No. 126153

IN THE
SUPREME COURT OF ILLINOIS

THOMAS D. BROWN, Petitioner-Appellant, v. PEOPLE OF THE STATE OF ILLINOIS and ILLINOIS STATE POLICE, Respondents-Appellees.	On Appeal from the Appellate Court of Illinois, Third Judicial District, No. 3-18-0409, There Heard on Appeal from the Circuit Court of the Tenth Judicial Circuit, Putnam County, Illinois, No. 16-MR-13, The Honorable STEPHEN A. KOURI, Judge Presiding.

BRIEF OF RESPONDENTS-APPELLEES

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NATURE OF THE ACTION

Under the Firearm Owners Identification ("FOID") Card Act ("Act"), 430 ILCS 65/1 *et seq.*, the Illinois State Police ("ISP") may not issue FOID cards to applicants who are "prohibited from acquiring or possessing firearms . . . by federal law." 430 ILCS 65/8(n). Under federal law, a person who has been convicted of a misdemeanor crime of violence ("MCDV") cannot possess a firearm, 18 U.S.C. § 922(g)(9), though an exception exists under 18 U.S.C. § 921(a)(33)(B)(ii) for those who have obtained a pardon or expungement or had their "civil rights restored."

In 2001, Thomas Brown was convicted of inflicting corporal injury on his spouse in California, which is a MCDV under federal law. In 2016, ISP revoked Brown's FOID card based on his 2001 California conviction, which Brown had not disclosed to ISP on his FOID application but came to light when a background check was run because he tried to buy a firearm from a federally licensed firearms dealer. Brown then petitioned the circuit court for relief under section 10(a) of the Act, which ISP opposed. After conducting a section 10 proceeding, the circuit court found that Brown was entitled to relief and ordered ISP to re-issue his FOID card.

ISP appealed, arguing, among other things, that Brown was not entitled to a FOID card because he did not satisfy the "civil rights restored" exception. The appellate court agreed and reversed the judgment. It also declined to reach Brown's as-applied constitutional challenge to section 922(g)(9) (as made

applicable to Brown through section 10(c)(4) of the Act), which it deemed premature, given that Brown had not yet sought relief under all available non-constitutional avenues. This Court granted Brown leave to appeal.

ISSUES PRESENTED FOR REVIEW

1. Whether the appellate court correctly determined that Brown had not satisfied the "civil rights restored" exception to the federal prohibition on firearm possession, where California — the convicting jurisdiction — has not restored Brown's civil rights.

2. Alternatively, whether the circuit court's findings that Brown satisfied the section 10(c) public interest and public safety requirements were against the manifest weight of the evidence, where Brown's criminal history included several incidents involving unsafe or dangerous behavior, and where he made a false statement on his FOID application.

3. Whether the appellate court correctly concluded that Brown's as-applied constitutional claim to section 922(g)(9), as made applicable to Brown through section 10(c)(4), was premature, where he has failed to pursue all non-constitutional forms of relief before raising a constitutional challenge.

4. Whether section 922(g)(9) violates the Second Amendment, where section 922(g)(9)'s categorical prohibition is reasonably related to the important state interest of preventing dangerous persons from possessing firearms.

STATUTES INVOLVED

The relevant portions of the Federal Gun Control Act, the Act, and California law are in the appendix to this brief. *See* A1-A4.

STATEMENT OF FACTS

Statutory Background

Under the Act, an Illinois resident must have a FOID card to possess a firearm in Illinois. 430 ILCS 65/2(a)(1), (4).[1] The Act provides that ISP may revoke a FOID card if an individual is "prohibited from acquiring or possessing firearms or firearm ammunition . . . by federal law." 430 ILCS 65/8(n).

When a FOID card is revoked by ISP due to a MCDV conviction, the individual may, under section 10 of the Act, "petition the circuit court in writing . . . for a hearing upon such denial." 430 ILCS 65/10(a); *see People v. Heitmann*, 2017 IL App (3d) 160527, ¶ 11. When considering a section 10 petition, the circuit court must evaluate the following four factors to determine whether to grant relief and order ISP to re-issue a FOID card: (1) whether the individual has been convicted of a "forcible felony under the laws of this State or any other jurisdiction" within 20 years of the FOID card application; (2) whether "the circumstances regarding a criminal conviction, where applicable, the applicant's criminal history and reputation are such that the applicant will not be likely to act in a manner dangerous to public safety"; (3) whether "granting relief would not be contrary to the public interest"; and (4) whether "granting relief would not be contrary to federal law." 430 ILCS 65/10(c)(1)-(4).

