.H. at 439.

B. Neither this Court nor the United States Supreme Court has Adopted the "Only Three Rights" Construction of the "Civil Rights Restored" Exception

The meaning of the "civil rights restored" exception was front and center when this Court issued its decision in *Coram*. *See Coram*, 2013 IL 113867 at ¶¶31-34, 43-45, 66 (op. of Karmeier, J.). Justice Karmeier's opinion observed that the

Supreme Court has never adopted the "only three rights" interpretation and suggested that the approach "misses the point and is a construction inconsistent with the objectives of Congress." *See id.* at ¶66. Yet, it does not appear that the Court considered the question of whether gun rights could be "civil rights" that, once restored, would result in removal of the firearm disability. Rather, Justice Karmeier's opinion found that "the power to grant relief, or restore rights, to those who have lost them as a result of state misdemeanor convictions is necessarily implied." *Id.* at ¶69 (op. of Karmeier, J.); *see also id.* at ¶107 (Burke, J., concurring).

While it thus appears that this Court did not consider the possibility that gun rights were "civil rights" that could be lost and then "restored," the Appellate Courts for the Third and Fourth Districts have nonetheless concluded, based on *Coram*, that "the rights restored under section 10 of the FOID Act are not necessarily the type of 'civil rights' referred to in section 921(a)(33)(B)(ii)." *Connour v. Grau*, 2015 IL App (4th) 130746, ¶24; *accord People v. Heitmann*, 2017 IL App (3d) 160527, ¶21. Both of these courts were (with all due respect) errant in their conclusions that either *Logan v. United States*, 552 U.S. 23 (2007), or *Coram* are binding precedent on the issue of whether gun rights are civil rights. The United States Supreme Court is a "is a court of final review and not first view," *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (quotation omitted), and significantly, "[o]nly the questions set out in the petition [for certiorari], or fairly included therein, will be considered by the Court," U.S. Sup. Ct. R. 14.1(a);

see also id. at R. 24.1(a). The question presented in *Logan* was whether "the 'civil rights restored' exemption contained in §921(a)(20) encompass state-court convictions that at no time deprived the offender of civil rights?" *Logan*, 552 U.S. at 26. Certainly, the question of exactly what rights fall within the term "civil rights" is a related or complementary question, but the fact that a question "may be '*related* to the one petitione[r] presented, and perhaps *complementary* to" it does not make that question "'fairly included therein.'" *Wood v. Allen*, 558 U.S. 290, 304 (2010) (*quoting Yee v. Escondido*, 503 U.S. 519, 537 (1992) (internal quotation marks omitted)). In *Wood v. Allen*, for example, the question of "[w]hether the state court reasonably determined that there was a strategic decision under [28 U.S.C.] §2254(d)(2) is a different question from whether the strategic decision itself was a reasonable exercise of professional judgment[.]" *Id.* at 304. Likewise, in *Jama v. ICE*, 543 U.S. 335 (2005), the question presented was "[w]hether the Attorney General can remove an alien to one of the countries designated in [a statute] without obtaining that country's acceptance of the alien prior to removal." *Id.* at 352 n.13. "That question does not fairly include whether Somalia is a country any more than it fairly includes whether petitioner is an alien or is properly removable," and the Court would not consider those issues. *Id.* Indeed, the Court's decision in *Logan* expressly observed that the "petitioner agrees, that the civil rights relevant under the above-quoted provision are the rights to vote, hold office, and serve on a jury." *Logan*, 552 U.S. at 28.

Not only was the scope of the term "civil rights" not before the Court, there is no realistic way that it could have been. At the time the Supreme Court decided *Logan* there was (as discussed above) no split of authority on the issue between either federal appellate courts or state supreme courts. And, the Supreme Court had not yet decided *Heller* and *McDonald*, which assuredly undermined the Sixth's Circuit's statement that "there is no individual right to possess a firearm." *Cassidy*, 899 F.2d at 549 n.12. Likewise, the Supreme Court of New Hampshire had not yet decided *DuPont*, 113 A.3d 239, 167 N.H. 429. Normally, the Supreme Court grants review to address "conflicts" between lower courts of last resort. *See* U.S. Sup. Ct. R. 10(a)-(b). The Supreme Court "ordinarily do[es] not decide in the first instance issues not decided below." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168-69 (2004) (*quoting Adarand Constructors*, 534 U.S. at 109); *see also Youakim v. Miller*, 425 U.S. 231, 234 (1976) (citations omitted). The question in *Logan* was simply whether "civil rights," whatever they were, could be "restored" if they had not been taken away—and that question turned on the meaning of the term "restored," not the meaning of the term "civil rights."

This Court's decision in *Coram* also did not decide the question of whether gun rights were "civil rights," but instead, the grounding of Justice Karmeier's opinion was that a state court's ability to restore gun rights was "necessarily implied." *See Coram*, 2013 IL 113867 at ¶69 (op. of Karmeier, J.). While Justice Burke's concurrence suggested disagreement with "the merits of this analysis," it

was not "necessary to address" because the Illinois statutes in force at the time did not incorporate federal law. *See id.* at ¶107 (Burke, J., concurring). Justice Burke's concurrence mentioned "civil rights" only once, and that reference did not attempt to draw any conclusion about what the term actually encompassed. *See id.* at ¶88 (Burke, J., concurring). Justice Theis's dissent mentioned "civil rights" four times, but the only pertinent reference is in the opinion's characterization of the petitioner's argument as being that "an offender does not lose civil rights, as that term has been construed." *See id.* at ¶131 (Theis, J., dissenting); *see also id.* at ¶¶121, 130, 132. Thus, this Court's decision in *Coram* did not address whether gun rights are "civil rights," and according to Justice Theis's characterization of the petitioner's argument, that issue was not even placed before the Court. It is well established that "[a] court may not speak authoritatively upon questions not involved in the litigation. This restrictive principle is salutary, for expressions of opinion upon extraneous matters must necessarily lack binding force." *Boddiker v. McPartlin*, 379 Ill. 567, 577 (1942); *accord Abrams v. Awotin*, 388 Ill. 42, 48-49 (1944); *Superior Coal Co. v. O'Brien*, 383 Ill. 394, 406 (1943).

