No. 126840

In the

Supreme Court of Illinois

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

Plaintiffs-Appellants,

v.

VILLAGE OF DEERFIELD, ILLINOIS, *et al.*

Defendants-Appellees.

Appeal from the Appellate Court of Illinois
Second Judicial District, No. 2-19-0879.
There on Appeal from the Circuit Court of
Lake County, Illinois, No. 18-CH-498.
The Honorable Luis A. Berrones, Presiding

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INTRODUCTION

In 2013, the General Assembly sought to ensure the statewide regulation of "assault weapons." In order to do so, the General Assembly enacted the FOID Card Act, which preempted local regulation of the ownership and possession of "assault weapons. " *See* 430 ILL. COMP. STAT. 65/13.1. The FOID Card Act thus restricted municipalities from setting their own policies on "assault weapons." In 2018, however, the Village of Deerfield charted a new course and attempted to effectively ban the ownership and possession of assault weapons and certain "large capacity magazines" for all but a select few within the Village. *See* App. 92–106. Plaintiffs—Guns Save Life, Inc. and John William Wombacher III—brought this suit, alleging that Deerfield's 2018 ban violated, *inter alia*, the General Assembly's decision to preempt such local policymaking.

Deerfield's 2018 Ordinances are invalid for several reasons. First, even assuming home rule units retain some limited authority to regulate "assault weapons" under the FOID Card Act, that authority only allowed Deerfield to "amend" its 2013 Ordinance—it could not enact wholly new legislation. Second, even if Deerfield's 2018 Ordinances could be considered proper "amendments," Deerfield did not preserve its authority to enact such amendments because the 2013 Ordinance regulated possession but not ownership of assault weapons. Third, independent of any other argument, the FOID Card Act states that "the regulation of the possession or ownership of assault weapons are exclusive powers and functions of this State." 430 ILL. COMP. STAT. 65/13.1(c); *see also id.* at 65/13.1(e). Under Article VII, Section 6(h) of the Illinois Constitution, the General Assembly thus completely preempted home rule authority to regulate "assault weapons." Deerfield cannot arrogate to itself regulatory authority that the General Assembly expressly took away.

ARGUMENT

I. A Substantive Analysis Demonstrates Deerfield's 2018 Ordinances Were No Mere Amendments.

"A subsequent statute, revising the whole subject of a former one, and intended as a substitute for it, although it contains no express words to that effect, operates as a repeal of the former." *Bd. of Trs. of Ill. & Mich. Canal v. City of Chicago,* 14 Ill. 334, 336 (1853). This cardinal rule of interpreting statutes and ordinances is not disputed by Deerfield—nor could it be given the many cases in which this Court has applied the principle. *See, e.g.*, *Vill. of Park Forest v. Wojciechowski*, 29 Ill. 2d 435, 439 (1963); *City of Metropolis v. Gibbons*, 334 Ill. 431, 434–35 (1929); *Culver v. Third Nat. Bank of Chicago*, 64 Ill. 528, 534 (1871). Instead, Deerfield embraces the Second District's mistaken approach by arguing that no comparative analysis between Deerfield's 2013 Ordinance and its 2018 Ordinances was necessary. *See* Deerfield Br. 24. For instance, Deerfield emphasizes that it labeled its 2018 Ordinances "amendments" and the fact that at least some of the text of the 2013 Ordinance was incorporated into the 2018 Ordinances. *See* Deerfield Br. 21–23.

It is hardly surprising that Deerfield continues to emphasize labels and word counts over the substance of the law it enacted. The substantive changes wrought by the 2018 Ordinances are self-evidently more than mere "amendments." The changes are wholesale. Under the 2013 Ordinance, an individual could own an "assault weapon," possess that assault weapon for self-defense, transfer or sell it, and store it under defined conditions. App. 108–113. Under the 2018 Ordinance, ownership of an "assault weapon" is prohibited for all but a few, no self-defense exception is provided (because gunowners cannot defend themselves with firearms they cannot possess), the only sale or transfer allowed is to remove the firearm from village limits, and no transport or storage conditions are set out

because storage and transport are now illegal. App. 98–99. These changes are in addition to the change in the treatment of large capacity magazines, which changed from being unregulated in 2013 to being outright banned in 2018. As Justice McLaren stated, these substantive changes demonstrate that "the simple act of calling the 2018 ordinance an amendment of the 2013 ordinance does not make it one." *Easterday v. Vill. Of Deerfield*, 2020 IL App (2d) 190879, ¶ 89 (McLaren, J., concurring in part and dissenting in part) (App. 171).

