No. 127201

IN THE
SUPREME COURT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS Plaintiff-Appellant, v. VIVIAN CLAUDINE BROWN, Defendant-Appellee.	)	On Appeal from the Circuit Court of White County, Illinois, No. 17-CM-60 Hon. T. Scott Webb, Judge Presiding

BRIEF OF AMICUS CURIAE MADISON COUNTY IN SUPPORT OF DEFENDANT-APPELLEE

THOMAS A. HAINE
Madison County State's Attorney
ANDREW K. CARRUTHERS
Assistant State's Attorney
Chief, Civil Division
JOHN C. HANSON
Assistant State's Attorney
157 North Main Street, Suite 402
Edwardsville, IL 62025
618-296-4050
akcarruthers@co.madison.il.us
jchanson@co.madison.il.us

Attorneys for Amicus Curiae Madison County

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Carolyn Taft Grosboll
SUPREME COURT CLERK

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INTEREST OF AMICUS CURIAE

Amicus State's Attorney Thomas A. Haine (State's Attorney, Madison County), being enjoined by his sworn duty[1] to protect and defend the rights of Madison County citizens, has an inherent interest in the constitutionality of criminal statutes like the Firearm Owners Identification Card Act (the "FOID Act"), which it is his office's duty to enforce in Madison County. Further, after a review of years of data from Madison County and practical experience from his office, it is his opinion that the FOID Act does not *in fact* advance public safety in Madison County and is an unconstitutional burden on peaceable Madison County citizens.

SUMMARY OF ARGUMENT

Current Illinois precedent requires either intermediate or strict scrutiny for laws impinging on core constitutional rights, as here. The FOID card fails on either of these levels of scrutiny because the FOID requirement is unhelpful to the core public safety interest regarding firearms: preventing lawless gun violence. In our office's experience, after a full survey of the previous five years of FOID prosecutions, FOID violations are few in number overall and make relatively little impact in combatting violent crime.

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[1] *See Powers and duties of State's Attorney* 55 ILCS 5/3-9005(a); *see also* Oath 55 ILCS 5/3-9001, "I do solemnly swear … that I will support the constitution of the United States and the constitution of the state of Illinois, and that I will faithfully discharge the duties of the office of state's attorney according to the best of my ability."

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Further, upon review of the applicable legal principles, it is the position of this office that to require a resident of the State of Illinois to fill out a form, provide a picture ID and pay a fee to obtain a FOID card before exercising their constitutional right to self-defense with a firearm is a *per se* violation of the Second Amendment to the United States Constitution, as applied to the States.[2] History shows there is no analogous Founding era regulation that is similar to the universal scope of the FOID Act's pre-possession licensure requirement for all firearms.

Striking down the FOID Act would fit squarely within the Judiciary's ongoing guardianship of basic constitutional rights. Courts have made clear that legislatures cannot legitimately require American citizens to pay a fee and carry documentation before they engage in political speech, assert their right against self-incrimination, or vote in an election. *Thornhill v. Ala.*, 310 U.S. 88, 97-98 (1940) (condemning licensure of political speech), *Chavez v. Martinez*, 538 U.S. 760, 770-73 (2003) (describing the limits of the Self-Incrimination Clause); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666 (1966) (striking down any requirement that a person pay a fee in order to vote). Just as such infringements on citizens' rights were struck down as unconstitutional, the FOID Act must also be struck down.

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[2] Notably, the State's Attorney is conscious of his dual responsibilities both to support the Constitution of the United States and to prosecute offenses committed against the laws of the State of Illinois. Until such time as the courts clarify that such FOID restrictions are unconstitutional, the duty to enforce this law remains.

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ARGUMENT

I. THE FOID CARD ACT FAILS ANY LEVEL OF HEIGHTED SCRUTINY.

At the heart of the FOID Act is an express prohibition applicable to every law-abiding resident of the State of Illinois. *See* 430 ILCS 65/1, *et seq*. The Act states, in no uncertain terms, that Illinois residents may *not* possess a firearm for protection of their own home without first obtaining government approval to exercise that right. Specifically, the Act provides, in relevant part:

> No person may acquire or possess any firearm, stun gun, or taser within this State without having in his or her possession a Firearm Owner's Identification Card previously issued in his or her name by the Department of State Police under the provisions of this Act.

430 ILCS 65/2(a)(1). To apply for a FOID card, a person must pay $10 up front, and then again every 10 years. *See* 430 ILCS 65/5(a), 65/5(b). Those who possess a firearm without a FOID card face criminal penalties, with the offense ranging from a petty offense to a felony depending on the circumstances. *See* 430 ILCS 65/14.

