IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the Second Judicial Circuit, White County, Illinois
Plaintiff-Appellant,	)	
v.	)	No. 17 CM 60
VIVIAN BROWN,	)	The Honorable Mark R. Stanley,
Defendant-Appellee.	)	Judge Presiding

REPLY BRIEF OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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ARGUMENT

The People's opening brief established that the circuit court's judgment should be reversed. Both this Court and the United States Supreme Court have held that the regulations imposed by the Firearm Owner's ID Card Act, 430 ILCS 65/2(a)(1) (the "FOID Card Act") — e.g., regulations preventing felons or the mentally ill from possessing firearms — are the sort of regulations permitted under the Second Amendment. If the State may constitutionally prohibit certain people from possessing firearms, then it must be allowed to establish a process to determine whether people fall into those prohibited categories. Nothing in defendant's brief supports a contrary conclusion. Defendant's position — that it is unconstitutional to convict someone of violating the FOID Card Act if that person could have received a FOID card had she bothered to apply — is meritless.

I. Article I, Section 22 of the Illinois Constitution Affords No Greater Protection than the Second Amendment to the United States Constitution.

Defendant contends that the People forfeited any argument that the FOID card requirement is constitutional under Article I, Section 22 of the Illinois Constitution by not specifically discussing Section 22 in its opening

brief. Def. Br. 5.[1] Not so. The People noted that the trial court held the statute unconstitutional under both the Second Amendment and Section 22 and argued that the "circuit court's judgment should be reversed." Peo. Br. 4-5. The ensuing discussion focused only on the Second Amendment because Section 22 does not afford greater protection than the Second Amendment. In other words, if defendant's challenge fails under the Second Amendment, then it necessarily fails under Section 22.

At the time of its drafting, Section 22 created an individual right to bear arms that was not then recognized under the United States Constitution, which in 1970 had been interpreted to afford only a collective right to an armed militia. Section 22 reads, "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed." Ill. Const. 1970 art. I, sec. 22. Section 22 differs from the Second Amendment in three ways: (1) it adds the words "[s]ubject only to the police power;" (2) it omits language about the importance of a well-regulated militia; and (3) it replaces the words "the people" with "the individual citizen." *See Kalodimos v. Vill. of Morton Grove*, 103 Ill. 2d 483, 491 (1984). The latter two

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[1] "Def. Br" denotes defendant-appellee's brief; "Peo. Br." denotes the People's opening brief; "C" denotes the common law record; and "R" denotes the report of proceedings.

changes were intended to expand the right to bear arms beyond a collective one, restricted to weapons traditionally used by well-regulated militia, to an individual right covering a broader range of firearms. *Id.* The Bill of Rights Committee at the 1970 constitutional convention explained that under Section 22, "a citizen has the right to possess and make reasonable use of arms that law-abiding persons commonly employ for purposes of recreation or the protection of person and property. Laws that attempted to ban all possession or use of such arms . . . would be invalid." Record of Proceedings, Sixth Illinois Constitutional Convention, Vol. VI, p. 87 (explanation of Proposal No. 1 of Bill of Rights Committee) (footnotes omitted).

But since 2008, the United States Supreme Court has held that the Second Amendment also affords an individual right to bear arms. *Dist. of Columbia v. Heller*, 554 U.S. 570, 595 (2008); *see also McDonald v. City of Chicago*, 561 U.S. 742, 766-78 (2010) (Second Amendment right to keep and bear arms fully applicable to States). In other words, after *Heller*, Section 22 no longer affords any greater protection than the Second Amendment. Indeed, if anything, Section 22 provides *less* protection than the Second Amendment, for this Court upheld Morton Grove's near-complete ban on handguns under Section 22, *Kalodimos*, 103 Ill. 2d at 498, while the United States Supreme Court has since held that such a ban is unconstitutional

under the Second Amendment, *see Heller*, 554 U.S. 635. In sum, the Second Amendment affords greater protection than Section 22; thus, if the FOID Card Act is constitutional under the Second Amendment, it is necessarily constitutional under Section 22.