C. Gun Rights are Civil Rights

While the federal appellate courts were ultimately uniform in their adoption of the "only three rights" construction, the underpinnings of this conclusion are questionable, at best. The Sixth Circuit never cited *anything* to support its conclusion that only three rights were pertinent, nor that gun rights

were not civil rights. *See Cassidy*, 899 F.2d at 549 & n.12. And the other federal appellate courts never cited anything other than *Cassidy* (or cases citing *Cassidy*) to justify reaching this same result. *See, e.g., United States v. Caron*, 77 F.3d 1, 2 (1st Cir. 1996) (relying on *Cassidy* to find the proposition "generally agreed"), *later proceeding at* 524 U.S. 308 (1998); *McGrath v. United States*, 60 F.3d 1005, 1007 (2d Cir. 1995) (citing *Cassidy* and noting that "[t]he parties agree"); *United States v. Essig*, 10 F.3d 968, 975 (3d Cir. 1993) (relying on *Cassidy*, *Dahms*, and *United States v. Thomas*, 991 F.2d 206 (9th Cir. 1993)); *United States v. Dahms*, 938 F.2d 131, 133 (9th Cir. 1991) (relying on *Cassidy*).

But significantly, there are substantial indications that Congress did not intend for the "civil rights restored" exception to exclude gun rights. The decisions that construed the meaning of "civil rights" before *Cassidy*'s view took hold did not adopt a hard-and-fast restrictive view like the Sixth Circuit ultimately took, and indeed, some courts directly indicated that gun rights were indeed "civil rights" within the exception's meaning. The first decision that contained any significant discussion of the meaning of "civil rights" was *United States v. Presley*, 667 F. Supp. 678 (W.D. Mo. 1987), *aff'd*, 851 F.2d 1052 (8th Cir. 1988). There, the court looked to the "civil rights" that had been taken away or preserved under Missouri law and discussed two "rights" that the defendant still did not have—jury service and the ability to serve as a law enforcement officer—but never indicated that those were the only pertinent rights. *See id.* at 678-79. Rather, they were the only rights that the defendant did not have on the facts

presented. *See id.* (*citing* Mo. Rev. Stat. §561.026). The district court concluded that while the question was "close . . . , the combination of limitations is sufficient so that I cannot in good conscience say that Missouri has substantially preserved or restored the civil rights of released convicts, as contemplated by Congress." *Id.* at 679. The Eighth Circuit affirmed because it "agree[d] with the District Court's reasoning and conclusion." *Presley v. United States*, 851 F.2d 1052, 1053 (8th Cir. 1988). The approach articulated here was to look at the field of "limitations" that still applied to the person and then determine whether the state had "substantially preserved or restored the civil rights," rather than looking at only certain rights in isolation. *See Presley*, 667 F. Supp. at 679; *see also United States v. Edwards*, 946 F.2d 1347, 1348-49 (8th Cir. 1991).

The next court was the Eleventh Circuit in *United States v. Kolter*, 849 F.2d 541 (11th Cir. 1988). There, the court observed simply that "the State Board of Pardons and Paroles [had] unqualifiedly restored all the civil and political rights [the defendant] had lost as a result of the burglary offense," but it never discussed what those rights were. *See id.* at 542-43. Instead, the court focused on the issue of retroactivity. *See id.* at 543. Because the charge against the defendant had been pending on the law's effective date, the court "h[e]ld [defendant] was not a convicted felon within the meaning of" the statute and accordingly reversed his conviction. *See id.* at 545. Again, this court focused on the "civil rights" that were implicated under governing state law, rather than limiting consideration to only particular civil rights. Three years later, another Eleventh

Circuit panel concluded that the "civil rights restored" exception did not apply where a state had restored a defendant's civil rights, but still prohibited the individual from transporting or carrying handguns. *See United States v. Palazzi*, 115 F.3d 906, 908 (11th Cir. 1997). The court explained that "this one significant civil right remains disabled, and, consequently, the §921(a)(20) exception upon which [defendant] seeks to rely is unavailing." *Id.* Thus, the Eleventh Circuit appeared to take it as a given that the right to bear arms was a "civil right" within the statute's meaning.

The next decision to address the term was *United States v. Landaw*, 727 F. Supp. 481 (N.D. Ind. 1989), where the court again looked to "the civil rights that [defendant] lost as a result of his state convictions" under state law—but did not discuss what any of those rights were. *See id.* at 483. The court found that the "civil rights restored" exception did not apply because in Indiana, the restoration of rights "involves no action by state authorities," but was instead "automatic upon release from custody." *See id.* at 483. Again, the focus was on the civil rights that were in fact lost and restored under governing state law, rather than being limited to consideration of only certain kinds of civil rights.

Another pertinent early decision is that of the United States District Court for the Central District of Illinois in *United States v. Erwin*, 723 F. Supp. 1285 (C.D. Ill. 1989), *aff'd*, 902 F.2d 510 (7th Cir. 1990). There, the court ruled that "[w]hatever else Congress may have meant by 'civil rights,' *it is clear it meant the right to possess firearms*." *Id.* at 1297 (emphasis added). The court explained that

Congress had sought, in its 1986 amendment, to remedy the situation in which a state had restored a person's gun rights, but the federal prohibition still applied. *See id.* The court reasoned that while there was no "federal civil right" to possess firearms—or rather, no right that the Supreme Court had recognized in sufficiently clear terms at the time—the Illinois Constitution still protected gun ownership as a "civil right." *See id.* at 1299. Thus, the *Erwin* court found that the exception did not apply because the State of Illinois had not restored the defendant's right to possess firearms, even though it had restored his rights to hold public office and vote, as well as "all license rights and privileges." *See id.* at 1297-99 (quoting statute).

The Seventh Circuit affirmed. *United States v. Erwin*, 902 F.2d 510 (7th Cir. 1990). Writing for a unanimous court, Judge Easterbrook explained that "Illinois, like many other states, restores some civil rights automatically (and without notice to the released prisoner) and others only on express decision." *Id.* at 512. Judge Easterbrook declined to craft a positive definition for "civil rights," but discussed the rights actually taken away and restored by Illinois law, including "the right to own or carry guns." *Id.* In affirming the conclusion that the "civil rights restored" provision did not apply, the court framed the issue as whether "the particular civil right to carry guns has been restored by law." *See id.* at 513. Shortly thereafter, another Seventh Circuit panel described firearms ownership as a "right" that was "expressly *not* restored" under Illinois law. *See United States v. Whitley*, 905 F.2d 163, 166 (7th Cir. 1990).