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[1] The record on appeal is one common law volume, cited as "C__," and one report of proceedings volume, cited as, "R__." The brief of Petitioner-Appellant is cited as "AT Br. at __."

Federal law prohibits those "who ha[ve] been convicted in any court of a misdemeanor crime of domestic violence" from possessing a firearm. 18 U.S.C § 922(g)(9). An MCDV is defined as an offense that (1) "is a misdemeanor under federal, State or Tribal law" and (2) "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim[.]" *Id.* § 921(a)(33)(A)(ii). This offense need not "include, as a discrete element, the existence of a domestic relationship between offender and victim." *United States v. Hayes,* 555 U.S. 415, 421 (2009). And a state law misdemeanor offense against a domestic relation will satisfy the "use of force" requirement if one element of the offense is a common-law battery. *United States v. Castleman*, 572 U.S. 157, 176-79 (2014); *see also Voisine v. United States*, 136 S. Ct. 2272, 2278-80 (2016).

Section 921(a)(33)(B)(ii) provides an exception to section 922(g)(9)'s prohibition. Under that section, an MCDV is not considered an offense for purposes of the federal prohibition if: (1) the misdemeanor conviction has been "expunged, or set aside"; (2) the misdemeanant has been "pardoned"; or (3) the misdemeanant has had his "civil rights restored." 18 U.S.C. § 921(a)(33)(B)(ii).

Under federal law, the "civil rights" referred to in section 921(a)(33)(B)(ii) are the rights to vote, hold public office, and serve on a jury. *Logan v. United States*, 552 U.S. 23, 28 (2007). In *Johnson v. Department of*

Illinois State Police, 2020 IL 124213, this Court held that for individuals convicted of an Illinois MCDV offense, the term "civil rights" also includes "firearm rights." *Id.* ¶¶ 27-28. But under any definition of this term, if no civil rights have been revoked, then there is nothing to restore, and the federal firearm prohibition endures. *See Logan*, 552 U.S. at 28. If, however, a misdemeanant's civil rights have been revoked and restored, then the misdemeanor is not considered an offense under section 922(g)(9), and that federal bar on firearm possession is lifted. *Id.* at 28-29; *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010).

Brown's California MCDV Conviction And FOID Card Revocation

Brown was convicted of an MCDV under California law. C235. In 2001, Brown and his then-wife stopped at a motel in California, where they got into an argument; he picked her up, dropped her down his back, and gave her "road rash." R14, 16. California police arrested him for "battery," and he pleaded guilty to the misdemeanor offense of inflicting corporal injury on a spouse. C235; *see* A3.

At the time, Brown possessed a FOID card that he obtained "when [he] first moved [to Illinois]," over 20 years ago. R18. In January 2013, Brown reapplied for a FOID card. C134. He checked "no" when asked on the application whether he had been convicted of domestic battery or a similar offense. C134, 229. ISP issued him a FOID card. *Id.* In 2016, Brown tried to purchase a firearm from a federally licensed firearms dealer. C13, 230. As

part of this transaction, ISP ran a background check on Brown and found his 2001 California MCDV conviction. *Id.* ISP revoked Brown's FOID card based on that conviction. *Id.*

Section 10 Proceedings

Brown thereafter filed a section 10 petition in the circuit court. C7-15. In it, he admitted to pleading guilty to "domestic battery" in California in September 2001, C7, but argued that granting him a FOID card even with this conviction would not be "contrary to federal law," C8. He also argued that section 10(c)(4) of the Act and section 922(g)(9) of the Federal Gun Control Act were unconstitutional as applied to him under the Second Amendment, C8-9, and Article I, Section 22 of the Illinois Constitution, C10-11, and filed a "notice of claim of unconstitutionality" for these statutes, C20.

ISP filed a motion to dismiss, C23-25, which the circuit court denied, C64-69. ISP then moved for summary judgment, C105-07, arguing that granting Brown relief was "contrary to federal law" based on his 2001 California conviction. C111-15. Specifically, ISP contended that because Brown's conviction was an MCDV, it barred him from possessing firearms under federal law and, in turn, from possessing a FOID card under section 10(c)(4) of the Act. C106, 110, 114. ISP further argued that under *Beecham v. United States*, 511 U.S. 368, 371 (1994), Illinois courts lacked the authority to remove the federal firearm prohibition imposed by a California MCDV conviction. C106, 116-18.