Defendant also points to the third difference between Section 22 and the Second Amendment to support his argument that Section 22 provides greater protection than the Second Amendment: Section 22 adds the words "[s]ubject only to the police power." Def. Br. 7. But those words cut against defendant's position. The Bill of Rights Committee explained that "[b]ecause arms pose an extraordinary threat to the safety and good order of society, the possession and use of arms is subject to an extraordinary degree of control under the police power." Record of Proceedings, Sixth Illinois Constitutional Convention, Vol. VI, p. 88. Thus, as this Court has recognized, the "police power" language is a limitation of the right provided, not on the State's power to regulate that right. *Kalodimos*, 103 Ill. 2d at 491. Indeed, the State's police powers provide broad authority to act to protect the lives, health, and general welfare of the public. *See, e.g.*, *Opyt's Amoco, Inc. v. Vill. of South Holland*, 149 Ill. 2d 265, 270 (1992); *Kalodimos*, 103 Ill. 2d at 496; *Sherman-Reynolds, Inc. v. Mahin*, 47 Ill. 2d 323, 326 (1970). While that power must be exercised reasonably, the drafters of Section 22 intended that "short of an

absolute and complete ban on the possession of all firearms, this provision would leave the legislature free to regulate the use of firearms in Illinois." Record of Proceedings, Sixth Illinois Constitutional Convention, Vol. III, p. 1718.

Indeed, the FOID Card Act was enacted in 1967, and therefore predates the individual right to keep and bear arms in the Illinois Constitution of 1970. In other words, Section 22 was enacted against the backdrop of the very licensing scheme defendant argues runs afoul of Section 22. For this reason as well, Section 22 affords no greater individual right to keep and bear arms than does the Second Amendment. If defendant's challenge fails under the Second Amendment, then it necessarily fails under section 22.

II. The FOID Card Act Is Not an Impermissible Burden on the Right to Possess Firearms in One's Home.

As the People's opening brief explained, a two-step framework governs this Court's analysis of a Second Amendment challenge. *In re Jordan G.*, 2015 IL 116834, ¶ 22. First, the Court determines whether the regulated activity is protected by the Second Amendment at all, based on a textual and historical analysis of the scope of the Second Amendment's protections. *Id.* If the regulated activity falls outside the scope of the Second Amendment as it was understood at the relevant historical time, then it is categorically

unprotected, and no further review is necessary. *Id.* If the regulated activity is not categorically unprotected, then, under the second step, the Court applies the appropriate level of scrutiny to the State's justification for the regulation. *Id.*

A. Because the FOID Card Act is merely the mechanism by which the State enforces longstanding regulations on gun ownership, the conduct it prohibits is categorically unprotected.

Here, this Court's analysis begins and ends at the first step. Contrary to defendant's position, the FOID Card Act does not restrict the core individual right afforded by the Second Amendment to keep a gun in one's home for self-defense when applied to people who can legally own a gun. *See* Def. Br. 10. Rather, the FOID Card Act limits one's ability to keep a gun in her home for self-defense *only* if the applicant is precluded from gun ownership under the Act's prohibitions, which align with the valid restrictions recognized by the Supreme Court in *Heller*, 554 U.S. at 626 (cautioning 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"); *see also Moore v. Madigan,* 702 F.3d 933, 940-41 (7th Cir. 2012) (listing "the usual prohibitions of gun ownership by children, felons, illegal aliens, lunatics, and in sensitive places like public schools, the propriety of which was not questioned in *Heller* "). "If the state may set substantive

requirements for ownership, which *Heller* says it may, then it may use a licensing system to enforce them." *Berron v. Ill. Concealed Carry Licensing Review Bd.*, 825 F.3d 843, 847 (7th Cir. 2016).