In *United States v. Traxel*, 914 F.2d 119 (8th Cir. 1990), the Eighth Circuit similarly found that "the right to possess firearms is the civil right with which section 921(a)(20) is concerned." *Id.* at 124. Because Minnesota law had provided since 1975 that the "civil rights restored to convicted felons by [statute] exclude the right to possess firearms," convictions from after 1975 "do not constitute convictions 'for which a person has had civil rights restored' within the meaning of section 921(a)(20)." *Id.*; *see also United State v. Ellis*, 949 F.2d 952, 955 (8th Cir. 1991) ("Minnesota has yet to restore Ellis's civil right to possess firearms. Thus, Ellis' civil rights were not restored under §921(a)(20)[.]"). And again, aside from concluding that "the right to possess firearms" was a "civil right" within the meaning of the statute, the court did not give the term "civil rights" any other positive definition. Rather, and like the other courts before it, that court looked to the rights that were taken away and restored under applicable state law. *See Traxel*, 914 F.2d at 121-23.

All of this reasoning went to the wayside as the federal courts adopted *Cassidy*'s "only three rights" view. The Eighth and Eleventh Circuits signed off on this view and continue to apply it. *See United States v. Nix*, 438 F.3d 1284, 1287-88 (11th Cir. 2006) (*citing*, *inter alia*, *Cassidy*); *United States v. Woodall*, 120 F.3d 880, 882 (8th Cir. 1997). And, although the Seventh Circuit never overruled its earlier decisions characterizing gun possession as one of the pertinent "civil rights," it also gradually joined the "only three rights" chorus. *Compare United States v.*

McKinley, 23 F.3d 181, 183-84 (7th Cir. 1994), *with United States v. Williams*, 128 F.3d 1128, 1134 (7th Cir. 1997).

III. As Applied Here—Where Relief is Unavailable Due Only to Technicalities in the Interplay Between State and Federal Law—the Lifetime Ban on Gun Possession Violates Petitioner's Second Amendment Right to Keep and Bear Arms

This Court has established a two-step approach to Second Amendment questions, looking first to history and precedent to determine whether the challenged law applies to "conduct that falls within the scope of the amendment." *People v. Webb*, 2019 IL 122951, ¶9. If the conduct falls within that scope, the court then "must determine and apply the appropriate level of constitutional scrutiny." *Id.* The degree of scrutiny applied varies with the "proximity [of] the restricted activity . . . to the core of the second amendment right and the [number of] people affected by the restriction." *People v. Chairez*, 2018 IL 121417, ¶45. Rational basis review is never appropriate. *Id.* ¶32.

A. Petitioner is Inside the Scope of Second Amendment Protection and her As-Applied Constitutional Claim is Squarely Before this Court

When the Supreme Court ruled that the Second Amendment secures "the individual right to possess and carry weapons in case of confrontation" in *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), it described the right as including "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635. The Court cautioned that the right "is not unlimited" and that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the

mentally ill," as well as two other types of laws (those "forbidding the carrying of firearms in sensitive places such as schools and government buildings" and "imposing conditions and qualifications on the commercial sale of arms"), *id.* at 626-27. In a footnote, the Court explained that it "identif[ied] these presumptively lawful regulatory measures only as examples; [its] list d[id] not purport to be exhaustive." *Id.* at n.26. Both this Court and the Seventh Circuit have recognized that, even as to those regulations that *Heller* identifies as "'presumptively lawful,'" "some level of scrutiny must apply." *See Chairez*, 2018 IL 121417 at ¶30 (*citing United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010); other citations omitted). Thus, contrary to the State's claim (pp. 38-40), Petitioner is inside the scope of constitutional protection. If bans on felons require justification even though *Heller* described them as "presumptively lawful," then bans on misdemeanants assuredly do. *See Hatfield v. Barr*, 925 F.3d 950, 953 (7th Cir. 2019).

The Seventh Circuit addressed the federal ban on gun possession by those with domestic violence misdemeanor convictions in *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc). There, the court upheld the prohibition "in its normal application," but it did so on its understanding that the ban was not—contrary to the argument raised by the appellant—actually "perpetual." *See id.* at 644-45. Specifically, even though the "civil rights restored" exception was unavailable to the appellant in that case, it remained possible "to seek pardon or expungement." *Id.* The court declined to consider the challenge further because

the appellant was "poorly situated" to assert an as-applied claim because he was "a recidivist" with two domestic battery convictions, the most recent of which was only a year before the conduct at issue had occurred. *See id.* at 645. Thus, the question of whether "a misdemeanant who has been law abiding for an extended period must be allowed to carry guns again, even if he cannot satisfy §921(a)(33)(B)(ii), [was] a question not presented today." *Id.*

Illinois courts have generally found this question to not be presented when the person raising it has not sought to obtain a pardon. Justice Theis's dissent in *Coram* concluded that the plaintiff's as-applied constitutional claim was premature because he "ha[d] not availed himself of a potential state remedy available to him" in the form of a gubernatorial pardon. *See Coram v. State*, 2013 IL 113867, ¶134 (Theis, J., dissenting) (*citing Skoien*, 614 F.3d at 645). The Appeals Court for the Third and Fourth Districts concluded likewise in *People v. Heitmann*, 2017 IL App (3d) 160527, ¶40, and *Baumgartner v. Greene Cnty. State's Attorney's Office*, 2016 IL App (4th) 150035, ¶61.

The situation of the Petitioner here is much different. Here, the conduct that gives rise to her prohibition is not recent, but is now from almost two decades in the past. Moreover, the Petitioner is not a recidivist, but instead, she was herself the victim in an abusive relationship—and it was that relationship that gave rise to the conduct at issue here. Unlike in *Coram*, *Heitmann* and *Baumgartner*, the Petitioner here has sought, unsuccessfully, to obtain a pardon. Her as-applied constitutional claim is squarely before the Court.

B. The State Must Show a Strong Public Interest and a Close Degree of Fit

A court reviewing a burden on the right to keep and bear arms "examine[s] the strength of the government's justifications for restricting certain firearm activity by evaluating the restriction the government has chosen to enact and the public-benefits ends it seeks to achieve." *Chairez*, 2018 IL 121417 at ¶35 (*citing Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011); *People v. Wilson*, 2012 IL 112026, ¶42). "[A] severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end." *Id.* (*quoting Ezell*, 651 F.3d at 708). However, "modest burdens on the right may be more easily justified," as when the activity at issue is "closer to the margins of Second Amendment protection," or when the law is operating to "merely regulate rather than restrict." *Id.* (*quoting Ezell*, 651 F.3d at 708).