There can be no real question that the conduct restricted by the FOID Card Act "falls within the scope" of the Second Amendment. *People v. Webb*, 2019 IL 122951, ¶ 9. The Second Amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. This Amendment reflects a preexisting individual right to keep and bear arms for

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self-defense and other lawful purposes, applicable to the states through the Fourteenth Amendment. *See Heller v. Dist. of Columbia*, (*Heller I*) 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010). And the U.S. Supreme Court has described the "right of law-abiding, responsible citizens to use arms in defense of hearth and home" as "the *central component* of the right." *Heller I*, 554 U.S. at 635, 599 (emphasis in the original). That is because "the home" is the place "where the need for defense of self, family, and property is most acute." *Id.* at 628.

By hindering the core of the right to keep arms in self-defense, the FOID Act clearly impinges on the Second Amendment, and also triggers higher scrutiny under Illinois precedent. *See People v. Chairez*, 2018 IL 121417, ¶ 45. The state must "bear the burden of showing a very strong public-interest justification and a close fit between the government's means and its end." *Id.* at ¶ 50. And "[i]f the State cannot proffer evidence establishing both the law's strong public-interest justification and its close fit to this end, the law must be held unconstitutional." *Id.* at ¶ 45, *citing Ezell v. City of Chicago*, 651 F.3d at 703.

Levels of scrutiny may be irrelevant going forward as Supreme Court precedent regarding fundamental constitutional rights shifts away from balancing tests and towards an analysis of history. *See, Infra, Sec. II.* But here, the FOID Act fails under any level of scrutiny, because once the Court peels back the academic theories and examines the actual practice of FOID

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enforcement, the Act has little if any evidence-based "strong public-interest justification."

To assist the Court in this analysis, we have surveyed prosecutions for the past five years in Madison County, the eighth largest county in Illinois with a population of over 260,000 residents. We have found that the FOID Act alone has very limited deterrence effect because people are almost never punished solely for a violation of the FOID Act. And where a law poses no practical deterrent to those who violate it, its public-interest justification exists only in theory, not in reality.

Two points revealed by our five-year survey are of particular relevance in this case. First, very few FOID violations are charged at all. Since 2016, only 200 violations of the FOID Act (430 ILCS 65/2(a)(1)) have been charged in Madison County. For context, in that same time frame, this office prosecuted over 20,000 felonies, on top of the far-more-numerous misdemeanors and traffic citations. Second, even fewer FOID charges result in a conviction. Only one-third of the 200 charged FOID cases resulted in a conviction, and only *one* was a felony conviction (for which only probation was imposed). The reasons for these dispositions are simple: When the FOID violation is the sole charge, it is easily remedied and thus often dismissed as moot. When the lack of a FOID accompanies more serious charges (as it very often does), prosecuting the FOID violation would add only a trivial penalty if any, and so it is not

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charged or is eventually dismissed as irrelevant when the more serious charges are disposed of.

In sum: in our experience, the FOID Act rarely leads to prosecutions, is often not the key charge in those prosecutions, and when it is the only charge, is most often dismissed because the Defendant is otherwise a law-abiding citizen. It is the practical experience of this office that the FOID card requirement is largely absent from public safety considerations in Madison County's criminal justice system, which is committed to fighting violent crime in the most effective and efficient manner possible.

II. HISTORY SHOWS THE FOID ACT IS *PER SE* UNCONSTITUTIONAL.

As described above, the FOID Act should fail under any level of scrutiny. But going forward, consulting history rather than tiers of scrutiny will likely be the rule for Second Amendment jurisprudence. Then-Judge Brett Kavanaugh concluded as much when he read the Supreme Court's 2008 *Heller I* decision as requiring lower courts "to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny." *Heller v. District of Columbia* (*Heller II*), No. 10-7036 at 5-6 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). Similarly, in a more recent Second Amendment case, then-Judge Amy Coney Barrett referenced *Heller I* and concluded that the proper analysis for Second Amendment purposes is one of "history and tradition … to identify the scope of the legislature's power to take" away a right. *Kanter v. Barr*, No. 18-1478 at 28 (7th Cir. 2019) (Barrett,

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J., dissenting). And Justices Kavanaugh's and Barrett's interpretations of prior Supreme Court precedent should be all the more compelling since their elevation to that Court. Indeed, all constitutional rights, including the Second Amendment, "are enshrined with the scope they were understood to have when the people adopted them." *Heller I*, 554 U.S. at 634-35. And the Supreme Court has rejected legal tests that make constitutional rights depend on a judge's view of the "*worth*" or "usefulness" of the right. *Id.* at 634. The relevant interests were weighed by the American people in the Founding era. See *Id.* at 634-35. "We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach." *Id.* at 634. And the current Court's strong preference for history over balancing tests is evident in a number of areas beyond even Second Amendment issues. C*f. American Legion v. American Humanist Association,* 139 S. Ct. 2067 (2019) (evincing the Court's shift to historical tests for Establishment Clause purposes); *Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246 (2020) (showing a similar shift for Free Exercise purposes).