It is well established that for a law to be "longstanding" for purposes of deciding whether the regulated conduct falls within the scope of the Second Amendment, the law is not required to "mirror limits that were on the books in 1791." *United States v. Skoien*, 614 F.3d 638, 640-41 (7th Cir. 2010) (en banc). Indeed, regulations may qualify as longstanding even if they "cannot boast a precise founding-era analogue." *NRA v. ATF*, 700 F.3d 185, 196 (5th Cir. 2012). "After all, *Heller* considered firearm possession bans on felons and the mentally ill to be longstanding, yet the current versions of these bans are of mid-20th century vintage." *Id.*

The FOID Card Act is longstanding on its own accord and also because it is consistent with laws enacted more than a century ago. Not only was the FOID Card Act enacted in 1967 — more than five decades ago — but it is also consistent with a broader history of licensure requirements. In 1911, for example, the State of Washington made it unlawful for a noncitizen "to carry or have in his possession at any time any shot gun, rifle or other firearm, without first having obtained a license from the state auditor, and . . . upon the payment for said license of the sum of fifteen dollars ($15.00)." 1911 Wash.

Sess. Laws 303, ch. 52 § 1 (R. 478). That same year, the State of New York made it unlawful for any person to possess "any pistol, revolver, or other firearm of a size which may be concealed upon the person" without a license. 1911 Laws of N.Y., ch. 195, § 1, at 443 (R. 479).

Nor is Illinois the only State that presently requires licensure for possession and acquisition of a firearm. It is illegal in New York, for example, "to possess a handgun without a valid license, even if the handgun remains in one's residence." *Kwong v. Bloomberg*, 723 F. 3d 160, 162 (2013). The State of Massachusetts also requires a license to possess any "firearm, rifle, shotgun or ammunition." M.G.L.A. 140 § 129C.

In sum, Illinois' FOID Card Act is no regulatory or historical outlier. Because it has been on the books for more than five decades and is a part of a longstanding tradition of licensure requirements, the FOID Card Act falls outside the scope of conduct protected by the Second Amendment. Consistent with this history, Illinois courts have repeatedly upheld the requirement that gun owners possess a FOID card at the first step of the Second Amendment analysis. *See People v. Mosley*, 2015 IL 115872, ¶ 36 (section 24-1.6(a)(3)(C)'s prohibition against a person publicly possessing a firearm without a valid FOID card passes Second Amendment scrutiny under the first step); *People v.*

Taylor, 2013 IL App (1st) 110166, ¶¶ 31-32 (same); *People v. Henderson*, 2013 IL App (1st) 113294, ¶¶ 31-36 (same).

Defendant dismisses these cases, arguing, "There is simply no issue of public safety when the firearm is never taken in public." Def. Br. 15. This assertion is baseless, belied by common sense and data. For example, suicide is the leading cause of violent death in the United States, most suicides occur in the victim's home, and firearms are the most common method used. *See* KA Fowler et al., *Surveillance for Violent Deaths — National Violent Death Reporting System, 18 States, 2014*, Morbidity and Mortality Weekly Report, Feb. 2, 2018, at 67(2): 1-36, *available at* https://www.cdc.gov/mmwr/volumes/67/ss/ss6702a1.htm?s_cid=ss6702a1_w (last checked July 30, 2019). Additionally, intimate partner violence is a contributing factor in nearly one out of every five homicides. *Id.* Unsurprisingly, therefore, state and federal courts have consistently upheld licensure or registration requirements imposed as prerequisites to possessing a firearm *inside or outside* the home. *See, e.g.*, *Kwong*, 723 F.3d at 168-69 (New York City's licensure fee for handgun possession, even within home, did not violate Second Amendment); *Commonwealth v. McGowan*, 982 N.E.2d 495, 501 (Mass. 2013) ("We have consistently held . . . that the decisions in *Heller* and *McDonald* did not invalidate laws that require a person to have a firearm identification card to

possess a firearm in one's home or place of business, and to have a license to carry in order to possess a firearm elsewhere.").

Relying on *Heller v. District of Columbia* ("*Heller II*"), 670 F.3d 1244 (D.C. Cir. 2011), defendant attempts to distinguish Illinois's licensing regime from those upheld elsewhere because the FOID Card Act applies to long guns as well as handguns. Def. Br. 9-10, citing *Heller II*, 670 F.3d at 1255. But in *Heller v. District of Columbia* ("*Heller III*"), 801 F.3d 264 (D.C. Cir. 2015), the court held that application of the District of Columbia's registration requirement to long guns, just like handguns, did not implicate the Second Amendment because the burden it creates is de minimus. *Id*. at 273-74. In other words, *Heller III* upheld D.C.'s registration requirement at the first step of Second Amendment analysis even though it applied to both long guns and handguns.