Further, Deerfield ignores the crucial statutory context within which any alleged power to amend exists: the circumscribed authority under the FOID Card Act. The General Assembly invoked its power to totally exclude home rule unit legislation under Article VII, Section 6(h) of the Illinois Constitution. *See* ILL. CONST. art. VII, § 6(h) ("The General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit."); 430 ILL. COMP. STAT. 65/13.1(c), 13.1(e). Whatever power a home rule unit has to "amend[]" an existing local regulation, 430 ILL. COMP. STAT. 65/13.1(c), that power cannot be construed to undo the very limits on local regulation that the General Assembly enacted. After all, by interpreting the scope of the power to "amend," the Court "may consider the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another." *Murphy-Hylton v. Lieberman Mgmt. Servs., Inc.*, 2016 IL 120394, ¶ 25. In a statute that otherwise entirely preempts local regulation of "assault weapons," the power to amend cannot be the limitless power to make substantive changes that Deerfield claims. "To hold otherwise would represent an unwarranted expansion of the legislatively established parameters of the Act and would be inconsistent with the Act's policy

objective." *Id.* at ¶ 30. Any power to amend thus must be read narrowly so as to ensure home rule authority is exercised in the limited manner that the General Assembly authorized.

Deerfield's efforts to distinguish the Third District's decision in *Athey v. City of Peru*, 22 Ill. App.3d 363 (3d Dist. 1974) fall flat. The case, though not binding on this Court, is instructive and squarely on point. In *Athey*, the Third District considered whether a zoning provision was a "new ordinance" or an "amendatory ordinance" because different procedures would have been required for its passage depending on how the ordinance was classified. *Id.* at 366 (noting the classification of the ordinance was a "threshold" issue). The city in one of the introductory clauses of the ordinance at issue stated, "Whereas the City of Peru, Illinois now desires to *amend* comprehensively its existing ordinance by adopting a new ordinance." *Id.* (emphasis added). But when the ordinance "in all its terms" was examined, the court concluded that it was not "amendatory" in nature. *Id.* at 367. In the end, the Third District concluded that the zoning provision was no amendment because "[n]o area covered by ordinance number 1497 [was] left unregulated by [ordinance number] 1699 . . . The new enactment totally displace[d] the former provision." *Id*. at 368. So too here. Deerfield may have labeled its 2018 Ordinances "amendments," but "by revising the whole subject matter of [the] former [ordinance]," Deerfield enacted something wholly new. *Id.* Such wholly new enactments are not allowed under the FOID Card Act.

Deerfield seeks support for its position from this Court's decision in *Village of Park Forest v. Wojciechowski*, 29 Ill. 2d 435 (1963). But *Wojcieshowski*, if anything, proves Plaintiffs' argument. First, in that case, this Court assessed whether a village ordinance that

outlawed reckless driving and drunk driving was still in operation after a subsequent ordinance had been enacted. *Id.* at 437–38. The Court did not rely on the village's title or the labels used in the subsequent ordinance. Instead, the Court stated that "[i]n *substance*, although by different wording, the amendments re-enacted the provisions of the former sections." *Id.* at 436 (emphasis added). By "re-enact[ing] and repeat[ing] almost verbatim the provisions of the original ordinance which defined the offenses of reckless driving and drunken driving . . . the pertinent provisions of the original ordinance were continued in force." *Id.* at 439. And the Court considered that only "two provisions of the entire traffic code were amended and there was no manifestation of an intent to entirely revise and repeal the original ordinance." *Id.* at 439. In other words, the Court evaluated the *substance* of the new ordinance, assessed to what extent that *substance* differed from the former ordinance, and evaluated the scope of the changes. A substantive analysis between two ordinances is thus commanded by this Court's precedents.

The *Wojcieshowski* Court also explained that "it would produce an absurd result to say that the village intended there would be an interval when the offenses" of reckless and drunk driving "were not punishable." *Id.* at 439. Thus, continuation of the punishable conduct made sense. Yet in this case, the "absurd result" would be to think the "offenses" set out in Deerfield's 2013 Ordinance are anything but a dead letter—the operative provisions of the 2013 Ordinance have not "continue[d] in force." *Id.* 439. As explained above, a Deerfield resident cannot "store or keep" a firearm that they cannot legally possess. It would be as if the *Wojciechowksi* court considered an ordinance that banned owning a car altogether in a purported amendment to an ordinance relating to reckless or drunk driving. But that is, in essence, what Deerfield has done with its 2018 Ordinances.