"The rigor of the review is dependent on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right." *Kanter v. Barr*, 919 F.3d 437, 441 (7th Cir. 2019) (quotations omitted). The situation presented in *Skoien* falls at "[o]ne end of the scale," while "[o]n the other end of the scale are cases dealing with a categorical ban on the second amendment right." *Chairez*, 2018 IL 121417 at ¶¶36, 39 (*citing Ezell*, 651 F.3d 684; *Skoien*, 614 F.3d 638). But what distinguishes the two ends of this scale is that the burden in *Skoien* was not "perpetual" because relief was potentially available.

But the burden at issue in *Ezell*—a ban on target ranges in Chicago—was categorical.

Courts upholding the prohibition on misdemeanor domestic violence convictions have often observed that the burden is not actually an absolute or categorical one because relief remains available—and this leads them to apply a less rigorous analysis. For example, the Ninth Circuit reasoned that while the ban on domestic violence misdemeanors "substantially burdens Second Amendment rights, the burden is lightened by the[] exceptions" that could potentially provide relief. *See United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013). A later decision explains that the court in *Chovan* "applied 'intermediate' rather than 'strict' judicial scrutiny in part because section 922(g)(9)'s 'burden' on Second Amendment rights was 'lightened' by those mechanisms." *See Fisher v. Kealoha*, 855 F.3d 1067, 1071 n.2 (9th Cir. 2017) (*citing Chovan*, 735 F.3d at 1138).

Similarly, when the Sixth Circuit upheld the prohibition in *Stimmel v. Sessions*, 879 F.3d 198 (6th Cir. 2016), it reasoned that the prohibition was "a significant restriction, but Congress lightened the burden on the right by providing domestic violence misdemeanants with four mechanisms of relief from their firearm disability." *Id.* at 207. Likewise, when the Fourth Circuit upheld the prohibition in *United States v. Staten*, 666 F.3d 154 (4th Cir. 2011), it found the "prohibitory sweep [was] further narrowed by" the statutory exceptions provided for expungements, pardons and restorations of civil rights. *See id.* at 163 (*citing* 18 U.S.C. §921(a)(33)(B)(ii)). This contributed towards the

court's conclusion that there was a "reasonable fit" between the government's objective and the burden imposed. *See id.*

The situation presented here is substantially different because there is definitively *no* relief available to Petitioner, who has been denied a pardon and otherwise has no relief available. This means that the government must provide a *stronger* public policy justification and show a *greater* degree of "fit" than the court in *Skoien* required. It is, of course, the government's burden to justify the restrictions it imposes. *See Chairez*, 2018 IL 121417 at ¶50 (*quoting Ezell*, 651 F.3d at 708-09); *see also Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012).

C. The State has Not Justified its Burden

The State cites the purpose of "reducing," "preventing" and "stopping" incidents of "gun violence" and "armed mayhem." *See* State Br. pp. 41-42, 44. Certainly, these are important public purposes. The problem lies in the utter lack of fit with Petitioner's circumstances.

To justify the burden that is at issue here, the State relies almost exclusively on decisions from federal appellate courts that—under varying circumstances and by varying rationales—upheld the domestic violence misdemeanor prohibition. *See id.* at 37-48. The proffered rationale is that "[a]dding a firearm to domestic violence situations makes them even deadlier" and "'increases the likelihood that it will escalate to homicide.'" *Id.* at 42 (*quoting United States v. Castleman*, 572 U.S. 157, 159-60 (2014)). This is fair enough, but it

presupposes the existence of a "domestic violence situation" in the first place. There is no reason to think a domestic violence situation still exists here.

The "fit" between the State's public safety purpose and the burden imposed breaks down on the facts presented here—and for reasons the court below cited, but which the State chooses not to address. The first is that Petitioner does not fall squarely within the intended sweep of the statute. When Congress enacted §922(g)(9), it "lightened" the burden (in the words of the Sixth and Ninth Circuits) because it provided exceptions for convictions that were expunged, set aside, pardoned or for which an individual had civil rights restored. *See Stimmel*, 879 F.3d at 207; *Chovan*, 735 F.3d at 1138; *see also Staten*, 666 F.3d at 163; *Skoien*, 614 F.3d at 644-45. Moreover, Congress enacted §922(g)(9) subject to §925(c), which expressly provides that federal prohibitions on gun ownership will not apply in cases where "the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. §925(c). For all practical purposes, this is the situation presented here, as the circuit court applied the largely analogous standard found in 430 ILCS 65/10(c)(2)-(3) to conclude that Petitioner is not likely to act in a manner dangerous to public safety and that relief would not be contrary to the public interest. Presumably, Petitioner would be able to obtain a similar determination, and relief under §925(c)—if review by the Attorney General was actually

available. But as discussed previously, it is not. Thus, while Petitioner falls outside the intended sweep of the prohibition, she remains subject to it. The fit is weak from the outset.

The second manner in which the "fit" breaks down is the utterly irrational manner in which the burden actually applies. Under the "only three rights" approach that currently dominates the federal appeals courts, relief is available under the "civil rights restored" exception only if an individual actually loses, and then has restored, the right to vote, to serve on a jury or to hold public office. In Illinois, misdemeanor convictions do not result in the loss of any of these rights unless a court sentences an individual to a term of confinement. If there is confinement, then an individual loses the right to vote during that term, but automatically receives that right back upon release. *See* 730 ILCS 5/5-5-5(c). This means that domestic violence misdemeanants who serve time in jail get their right to keep and bear arms back as soon as they are released. But, misdemeanants who serve *no* jail time never get them back, even though individuals in this category are by all indications the less serious offenders, as evinced by the fact that they were never sentenced to confinement. *See Coram*, 2013 IL 113867 at ¶18 (op. of Karmeier, J.); *see also Pournaras v. People*, 2018 IL App (3d) 170051, ¶14 (convicted felon had civil rights restored upon completion of sentence).

Perhaps the federal government could justify this arbitrary application of the law by denying responsibility for the precise manner in which federal law

"plays out" in each of the fifty states. *Cf. Skoien*, 614 F.3d at 645 (*citing Logan v. United States*, 552 U.S. 23 (2007)). But this case is about ISP's revocation of Petitioner's FOID Card, not any action the federal government took. *See Coram*, 2013 IL 113867 at ¶94 (Burke, J., concurring). And the reason that ISP revoked Petitioner's FOID Card is that the Illinois legislature amended the FOID Act to require ISP to apply federal prohibitions. In doing so, the Illinois legislature made Petitioner subject to this arbitrary result. And if the legislature had not amended the FOID Act in this manner, then there is little room for dispute that the court below would have been free to grant Petitioner relief based on its conclusion that Petitioner satisfied the requirements of 430 ILCS 65/10(c). *See Coram*, 2013 IL 113867 at ¶¶99, 101 (Burke, J., concurring).