And, if the State may impose a licensing system to enforce the substantive requirements for ownership found in the FOID Card Act, it may further impose a fee to defray the cost of that licensing system. This Court should uphold the FOID Card Act's $10 fee at the first step of its Second Amendment analysis along with the licensing scheme as a whole. *See, e.g.*, *Kwong*, 723 F. 3d at 167 (upholding New York's $100 licensing fee to possess firearm without applying heightened scrutiny because it imposed no more

than "a marginal, incremental or even appreciable" burden on right to keep firearm in home for self-defense).

Defendant argues that beyond this Court's traditional Second Amendment analysis, the $10 fee is unconstitutional because the State may not impose a charge for the enjoyment of a constitutional right. *See* Def. Br. 13, citing *Murdock v. Pennsylvania*, 319 U.S. 105, 113-14 (1943). But the $10 fee is not a charge or tax on the exercise of Second Amendment rights. Rather, the payment compensates the State for the costs associated with processing the FOID card application, and thus serves the valid purpose of defraying the cost of the licensing regime. "The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to [exercise the right] cannot be enough to invalidate it." *E.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992).

"The Supreme Court's First Amendment fee jurisprudence provides the appropriate foundation for addressing fee claims under the Second Amendment." *People v. Stevens*, 2018 IL App (4th) 150871, ¶13 (citing *Kwong*, 723 F.3d at 165). Licensing fees are permissible "when they are designed 'to meet the expense incident to the administration of the [licensing statute] and to the maintenance of public order in the matter licensed.'"

Stevens, 2018 IL App (4th) 150871 at ¶14 (citing *Cox v. New Hampshire*, 312 U.S.569, 577 (1941)). Defendant objects that the State has offered no evidence regarding the purpose of the required $10 payment. Def. Br. 15. But it is clear that the $10 payment serves the purpose of defraying the costs of the licensing scheme and policing the matter licensed. The plain language of the FOID Card Act states that the $10 is a "fee." 430 ILCS 65/5(a). A fee "seeks to recoup expenses incurred by the state — to 'compensat[e]' the state for some expenditure incurred." *People v. Jones*, 223 Ill. 2d 569, 582 (2006). If a charge is not assessed to compensate the State for a cost, only then does it constitute a tax or fine. *See Crocker v. Finley*, 99 Ill. 2d 444, 452 (1984) (explaining that "court charges imposed on a litigant are fees if assessed to defray the expenses of his litigation," but "a charge having no relation to the services rendered, assessed to provide general revenue rather than compensation, is a tax").

Moreover, the Act is explicit about how the fee is distributed to defray various costs: $6 to the Wildlife and Fish Fund, $1 to the State Police Services Fund, and $3 to the State Police Firearm Services Fund. 430 ILCS 65/5(a). And the Illinois Administrative Code explicitly sets forth the purposes for which those funds can be used, and they are directly related to

implementing the FOID Card Act. For example, the Department of State Police may use money from the State Police Firearm Services Fund:

> to finance any of its lawful purposes, mandates, functions, and duties under the Firearm Owners Identification Card Act and the Firearm Concealed Carry Act, including the cost of sending notices of expiration of Firearm Owner's Identification Cards, concealed carry licenses, the prompt and efficient processing of applications under the Firearm Owners Identification Card Act and the Firearm Concealed Carry Act, the improved efficiency and reporting of the LEADS and federal NICS law enforcement data systems, and support for investigations required under these Acts and law. Any surplus funds beyond what is needed to comply with the aforementioned purposes shall be used by the Department to improve the Law Enforcement Agencies Data System (LEADS) and criminal history background check system.

20 ILCS 2605/2605-595. Similarly, the Wildlife and Fish Fund also relates to policing the safe possession of firearms because the Illinois Department of Natural Resources is required to conduct courses in firearms safety. 520 ILCS 5/3.2 ("Funds for the conducting of firearms and hunter safety courses shall be taken from the fee charged for the Firearm Owners Identification Card."). In other words, the $10 payment clearly is a fee imposed "to defray the expenses of policing the activities in question," and not a tax, and therefore is permissible.