As the circuit court held, "[t]he banning of assault weapons is substantively different than regulations regarding the transportation and storage of such weapons," App. 19, and the banning of large-capacity magazines is substantively different than simply defining them. The 2018 Ordinances "revise[ ] the whole subject matter" and "totally displace[ ] the former provision[s]" of the 2013 Ordinance. *Athey*, 22 Ill. App. 3d at 367–68. Deerfield may have had the power to amend, but it does not have the power to wholly rewrite. The 2018 Ordinances are thus invalid.

II. Deerfield's Authority to Ban Ownership Has Lapsed.

During the ten-day window in July 2013, home rule units were not empowered to enact just *any* ordinance or regulation that regulated the possession or ownership of assault weapons. Instead, the FOID Card Act states that any ordinance or regulation . . . that purports to regulate the possession or ownership of assault weapons in a manner that is *inconsistent* with this Act, shall be invalid unless the ordinance or regulation is enacted" before July 20, 2013. 430 ILL. COMP. STAT. 65/13.1(c) (emphasis added). Thus, whichever ordinance was enacted needed to regulate possession or ownership of assault weapons in a manner *inconsistent* with the FOID Card Act. But Deerfield's 2013 Ordinance only regulated the *possession* of assault weapons in a manner inconsistent with the FOID Card Act, it did not regulate the *ownership* of assault weapons at all. Thus, the 2013 Ordinance provided no predicate for Deerfield to later amend and use to ban ownership of assault weapons.

Deerfield does not dispute that the 2013 Ordinance failed to regulate ownership. Instead, Deerfield insists that there is nothing abnormal about "proscribing activity that was previously lawful." Deerfield Br. 26. For support, Deerfield points to other home rule

units' bans on assault weapons. *Id.* But Deerfield fails to mention that the operative bans in those home rule units were passed in November 2006 and in June 2013—before the FOID Card Act's preemption provision was effective, before the ten-day window began, and before any limitation on amendments became effective. *See Wilson v. Cook Cnty.*, 937 F.3d 1028, 1029 (7th Cir. 2019); *Friedman v. City of Highland Park*, 68 F. Supp. 3d 895, 897 (N.D. Ill. 2014). These examples thus reveal nothing about the scope of home rule units' amendment authority when the home rule units failed to regulate ownership inconsistent with the FOID Card Act in the first instance. Similarly, Deerfield's argument that home rule units have banned previously lawful billboards is beside the point. *See Lamar Whiteco Outdoor Corp. v. City of West Chicago*, 355 Ill. App. 3d 352 (2d Dist. 2005). After all, Deerfield fails to point to any statute anywhere circumscribing the nature of a home rule unit's billboard banning authority or limiting how it may alter the billboard regulations it has on the books.

The Amicus Brief by the Illinois Attorney General primarily argues, echoing the Second District, that the 2013 Ordinance did regulate ownership and that distinguishing between possession and ownership "is artificial." Illinois AG Amicus Brief at 21. But the General Assembly preempted local regulation of "the possession or ownership" of assault weapons, 430 ILL. COMP. STAT. 65/13.1(c), and this Court is not free to disregard that statutory text by declaring that "possession" and "ownership" are really the same thing. *See People v. Baskerville*, 2012 IL 111056, ¶ 25 (declining to read "resist" and "obstruct" to mean the same thing because of this Court's "obligation to avoid a construction which renders a part of the statute superfluous or redundant, and instead presume that each part

of the statute has meaning."); *see also People v. Gutman*, 2011 IL 110338, ¶ 38 (noting same obligation with respect to "profits" and "proceeds").

In its 2013 Ordinance, Deerfield did not "impose any greater restrictions on *ownership* of assault weapons than the FOID [Card] Act imposed." *Easterday*, 2020 IL App (2d) 190879, ¶87 (McLaren, J., concurring in part and dissenting in part) (App. 170). Instead, the 2013 Ordinance "regulated the possession of assault weapons, imposing restrictions on how assault weapons may be stored, kept, and transported." *Id.* at ¶ 86 (App. 169). The Attorney General does not dispute that the 2013 Ordinance regulated different conduct from the 2018 Ordinances, but instead resorts to an argument that the 2013 Ordinance could be *characterized* as an ordinance regulating ownership. *See* Illinois AG Amicus Br. at 20–22. But this Court need not resort to (mis)characterizations to interpret the 2013 Ordinance. Instead, the Court should focus on the manner in which the 2013 Ordinance actually regulated the conduct of its citizens and how it differentiates between ownership and possession. For instance, the 2013 Ordinance required that the lock or the locked container for the assault weapon "render such weapon inoperable by any person *other than the owner* or other lawfully authorized user." App. 111–12 (emphasis added). Thus, someone who *owned* the firearm could lawfully use it; someone who merely *possessed* the firearm without owning it generally could not. The 2013 Ordinance provided an exception that "[f]or purposes of this section, such weapon shall not be deemed stored or kept when being carried by or under the control of *the owner* or other lawfully authorized user." App. 112 (emphasis added). Thus, an *owner* could carry an assault weapon, but someone else who possessed the firearm generally could not. The 2013 Ordinance exempted owners from certain possession regulations so that the *owner* could, in fact,