The only data the State provides is contained within the court decisions it cites. *See* State Br. at 42-43. This consists of two studies indicating that, when there is a domestic violence situation, the presence of a firearm increases the likelihood of homicide. *See Skoien*, 614 F.3d at 643 (*citing* Arthur Kellerman, et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 New England J. Medicine 1084, 1087 (1993); Linda E. Saltzman, et al, *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 J. Am. Medical Ass'n 3043 (1992)). Of course, this runs from the premise that there is a domestic violence situation in the first place. The State also cites to a government study indicating that intimate partners killed 678 women and 147 men using guns in 2005. *See Staten*, 666 F.3d at 166 (*citing* James Alan Fox & Marianne W. Zawitz, Bureau of

Justice Statistics, U.S. Dep't of Justice, *Homicide Trends in the United States* 101 (2007)). But again, no one is disputing that domestic violence is a problem, or that the government has an interest in addressing it. These studies do not establish a "fit" between these objectives and the burden imposed on Petitioner.

The real "fit" issue is recidivism, as this goes to the question of whether there is a good reason for concluding that Petitioner's 2001 conviction indicates a substantial ongoing risk at the present time. On this issue, the State cites three studies contained within judicial decisions. *See* State Br. p. 43. But two of these concern the risk of recidivism "within three years of conviction." *Id.*; *see Skoien*, 614 F.3d at 644 (*citing* John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 Crime & Justice 1, 31 (2001); John Wooldredge & Amy Thistlewaite, *Reconsidering Domestic Violence Recidivism: Individual and Contextual Effects of Court Dispositions and Stake in Conformity* ii, iv (1999)). These indicate little or nothing here, where far more than three years have passed without incident.

The State last cites "an overall estimated recidivism range between 40% and 80%" following a misdemeanor domestic violence conviction, without specifying any timeframe. State Br. p. 43; *see Stimmel*, 879 F.3d at 208 (*citing* Carla Smith Stover, *Domestic Violence Research: What Have We Learned and Where Do We Go From Here?*, 20 J. Interpersonal Violence 448, 450 (2005)). But on review, this statement in Carla Stover's research paper was a summary of the conclusions contained in two other studies, both of which concerned relatively short periods

of time. *See* Stover, *supra*, at 450 (*citing* Joel Garner, et al., *Published Findings from the Spouse Assault Replication Program: A Critical Review*, 11 J. of Quantitative Criminology 3 (1995); Melanie Shepard, *Predicting Batterer Recidivism Five Years After Community Intervention*, 7 J. of Family Violence 167 (1992)). Specifically, the Garner, et al. paper attempted to harmonize the results of seven studies that had looked at whether arrest deterred future incidents of abuse in six different cities. *See* Garner, at al., *supra*, at 3, 10-11. The authors found that 6-month recidivism rates varied broadly from 6.5% to 62.8% across the six cities, but they "recommend[ed] caution in interpreting the published results on the prevalence of reoffending until more complete and consistent analyses are available." *See id.* at 12-13. Notably, a later report that continued this analysis found across-the-board recidivism rates of 36% in cases of arrest and 48% in cases of nonarrest. *See* Christopher D. Maxwell, et al., Nat'l Inst. of Justice, *The Effects of Arrest on Intimate Partner Violence: New Evidence From the Spousal Assault Replication Program* at 5 (2001). This later analysis included data "which for some suspects lasted nearly 3 years." *Id.* at 8. The other study, by Melanie Shepard, looked specifically at five-year recidivism rates among 100 men in Duluth, Minnesota and, at the end of the five years, found a recidivism rate of 40% (with recidivism defined to include a domestic assault conviction, an order of protection and/or being a "police suspect[] for domestic assault"). *See* Shepard, *supra*, at 170, 173. So, significantly, *none* of these studies purport to address recidivism for anything more than at most five years, and most considered a shorter period. In contrast,

18 years have passed here, without any recidivist incidents taking place. These studies do not justify the ongoing burden at this point in time.

Again, the court in *Skoien* required "some form of strong showing" to show that the prohibition for misdemeanor domestic violence convictions was "substantially related to an important governmental objective." *Skoien*, 614 F.3d at 641; *see also Chairez*, 2018 IL 121417 at ¶37. The State has failed to meet that burden. And the State has especially failed in light of the fact that a more rigorous standard applies here.

IV. The FOID Act violates the Second Amendment and Article I, Section 22 of the Illinois Constitution by Requiring a License to Own a Firearm

For these reasons, the application of 430 ILCS 65/8 and 65/10 to Ms. Johnson is unconstitutional as-applied, and the circuit court's decision may be affirmed on that basis. But the conclusion of the court below that the State must stop preventing Ms. Johnson from exercising her Second Amendment right to armed self-defense in the home is also correct, and should be affirmed, for another, independent reason: The FOID Card requirement *itself* is *facially* unconstitutional. The State has no authority, under the Second Amendment, to impose a prior restraint on an ordinary citizen's exercise of her fundamental right to armed home defense. Accordingly, not only was the court below correct that Ms. Johnson must be issued a FOID Card; under the Second Amendment, Ms. Johnson *cannot be required* to obtain a FOID Card in the first place, before exercising her core Second Amendment rights.

While Petitioner did not squarely present this facial constitutional claim in the court below, it is well settled that this court "can sustain the decision of the circuit court on any grounds which are called for by the record." *People v. Cornelius*, 213 Ill. 2d 178, 192 (2004). Moreover, a party can challenge a statute's constitutionality "at any time" so long as the Illinois Attorney General receives notice under Supreme Court Rule 19, *see U.S. Bank Tr. Nat'l Ass'n v. Junior*, 2016 IL App (1st) 152109, ¶22, and here, the Illinois Attorney General is on notice because ISP is a party, *see People v. Croom*, 2012 IL App (4th) 100932, ¶12. What is more, the constitutionality of the FOID Card requirement is already before this Court in another case in which the State is a party represented by the Attorney General's office. *See State v. Brown*, No. 1241000. Requiring the Attorney General's office to address the requirement in this case thus will not prejudice it in any way, and we respectfully submit that the Court will benefit from our briefing on this issue.