In sum, if the State may impose the substantive restrictions on gun ownership found in the FOID Card Act – and defendant does not dispute that – then the State may impose a licensing system to enforce them. Indeed,

Illinois's licensing scheme is part of a longstanding tradition of licensure requirements intended to enforce similar substantive regulations. And, if the State may impose a licensing system, then it is allowed to impose a fee to defray the costs of policing illegal gun ownership. Therefore, this Court should continue to uphold the FOID Card Act at the first step of its Second Amendment analysis, as it has consistently done.

B. Alternatively, the FOID Card Act survives intermediate scrutiny.

Even if the FOID Card Act regulates protected activity, it survives intermediate scrutiny. Defendant argues strict scrutiny should apply, Def. Br. 11, but this assertion is baseless. "[T]he argument is not strict versus intermediate scrutiny but rather how rigorously to apply intermediate scrutiny to second amendment cases." *See People v. Chairez*, 2018 IL 121417, ¶35. Accordingly, step two of this Court's Second Amendment analysis "requires an initial determination of where on the sliding scale of *intermediate scrutiny* the law should be analyzed." *Id.* at ¶¶45-46 (emphasis added).

And here, ordinary, as opposed to heightened, intermediate scrutiny applies because the FOID Card Act does not function "as a categorical prohibition without providing an exception for law-abiding individuals." *Cf. Chairez*, 2018 IL 121417 at ¶¶ 48-50 (applying heightened intermediate

scrutiny where law imposed complete ban on carriage for self-defense in "a vast number of public areas across the state" and affected "the gun rights of the entire law-abiding population of Illinois"). The FOID Card Act prohibits gun possession and ownership only for presumptively risky people. Others need only fill out a form, provide a photo ID, and pay a $10 processing fee. These requirements — necessary to the administration of the State's legitimate prohibition against possession of firearms by felons and the mentally ill — do not significantly affect the core Second Amendment right to armed self-defense. So, at most, intermediate scrutiny should apply.

Under intermediate scrutiny, the FOID Card Act is constitutional as long as it is substantially related to an important government interest. *See People v. Alcozer*, 241 Ill. 2d 248, 262 (2011); *Skoien*, 614 F.3d at 641 (applying intermediate scrutiny in Second Amendment case). It is beyond dispute that the State has a legitimate and substantial interest in keeping guns out of the hands of dangerous people. *See, e.g.*, *United States v. Yancey*, 621 F.3d 681, 683 (7th Cir. 2010) ("Congress enacted the exclusions in § 922(g) to keep guns out of the hands of presumptively risky people."). Indeed, defendant concedes as much. Def. Br. 11.

Instead, she challenges the fit between the State's interest and provisions of the FOID Card Act. *Id.* But as amicus Giffords Law Center to

Prevent Gun Violence demonstrated in its brief, "[t]he weight of empirical evidence shows that licensing laws like Illinois' are likely to be highly effective at reducing gun homicides and suicides and at decreasing gun purchases by criminals." Brief for Giffords Law Center to Prevent Gun Violence as Amicus Curiae supporting People of the State of Illinois, at 9.

Defendant's amici ask this Court to reject this evidence. Brief for State's Attorneys Stewart J. Umholtz and Brandon J. Zanotti, et al., as Amici Curiae supporting Defendant, at 33-54 ("Umholtz brief"). But the Giffords amicus brief relies on peer-reviewed social science research that strongly supports Illinois's gun licensing law. *See Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 593-94 (1993) (peer review is a "component of 'good science'" that helps ensure "substantive flaws in methodology will be detected."). In any event, this Court need not determine whether the evidence justifies the FOID Card Act as a matter of policy because that is the role of the General Assembly. *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (legislature "far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions"); *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997) (where psychiatric experts joined conflicting *amicus* briefs, their disagreements "do not tie the State's hands" in its policy choices). This is particularly true where intermediate scrutiny

applies. The Supreme Court has explained that heightened means-end scrutiny, including intermediate scrutiny, does not require legislatures to provide exact empirical justifications for regulations. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60 (1973) ("We do not demand of legislatures 'scientifically certain criteria of legislation.'") (internal citation and quotation omitted). Indeed, "[i]t would be foolhardy—and wrong—to demand that the legislature support its policy choices with an impregnable wall of unanimous empirical studies." *Gould v. Morgan*, 907 F.3d 659, 676 (1st Cir. 2018).