possess these firearms in Deerfield. Such distinctions between ownership and possession are not uncommon in firearm regulation, as more fully explained in Plaintiffs Opening Brief. *See* Plaintiffs' Opening Br. at 21–22.

The Attorney General's after-the-fact recharacterization of Deerfield's 2013 Ordinance does not alter the reality that Deerfield made a policy decision in July 2013. It enacted an ordinance that only regulated possession. As Justice McLaren explained, "[h]aving regulated the storage and transportation of assault weapons in 2013, Deerfield could have changed or modified those restrictions, either increasing or decreasing the severity of the restrictions in the 2018 ordinance." *Easterday*, 2020 IL App (2d) 190879, ¶ 88 (McLaren, J., concurring in part and dissenting in part) (App. 171). "However, Deerfield did not regulate ownership, and one cannot amend a regulation that does not exist." *Id*

III. The Circuit Court Correctly Determined That the FOID Card Act Completely Preempted Home Rule Authority

Deerfield's 2018 Ordinances are also invalid for the independent reason that the FOID Card Act entirely preempted home rule authority to regulate so-called "assault weapons." As noted in Plaintiffs' Opening Brief, it is unnecessary for the Court to reach this issue should it conclude that Deerfield's 2018 Ordinances are unlawful for the reasons discussed above, yet the Court cannot rule for Deerfield and uphold the ordinances without deciding this issue.

Deerfield primarily argues that the words "may be amended" in Section 13.1(c) of the FOID Card Act controls the preemption inquiry here. *See* Deerfield Br. 17–20. But this Court's analysis must instead center around the text of the Illinois Constitution because the framers of the relevant preemption provisions were "strongly opposed to judicial 'preemption' and sought a means to reduce its importance." David C. Baum, *A Tentative*

Survey of Illinois Home Rule (Part II): Legislative Control, Transition Problems, and Intergovernmental Conflict, 1972 U. ILL. L.F. 559, 572. Thus, "the Illinois approach places almost exclusive reliance on the legislature rather than the courts to keep home rule units in line." *Scadron v. City of Des Plaines*, 153 Ill. 2d 164, 188 (1992). To that end, this Court's focus should be on which provision of the Illinois Constitution the General Assembly actually invoked, rather than the searching and amorphous judicial inquiry into legislative intent that Deerfield and its amici advocate.

Under the Illinois Constitution, the General Assembly has two mechanisms to preempt the authority of home rule units. Under Article VII, Section 6(h), the General Assembly "may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit." ILL. CONST. art. VII, § 6(h). In other words, Section 6(h) allows the General Assembly to completely displace the regulatory authority of home rule units. Under Article VII, Section 6(i), the General Assembly may "specifically limit by law the home rule unit's concurrent exercise of power." ILL. CONST. art. VII, § 6(i). Under Section 6(i), the General Assembly can partially preempt home rule legislation. Thus, the General Assembly cites Section 6(i) when it "intends to permit concurrent local legislation, but only within limits that are consistent with the state statutory scheme." Baum, *supra*, 1972 U. ILL. L.F. at 574. Consider the General Assembly's regulation of municipal term limits, which provides that:

> A home rule unit may not regulate term limits in a manner inconsistent with this Section. This Section is a limitation under subsection (i) of Section 6 of Article VII of the Illinois Constitution on the concurrent exercise by home rule units of powers and functions exercised by the State.

65 ILL. COMP. STAT. 5/3.1-10-17(c). In this statute, the General Assembly properly invoked 6(i) to allow concurrent authority and limited the manner in which that concurrent authority

could be exercised. *See Burns v. Mun. Officers Electoral Bd. of Vill. of Elk Grove Vill.*, 2020 IL 125714, ¶ 21.