A. The FOID Act Burdens Conduct Within the Scope of the Right to Keep and Bear Arms

As discussed above, this Court analyzes Second Amendment challenges under a two-step approach—asking first whether the challenged law applies to "conduct that falls within the scope of the amendment." *People v. Webb*, 2019 IL 122951, ¶9. We have already established that it does. Under the FOID Act—one of only two such laws in the Nation—citizens must seek the State's prior approval before even *possessing* a firearm *in the home*. And as the U.S. Supreme Court has held, the right to keep and bear arms "in defense of hearth and home"

is "the *central component* of the right." *District of Columbia v. Heller*, 554 U.S. 570, 599, 635 (2008). After all, "the home" is the place, according to *Heller*, "where the need for defense of self, family, and property is most acute." *Id.* at 628. There can thus be no serious dispute that the conduct restricted by the FOID Card requirement lies within the Second Amendment's protective scope.

Nor is the State's self-defense prior restraint one of the "longstanding" regulatory measures that, under *Heller*, is presumptively constitutional. 554 U.S. at 626–27. Petitioner is aware of *no* analogous restriction that was on the books in any jurisdiction in the Nation in 1791, "the critical year for determining the [Second Amendment's] historical meaning." *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012); *see also Gamble v. United States*, 587 U.S. ___, 139 S. Ct. 1960, 1975 (2019) (*Heller* determined the scope of the Second Amendment based on "the public understanding in 1791" as evidenced by "the text of the Second Amendment" itself and "a wealth of authority" from the time of the Founding). And the FOID Act's regime remains an extreme outlier today: only two States in the Nation, Illinois and Massachusetts, impose such a restriction on keeping any common arms in the home. *See* Mass. Gen. Laws ch. 140, §129C. The FOID Act's requirement of a license for mere home possession is and has always been a stranger to our constitutional traditions; it is not a traditional, longstanding exception to the Second Amendment's scope.

B. The FOID Act Is Categorically Unconstitutional—Or, at a Minimum, Subject to Strict Scrutiny

If the challenged law burdens conduct within the scope of the Second Amendment, courts "must determine and apply the appropriate level of constitutional scrutiny." *Webb*, 2019 IL 122509 at ¶9. At this second step, broadly prohibitory laws are categorically unconstitutional. *See id.* at ¶21; *People v. Aguilar*, 2013 IL 112116, ¶21. Less restrictive laws are subject to heightened scrutiny, the rigor of which varies with the "proximity [of] the restricted activity . . . to the core of the second amendment right and the [number of] people affected by the restriction." *Chairez*, 2018 IL 121417 at ¶45. Rational basis review is never appropriate. *Id*. at ¶32.

The FOID Act applies broadly and impedes the core right of home defense, so it is categorically unconstitutional. Under binding precedent, a broadly prohibitory law that infringes core Second Amendment conduct is unconstitutional *per se*. The U.S. Supreme Court's decision in *Heller* makes clear that because the Second Amendment "elevates" its protections "above all other interests," infringements upon its "core protection" must be held unconstitutional categorically. 554 U.S. at 634–35. And the Illinois Supreme Court has likewise held that "a wholesale statutory ban on the exercise of a personal right that is specifically named in and guaranteed by the United States Constitution" is flatly impermissible. *Aguilar*, 2013 IL 112116, ¶21. Like the ban on keeping arms struck down as per se unconstitutional in *Heller*, 554 U.S. at 634–35, and the ban on bearing arms in public categorically struck down by this

Court in *Aguilar*, 2013 IL 112116, ¶21, the FOID Card requirement is flatly unconstitutional.

Even if not invalidated categorically, the FOID Act's burdensome license requirement still requires a particularly rigorous scrutiny. The level of scrutiny applied in Second Amendment challenges depends on the "proximity [of] the restricted activity . . . to the core of the second amendment right and the [number of] people affected by the restriction." *Chairez*, 2018 IL 121417, ¶45. Here, the challenged restriction strikes at the Second Amendment's heartland. The FOID Card requirement essentially acts as a prior restraint on the fundamental right to self-defense in the home. *Cf. N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (prior restraints carry a "heavy presumption against [their] constitutional validity"). Moreover, the FOID Card requirement applies as broadly as possible because it restrains virtually every Illinois citizen who wishes to exercise the right to keep and bear arms. The standard of review must accordingly be particularly rigorous. The government thus "bears the burden of showing a very strong public-interest justification and a close fit between the government's means and its end." *Chairez*, 2018 IL 121417 at ¶50.

C. The FOID Act Fails Any Heightened Constitutional Scrutiny

Even if the FOID Card requirement were subject to a less rigorous analysis akin to federal intermediate scrutiny—the lowest tier of scrutiny potentially available, *see Chairez*, 2018 IL 121417 at ¶32—it cannot survive. Under intermediate scrutiny, a law must be "narrowly tailored to serve a significant

governmental interest." *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). And even granting that the State's interest in public safety is significant, the FOID Card requirement cannot pass this standard because there is no evidence that it advances that interest at all.

The FOID Act's license requirement is unlikely to have any effect on public safety because most criminals will simply *ignore* it. "[M]ost of the methods through which criminals acquire guns and virtually everything they ever do with those guns are *already* against the law." James D. Wright & Peter H. Rossi, *Armed and Considered Dangerous* xxxv (2d ed. 2008), http://bit.ly/2XAu4bj; *see also* National Research Council, *Firearms and Violence: A Critical Review* 88 (Charles F. Wellford, et al. eds. 2005), http://bit.ly/2N9N7oN (empirical studies "show fairly consistently that many guns [used by criminals] are stolen or borrowed, rather than purchased in the primary market"); Bureau of Justice Statistics, *Source and Use of Firearms Involved in Crimes: Survey of Prison Inmates, 2016* 1 (2019), http://bit.ly/2NcGqm8 ("Seven percent [of prisoners who had possessed a firearm during their offense] had purchased it under their own name from a licensed firearm dealer."). It defies reality to suggest that criminals bent on committing violent, unlawful acts will first submit an application, pay the $10 fee, and wait 30 days before acquiring their crime guns. No, the burden of the FOID Act falls disproportionately *on the law-abiding*. It therefore most likely has the perverse effect of undermining public safety, by making it more difficult for law-abiding citizens to defend themselves from violent crime. *See* Gary Kleck &

Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. Crim. L. & Criminology 150, 164 (1995) (noting that armed self-defense is extremely common, and that "each year in the U.S. there are about 2.2 to 2.5 million [defensive uses of guns] of all types by civilians against humans."); National Research Council, *supra*, at 103 ("At least 19 other surveys have resulted in estimated numbers of defensive gun uses that are similar (*i.e.*, statistically indistinguishable) to the results found by Kleck and Gertz").