But even if resolving conflicts in the empirical evidence cited by the parties' amici were a proper role for this Court, the objections raised by defendant's amici are meritless. For example, defendant's amici criticize the use of synthetic control analysis in the Connecticut-Missouri research by Johns Hopkins professors Daniel Webster and Cassandra Crifasi. Umholtz Brief at 47-48. But comparison to a synthetic control state is a widely accepted means of evaluating state-specific policies that cannot be evaluated in a randomized trial. *See, e.g.*, Susan Athey, et al., *The State of Applied Econometrics: Causality and Policy Evaluation*, 31 J. ECON. PERSPECTIVES 3, 9 (2017) (synthetic control method is "arguably the most important innovation in the policy evaluation literature in the last 15 years").

Taking a different tack, defendant challenges Illinois's licensing

regime because it requires registration of gun owners rather than guns. Def. Br. 10, citing *Heller II*, 670 F.3d at 1255. But in *Heller III*, the court upheld the District of Columbia's requirement that all gun owners appear in person to be photographed and fingerprinted. 801 F.3d at 275-77. The court explained that licensing schemes requiring gun owners to register with law enforcement "directly and materially advance public safety by preventing at least some ineligible individuals from obtaining weapons and, more important, by facilitating identification of the owner of a registered firearm during any subsequent encounter with the police." *Id.* at 277.

Defendant's amici also argue that a law requiring a license to possess rather than purchase guns imposes only extra burdens and no benefits. Umholtz Brief at 33-35. But many people licensed to purchase a gun may become prohibited from possession later, following a criminal conviction, assessment of mental incapacity, or domestic violence restraining order. License-to-possess laws thus help States enforce laws that bar dangerous people from continuing to possess guns.

In sum, if the Second Amendment allows prohibitions on gun possession and ownership by felons, minors, the mentally ill, and other presumptively risky people — which both this Court and the United States Supreme Court have held that it does — than it must allow a mechanism by

which the State can enforce those prohibitions. The FOID Card Act is that mechanism.

C. Compliance with the FOID Card Act is not impossible in one's own home.

Defendant contends that "the circuit court correctly found that the requirements of the FOID Card Act place the law-abiding person, who simply wants to keep a firearm in her own home for lawful purposes, in an impossible situation." Def. Br. 19. But defendant identifies no component of the FOID Card Act that was impossible for her to comply with. Rather, her argument is that she did not *want* to comply. Her argument fails to demonstrate that it would be impossible for all adult residents of a home who are in constructive possession of a firearm to also be in possession of a FOID card.

Defendant's argument rests on two hypothetical scenarios: (1) a person who has a valid FOID card and keeps a firearm in her home for self-defense but does not possess her FOID card on her person 24 hours a day; Def. Br. 22, and (2) a person who does not herself have a valid FOID card but lives with someone who both has a valid FOID card and keeps a firearm in the home. Def. Br. 23. First, neither of those scenarios describes defendant's circumstances, and an "as-applied challenge requires a showing that the statute violates the constitution as it applies to the facts and circumstances of

the challenging party." *People v. Thompson*, 2015 IL 118151, ¶ 36; *see also Skoien*, 614 F. 3d at 645 ("A person to whom a statute properly applies can't obtain relief based on arguments that a differently situated person might present.") (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Defendant's as-applied challenge to the FOID Card Act should be rejected on this basis alone.