Deerfield resists this general approach laid out in the Illinois Constitution and instead suggests, like the Second District, that the FOID Card Act creates a unique, "hybrid balance of regulatory power between the State and local governments." *See* Deerfield Br. at 17–18. Deerfield points to no caselaw supporting its novel theory of preemption. And what the General Assembly enacts is dispositive. Here the General Assembly expressly invoked its authority under Section 6(h), and once that power is exercised home rule regulatory authority is *completely* preempted by force of the Illinois Constitution. *See, e.g.*, *Schillerstrom Homes, Inc. v. City of Naperville*, 198 Ill. 2d 281, 287 (2001); *City of Chicago v. Roman*, 184 Ill. 2d 504, 517; *Vill. of Bolingbrook v. Citizens Utilities Co. of Ill.*, 158 Ill. 2d 133, 138 (1994). The FOID Card Act states that "the regulation of the possession or ownership of assault weapons are exclusive powers and functions of this State," 430 ILL. COMP. STAT. 65/13.1(c), and that "[t]his Section is a denial and limitation of home rule powers and functions under subsection (h) of Section 6 of Article VII of the Illinois Constitution," *id.* at 65/13.1(e). The invocation of Section 6(h) by the General Assembly is the end of the matter, and there is no "hybrid" form of preemption under that provision of the Illinois Constitution. As the circuit court correctly concluded, the General Assembly made state regulation in this area exclusive, and home rule units therefore may not exercise concurrent regulatory authority. *See Roman*, 184 Ill. 2d at 516.

To counter the plain text of the FOID Card Act to preempt home rule unit regulation, Deerfield places great reliance on the comments of Representative Scott Drury at a Village Board Meeting to supposedly explain the General Assembly's intent. It is not

clear how comments of a single legislator, made outside the context of legislative debate, in a forum where no other legislator could dispute his account, and made after the FOID Card Act had been passed would even qualify as "legislative history"—it is only legislative history to the extent that anything a legislator says in the past would be. Yet, if these comments somehow could be conceived of as some form of legislative history, they are a remarkably poor instance of it. Even in an era when the U.S. Supreme Court made more frequent use of legislative history, that court explained that "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979). Moreover, remarks made *after* the passage of a law are even less reliable. The Court explained that a Committee Report "subsequent" to enactment "provide[s] an *extremely hazardous* basis for inferring the meaning of a congressional enactment." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 116 n.13 (1980) (emphasis added). Assuredly, the after-the-fact comments of a single legislator are even more hazardous to rely upon.

The FOID Card Act "clearly deprives home rule units of the authority to regulate the possession or ownership of assault weapons," App. 16 (circuit court decision). As a consequence, Deerfield's 2018 Ordinances are completely preempted and invalid.

IV. Jurisdiction

Lastly, Deerfield contends that the issue of whether the Second Circuit had jurisdiction over this appeal cannot be reviewed by this Court because Plaintiffs did not cross-appeal. *See* Deerfield Br. at 31. This argument misses the mark as issues of subject-matter jurisdiction cannot be forfeited. *See Sandholm v. Kuecker*, 2012 IL 111443, ¶ 67 n. 3 ("[A] lack of subject matter jurisdiction may be raised at any time, in any court, either

directly or collaterally."). Moreover, Plaintiffs are *appellees*, with summary judgment having been granted in their favor by the circuit court. "[F]indings of the circuit court adverse to the appellee do not require that the appellee cross-appeal if the judgment of the circuit court was not, at least in part, against him." *Landmarks Pres. Council of Ill. v. City of Chicago*, 125 Ill. 2d 164, 174 (1988). After all, "[i]t is the judgment and not what else may have been said by the lower court that is on appeal to a court of review." *Material Serv. Corp. v. Dep't of Revenue*, 98 Ill. 2d 382, 387 (1983). To that end, appellees can raise arguments relating to the appellate court's jurisdiction in order to defend the judgment below without need of a cross appeal.

As explained in Plaintiffs' Opening Brief, Plaintiffs continue to believe the Second District lacked appellate jurisdiction and that lack of jurisdiction is an independent basis to vacate its decision. *See* Plaintiffs' Opening Br. at 2–4.

CONCLUSION

For the foregoing reasons, the Court should reverse the Second District.

Dated: July 7, 2021

Respectfully submitted,

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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 containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 14 pages.

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PLEASE TAKE NOTICE that on July 7, 2021, the Plaintiffs-Appellants submitted for filing by electronic means **REPLY BRIEF OF PLAINTIFFS-APPELLANTS** with the Supreme Court of Illinois.

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Under penalties as provided by law pursuant to section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

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CERTIFICATE OF SERVICE BY E-MAIL

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