Importantly, even if the FOID Act *does* advance public safety, it burdens far more constitutionally protected conduct than necessary in the process. Even under intermediate scrutiny, a challenged restriction cannot burden substantially more constitutionally-protected conduct than necessary to achieve the State's interest. *McCullen*, 573 U.S. at 494. In *McCullen*, for example, the Supreme Court struck down a Massachusetts "buffer zone" law forbidding certain types of speech outside of abortion clinics, reasoning that the State had failed to show that measures substantially less restrictive than such an extreme prophylactic measure were not just as "capable of serving its interests." *Id*. Massachusetts's law, the Court noted, was "truly exceptional," and the State was able to "identify no other . . . law" that was comparable, raising the "concern that the Commonwealth has too readily forgone options that could serve its interests just as well." *Id.* at 490. Even in the context of intermediate scrutiny, the State must "show[ ] that it seriously undertook to address the problem with less intrusive tools readily available to it," or at the least, "that it considered different methods

that other jurisdictions have found effective." *Id.* at 494. This requirement, the Court explained, "prevents the government from too readily sacrificing speech for efficiency." *Id.* at 486.

The FOID Act fails intermediate scrutiny under the very same reasoning. As in *McCullen*, there are far less-restrictive means available for achieving the State's professed goals. Federal law, for example, already requires firearm dealers to run background checks to ensure that they do not sell firearms to prohibited purchasers. *See* 18 U.S.C. §922(t). Illinois also can supplement these measures by, for example, requiring individuals convicted for the first time of a violent felony or adjudicated mentally incompetent (and sufficiently dangerous) to surrender any firearms they own. Employing these methods may be more costly, or less convenient. But while nakedly suppressing constitutionally protected conduct "is sometimes the path of least resistance," intermediate scrutiny's tailoring requirement is designed precisely to "prevent[ ] the government from too readily sacrificing [constitutional rights] for efficiency." *McCullen*, 573 U.S. at 486.

Critically, the very fact that only Illinois and one other State rely on a blanket licensing requirement shows that this requirement is not necessary. "It would be hard to persuasively say that the government has an interest sufficiently weighty to justify a regulation that infringes constitutionally guaranteed Second Amendment rights if the Federal Government and the states have not traditionally imposed—and even now do not commonly impose—such

a regulation." *Heller v. District of Columbia*, 670 F.3d 1244, 1294 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). Forty-eight States (41 of which have lower murder rates than Illinois, Centers for Disease Control & Prevention, *Homicide Mortality by State*, https://bit.ly/2BBgqcI) rely on some combination of less-burdensome measures to keep firearms out of the hands of violent criminals and the mentally infirm; Illinois cannot credibly claim that only it and Massachusetts have happened upon the single, necessary means of achieving this end.

Indeed, Illinois cannot show that it even considered these alternative methods—embraced, and found effective, in virtually every other jurisdiction in the country. As in *McCullen*, the State accordingly never "seriously undertook to address the problem with less intrusive tools readily available to it. Nor has it shown that it considered different methods that other jurisdictions have found effective." *McCullen*, 573 U.S. at 494; *see also Bruni v. City of Pittsburgh*, 824 F.3d 353, 371 (3d Cir. 2016). That alone is fatal to the FOID Act's draconian licensing regime.

While the foregoing suffices to establish the FOID Act's unconstitutionality, the State's requirement that its citizens not only apply for a license before exercising their rights, but also *pay* for it, further undermines the FOID Act's validity. This is invalid under well-settled law. The power to tax is the power to destroy. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 327 (1819). Recognizing as much, both the United States Supreme Court and this Court have consistently struck down special taxes on the exercise of

constitutional rights. As the U.S. Supreme Court put the point in 1944, citizens cannot "be required to pay a tax for the exercise of . . . a high constitutional privilege." *Follett v. McCormick*, 321 U.S. 573, 578 (1944). Accordingly, where a tax or fee "single[s] out" constitutionally protected conduct "for special treatment," it "cannot stand unless the burden is necessary to achieve an overriding governmental interest." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 582 (1983).

The FOID Act does just that. In addition to requiring the State's blessing in advance of possessing any firearm, the Act provides that citizens may obtain that prior approval only "upon the payment of a $10 fee." 430 ILCS 65/5(a). And once an applicant receives her FOID Card, she faces further fees still. One such fee is inevitable: she must renew her FOID Card every 10 years, for another $10 fee. *See* 430 ILCS 65/5(b). If she changes her address or legal name, she must promptly inform the Police Department and obtain a corrected FOID Card, for a $5 fee. *See* 430 ILCS 65/13.2. And if her card is "lost, destroyed, or stolen," she must obtain a replacement, again for at least a $5 fee. *See id*. In Illinois, these are the costs of exercising a constitutional right.

Because a tax is "a powerful weapon against the taxpayer selected," *Minneapolis Star*, 460 U.S. at 585, courts have "carefully and meticulously scrutinized" taxes on the exercise of fundamental rights, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 667 (1966). In *Harper*, the U.S. Supreme Court struck down a $1.50 poll tax, *i.e.*, a payment required to vote. *See id*. at 664 n.1. "Voter

qualifications have no relation to wealth nor to paying or not paying this or any other tax," the Court said, yet the tax made "the affluence of the voter or payment of [a] fee an electoral standard." *Id*. at 666. Thus, the Court held, the tax infringed on citizens' fundamental rights to equal protection and to vote. *See id*. at 666, 670. Although a state is generally free to "exact fees from citizens for many different kinds of licenses," such as driver's licenses and other privileges granted by the State, a State may not exact fees for the exercise of fundamental, constitutional rights. *Id*. at 668.

The principles applied in *Harper* apply equally to other freedoms. In *Minneapolis Star*, the Court struck down a state law that singled out the press by imposing a tax on paper and ink. Even though the law did not clearly make newspapers' tax burdens greater than other businesses', and even though no direct evidence suggested that it was enacted for the purpose of suppressing speech, *see* 460 U.S. at 586–89, the Court held that it violated the First Amendment. The existence of the tax alone "suggest[ed] that the goal of the regulation [wa]s not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Id.* at 585. Not long after, the Court struck down another state tax that "targeted a small group of newspapers," reiterating that "[a] tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228, 234 (1987) (alteration in original) (*quoting Minneapolis Star*, 460 U.S. at 592–93). The Court has likewise

struck down taxes that target religious practice. *See Follett*, 321 U.S. at 577; *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943); *see also Jimmy Swaggart Ministries v. Board of Equalization of Calif.*, 493 U.S. 378, 386 (1990) (observing that "flat license taxes that operate[ ] as a prior restraint on the exercise of religious liberty" have been held unconstitutional). Although these decisions arose out of many different constitutional provisions, they are united in their holdings that "[a] state may not impose a charge for the enjoyment of a right granted by the federal constitution" absent a compelling justification. *Murdock*, 319 U.S. at 113.