Second, and in any event, compliance with the FOID Card Act is not impossible in one's own home. As explained in the People's opening brief, the statute uses the same word — "possess" — to describe both the firearm and the FOID card. The surest and most reliable indicator of legislative intent is the statutory language itself, given its plain and ordinary meaning. *People v. Perry*, 224 Ill. 2d 312, 323 (2007). Where the language of the statute is clear and unambiguous, this Court applies it as written, without resort to extrinsic aids of statutory construction. *Id.* Therefore, here, the word "possess" should have the same meaning when determining whether an individual "possesses" a firearm or a FOID card. But even if the plain language of the statute were ambiguous, it is at the very least reasonable to read the words "possess" and "possession" as establishing identical standards of constructive possession, which would resolve defendant's hypotheticals scenarios. *See People v. Johnson*, 225 Ill. 2d 573, 584 (2007) (Court will affirm statute's

constitutionality if reasonably possible to give statute such an interpretation). For example, under the plain language of the statute, if one is in constructive possession of a firearm kept in one's bedroom for self-defense, one would also be in constructive possession of a FOID card kept in one's nightstand.

Defendant's reliance on *People v. Elders*, 63 Ill. App. 3d 554 (5th Dist. 1978), is misplaced since that case is entirely consistent with the People's interpretation of the FOID Card Act. Marion Elders's wife told police that Elders had a gun in his car. *Id.* at 555. After arresting Elders outside his trailer, police searched the car and recovered a gun. *Id.* The State argued, in relevant part, that the warrantless search was justified because Elders did not have a FOID card when police arrested him, so there was probable cause to believe that the pistol recovered from his car was illegal. *Id.* at 559. The appellate court held that it is not enough that a person in possession of a firearm have been issued a FOID card; that person must have his FOID card on his person. *Id.* But it also held that "there is no requirement that a person must carry the card at all times." *Id.* In fact, the appellate court held that because Elders was not in possession of the car where the gun was found, and thus of the gun itself, at the time of his arrest, the fact that he did not have a FOID card on him did not support probable cause or the search.

Id. Indeed, none of the cases defendant cites involves a situation in which the defendant found in possession of a gun who could have produced a FOID card (for example, from a glove compartment or nightstand), but was held to be in violation of the FOID Card Act because that card was not on his person.

Nor does it render compliance with the FOID Card Act impossible to require that all adult inhabitants of a house who may be said to be in constructive possession of a firearm also possess a FOID card. First, defendant concedes that a gun owner can deny constructive possession to other inhabitants of her home by denying them control or the ability to exercise control over the gun, by, for example, keeping the gun in a safe to which no one else knows the combination. Def. Br. 23. This measure would eliminate the need for the other inhabitants of the house to obtain a FOID card. But defendant objects to the idea that if the firearm is not secured, all adult residents of the house with knowledge of the firearm and exclusive control over its location would be required to have FOID card. *Id.* Such a requirement is a feature, not a flaw, of the FOID Card Act. The State has an equally compelling interest in ensuring that anyone who can exercise dominion over a firearm is not a felon or mentally ill. *See* 430 ILCS 65/1 ("[I]n order to promote and protect the health, safety and welfare of the public, it is necessary and in the public interest to provide a system of

identifying persons who are not qualified to acquire or possess firearms"); *see also McGowan*, 982 N.E. 2d at 502 (upholding Massachusetts law requiring those licensed to possess a firearm, when they are not carrying or otherwise immediately controlling the firearm, to secure it to ensure that those who are not authorized to possess a firearm do not gain access to their firearm).

In short, this Court should not depart from the well-established principle that a party cannot succeed on an as-applied constitutional challenge based on circumstances that are inapplicable to her. That dispositive shortcoming aside, it is not impossible to comply with the FOID Card Act in one's home. Accordingly, this Court should reverse the circuit court's judgment.

CONCLUSION

For these reasons, and those stated in the People's opening brief, this Court should reverse the judgment of the circuit court.

July 30, 2019

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CERTIFICATE OF COMPLIANCE

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. 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(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 5,293 words.

/s/ Garson S. Fischer
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CERTIFICATE OF FILING AND SERVICE

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. The undersigned certifies that on July 30, 2019, the foregoing **Reply Brief of Plaintiff-Appellant** was electronically filed with the Clerk, Illinois Supreme Court, and served upon the following by email:

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