Going forward, it should simply be that "[g]un bans and gun regulations that are not longstanding or sufficiently rooted in text, history, and tradition are not consistent with the Second Amendment individual right." *Heller II*, No. 10-7036 at 31 (Kavanaugh, J., dissenting). Therefore, the key question for this Court should be one of history: is the universal FOID requirement analogous to one of the "longstanding" types of regulations that are "presumptively

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lawful"? *Heller I,* 554 U.S. at 626-627 & N.26. By this standard, to be clear, it is not the Appellee's burden to show that FOID requirements were long *rejected*. Rather, it is the State's burden to show that FOID requirements (or something like them) were long *accepted*. See *Heller II*, No. 10-7036 at 14 (stating that "a regulation that is 'longstanding' … necessarily means it has long been accepted by the public") (majority opinion). In short, absence of evidence (of FOID-like regulations in the Founding) is positive evidence for the conclusion that the FOID Act is unconstitutional.

At times the historical analysis can be long and intensive. *See, e.g., Kanter v. Barr*, No. 18-1478 at 27-63 (7th Cir. 2019) (Barrett, J., dissenting). However, in this case, the history of regulations analogous to the FOID card requirement around the Founding era is straightforward and nonexistent. Simply put, we are aware of no FOID-like restriction – namely, a universal pre-possession licensure requirement applying to every person and every firearm – that was on the books in any jurisdiction in the Nation anytime near 1791, "the critical year for determining the [Second Amendment's] historical meaning." See *Moore v. Madigan*, No. 12-1788, 1 (7th Cir. 2012). The historical record could not be clearer or cleaner on this issue. In fact, the FOID Act is a national outlier *even today*. Only three states—Illinois, Massachusetts, and New York—require a license prior to owning firearms, and New York's law applies only to handguns. *See Guns Save Life, Inc.*, 2019 IL App (4th) 190334,¶ 57; MASS. GEN. LAWS ch. 140, § 129B; N.Y. PENAL LAW § 400.00; *see also*

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Kwong v. Bloomberg, No. 12-1578 (2d Cir. 2013). It is simply a historical fact that nothing like the FOID Act's requirement that law-abiding citizens obtain a license before possessing any kind of firearm in the home existed in or around the Founding era, and such a requirement is highly unusual even today.

CONCLUSION

Madison County is committed to robust Second Amendment protections. In November of 2018, the citizens of Madison County overwhelmingly passed a resolution making Madison County a Second Amendment "Sanctuary." Its residents enjoy hunting and shooting sportsmanship activities, and value their constitutionally protected ability to defend their homes and persons with firearms when necessary. As the chief law enforcement officer of Madison County, I have a fundamental interest in the preservation of the lawful balance of public safety and Second Amendment rights. As part of the St. Louis Metropolitan Area, Madison County citizens have an acute concern for the violence perpetrated by armed criminals. To prevent violence, my office is committed to empower law enforcement to keep weapons out of dangerous hands, and to promote a healthy culture of lawful gun-ownership for self-defense throughout our communities.

Rather than balance these interests, Illinois' FOID card requirement sacrifices fidelity to the Constitution for a merely theoretical advantage to public safety that, in the practical experience of Madison County's State's Attorney's Office, makes no measurable impact on our ability to punish

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lawbreakers and advance the safety of our communities. Also, a review of history makes it clear that the FOID Act burdens Second Amendment rights and is not the kind of regulation understood at the Founding era to be compatible with the right to "keep and bear arms."

WHEREFORE, the Amicus prays that the honorable court affirm Circuit Court of the Second Judicial Circuit, White County, Illinois, and make clear that the Constitution protects law-abiding, responsible citizens in Madison County and throughout Illinois from being forced to ask permission before they can simply protect their home.

Respectfully submitted,

THOMAS A. HAINE
Madison County State's Attorney

By: /s/ ANDREW K. CARRUTHERS
ANDREW K. CARRUTHERS
Assistant State's Attorney
Chief, Civil Division
JOHN C. HANSON
Assistant State's Attorney
157 North Main Street, Suite 402
Edwardsville, IL 62025
618-296-4050
akcarruthers@co.madison.il.us
jchanson@co.madison.il.us

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service is 10 pages.

/s/ Andrew Carruthers
Andrew Carruthers

CERTIFICATE OF FILING & SERVICE

The undersigned certifies under penalty of law as provided in 735 ILCS 5/1-109 that the statements in this instrument are true and correct and that the foregoing brief was electronically filed with the Illinois Supreme Court using the court's Odyssey eFileIL system, and was served on all counsel of record, listed below, via Odyssey eFile system on November 5, 2021.

/s/ Andrew Carruthers
Andrew Carruthers

Persons served:

Garson S. Fischer
eserve.criminalappeals@atg.state.il.us
Attorney for the Plaintiff-Appellant

David G. Sigale
dsigale@sigalelaw.com
Attorney for the Defendant-Appellee

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