This Court applied the same principles and level of scrutiny under Constitution of Illinois in *Boynton v. Kusper*, where it found that a $10 fee on marriage licenses, which was used to fund programs for victims of domestic violence, imposed an unconstitutional burden on the right to marry. *See* 112 Ill. 2d 356, 369 (1986). The Court expressly declined to apply so-called "rational-relation" review, instead applying strict scrutiny because the tax "impose[d] a *direct* impediment to the exercise of [a] fundamental right." *Id*. at 369 (*citing Minneapolis Star*, 460 U.S. at 575). Under that standard of review, it made no difference that the legislature had found a relationship between marriage and domestic violence. On the same "cause-and-effect" logic, "other worthy social problems can be found that are just as closely and reasonably related to marriage as is domestic violence, if not more so." *Id.* at 367–68. Thus, "countless other social welfare programs would qualify for monies obtained by imposing a similar tax on those who apply for marriage license." *Id*. at 367. The amount of

the tax is likewise irrelevant. "Once it is conceded that the State has the *power* to . . . single out marriage for special tax consideration, there is no limit on the amount of the tax that may be imposed." *Id*. at 369–70. Coupled with that inherent danger was the likelihood that "some people will be forced by the tax imposed to alter their marriage plans and will have suffered a serious intrusion into their freedom of choice." *Id*. at 370. These risks were enough to render the tax unconstitutional.

As in these cases, so too here. The same principles and legal standards apply to the right to keep and bear arms as apply to the rights to vote, speak, and marry. No less than with other rights, "[t]he power to tax the exercise of [this] privilege is the power to control or suppress its enjoyment," *Murdock*, 319 U.S. at 112; "wealth or fee paying has . . . no relation" to the qualifications for exercising the right to keep and bear arms; and the core right of lawful, armed self-defense is too precious and fundamental to be burdened in this way, *Harper*, 383 U.S. at 670. To apply any lesser standard than strict scrutiny would thus be to render the Second Amendment a "second-class right," an approach both the U.S. Supreme Court and this Court have rejected. *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality); *see also People v. Aguilar*, 2013 IL 112116, ¶21. Accordingly, the FOID Act, which singles out the exercise of Second Amendment rights for special fees and surcharges, must be weighed under strict scrutiny.

Nor can the FOID Act be upheld because its $10 fee is modest in amount. As the courts have repeatedly held, "[t]he degree of the discrimination is

irrelevant," *Harper*, 383 U.S. at 668, since if the power of the Government to condition the exercise of Second Amendment freedoms on the payment of a fee is acknowledged, "there is no limit on the amount of the tax that may be imposed," *Boynton*, 112 Ill.2d at 370. Indeed, Illinois lawmakers have sought to heighten the burdens imposed by the FOID Act: the House has recently passed a bill that would quadruple the fees to $20 every five years, impose additional fees for defraying the costs of a background check, and require the submission of fingerprints along with the application—for up to an additional $30 payment. *See* Bill Status of SB1966, *101st General Assembly*, Ill. Gen. Assemb. (June 25, 2019, 4:10 PM), https://bit.ly/2IKL4Uf.

To be sure, in the First Amendment context the Supreme Court has permitted fees on the exercise of constitutional rights when the fee is "not a revenue tax, but one to meet the expense incident to the administration of the [licensing law] and to the maintenance of public order in the matter licensed." *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941) (quotations omitted). But this line of cases is readily distinguishable. While *Cox*, for example, upheld a state law requiring licenses to conduct a parade, that decision was based on two features of the law that are absent here. First, in the unique First Amendment context, a licensing system of the kind in *Cox* actually *facilitates* speech by reconciling different citizens' competing claims to use the same property for purposes of engaging in expression. Without a licensing scheme, there would be no way to coordinate the use of the streets and parks for protest or parade, and the result

would be chaos and less protected speech overall as competing parades crowded out each-other's message. *See id*. at 570–72. Second, the Court in *Cox* emphasized that the licensing regime there was strictly a neutral time, place, and manner restriction—and it cautioned that it would not have upheld the law if it had been applied in a content-discriminatory matter to squelch certain types of speech or to prohibit expression "of any kind at any time, at any place, and in any manner without a permit." *Id.* at 577.

Far from supporting the FOID Act, this reasoning shows why it is unconstitutional. The FOID Card requirement does not facilitate the exercise of the right to keep and bear arms, since that right does not suffer from a "tragedy of the commons" akin to the one at work in the First Amendment parade context. Instead, it restricts the right of virtually all citizens merely to exercise their right to possess their own firearms for self-defense in the home. Nor is the FOID Card requirement a neutral time, place, and manner restriction; under the Act, there is no time in which an Illinois citizen can bear arms, no place she can keep them, and no manner in which she can exercise her fundamental right to armed self-defense, without first obtaining a FOID Card and paying a recurring $10 fee for the pleasure of doing so. The FOID Act cannot be upheld under the *Cox* line of cases; instead, it must be subjected to strict judicial scrutiny. And as shown above, it cannot be sustained under even intermediate scrutiny.

CONCLUSION

The circuit court should be affirmed.

Respectfully submitted,

/s/ David D. Jensen
DAVID D. JENSEN

REBECCA M. BLAKESLEE

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service and those matters to be appended to the brief under Rule 342(a) is 14,910 words.

/s/ David D. Jensen
David D. Jensen

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on July 29 2019 I electronically filed the foregoing BRIEF OF PETITIONER-APPELLEE with the clerk of the Illinois Supreme Court, by using the Odyssey eFileIL System.

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

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I further certify that two other participants, named below, are not registered service contacts on the Odyssey eFileIL system, and thus was served by transmitting a copy from my e-mail address to all primary and secondary e-mail addresses of record designated by that participant on July 29 2019:

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Under penalty as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth in this instruction are true and correct to the best of my knowledge, information, and belief.

/s/ David D. Jensen
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