In addition, ISP contended, Brown could not show that he was not "likely to act in a manner dangerous to public safety" because of his MCDV conviction, or that granting him relief was not "contrary to the public interest" given the falsehoods on his FOID application. C122. As to the latter, ISP explained that Brown was "untruthful on his FOID card application" when he stated that he had never been convicted of a MCDV, and "though he had an opportunity to provide detailed documentation" to ISP about that conviction, he did not do so. C122.

As to Brown's constitutional challenge, ISP argued first that it was "premature" because he still had non-constitutional avenues of relief available to him to remove his federal firearm prohibitor, including seeking a pardon. C128. Alternatively, ISP explained, section 922(g)(9) of the Federal Gun Control Act and section 10(c)(4) of the Act were constitutional under both the Second Amendment and Article I, Section 22 of the Illinois Constitution as applied to Brown. C123-25.

The circuit court held a hearing, C189, during which Brown and his current wife testified in support of his section 10 petition, R5-34, and Lieutenant Jennifer Radosevic, the Assistant Bureau Chief in ISP's Firearm Services Bureau, testified on ISP's behalf, R34-62.

Brown first testified about his California MDCV conviction. He stated that for eight or nine years, he was part of a semi-truck driving team with his then-wife, Suzie. R6-7. In September 2001, he was driving with Suzie in

California when their pickup load was cancelled, so they stayed in a motel. R13. After going to a bar together, they got into "a little bit of an argument." *Id.* Brown said that he "picked her up and was carrying her, and it was kind of a playful moment in some way, and she kind of lost [his] balance. She kind of fell off onto the ground." *Id*. He explained that "the police showed up" and because "she had a little road rash on her arm from falling off, they considered that . . . battery." R14. Brown said that, "at the time, [he] didn't think much of it," and that he went to jail for three days before his case "came up" and he "took the plea bargain to get out of the situation." *Id.*

Brown pleaded guilty to inflicting corporal injury on a spouse, and received a sentence of three years' probation, a fine, 80 hours of community service, and 52 anger management classes. R9; C235. He testified that he believed that this California conviction was not on his criminal record, R9, 24-25, but admitted that he never tried to get this conviction expunged, vacated, or pardoned, R23-24.

Brown also testified about the rest of his criminal record. In 2005, he was convicted of a DUI in Bureau County, Illinois and sentenced to court supervision. R11. And, also in 2005, he was arrested and charged with battery following a bar fight in LaSalle County, Illinois. R12, 25. When asked about this arrest, he testified that the charges were "dropped" and that "it was a person [who] owed my ex-wife some money, and it was in a bar, and I [was] just defending myself and the situation." R12. He also testified that in 1997,

as a minor, he was convicted in Minnesota of misdemeanor assault in the fifth degree. R26.

Brown then testified about the misstatement that he made on his 2013 application for a FOID card. He said that he "remembered filling [out] the application out and sending it in" and thinking "everything was fine" because he believed that his California conviction did not count as a conviction. R24-25. When asked why he did not indicate on the application that he had been convicted of domestic battery, he said "that was all supposed to be court supervision out there in California . . . it is not that I'm trying to deny something happened, but that was supposed to be under supervision, and I did my probation." R20-21.

Finally, Brown explained that he wanted to possess firearms in Illinois for protection, hunting, and to teach his current wife how to use a weapon. R21. He noted that he had possessed a FOID card for more than 20 years and used firearms for hunting and target practice. R18. He indicated that, after his FOID card was revoked, his wife took possession of his firearms. R22-23.

Brown's current wife testified that she obtained a FOID card in 2010 after marrying Brown, and that Brown taught her how to clean firearms. R29-30. She said that Brown was always "careful with firearms" and locked them up safely; she did not believe that granting him a FOID card would be contrary to the public interest or that he would be a danger to public safety if he had one. R31, 33.

Lieutenant Radosevic also testified. R36-37. Radosevic explained that Brown answered "no" on his 2013 FOID card application in response to the question whether he had been convicted of domestic battery, aggravated domestic battery, or a substantially similar offense in another jurisdiction, when the answer should have been "yes." R48. This response was "concern[ing]," she explained, as it was "clearly not correct." *Id.* Radosevic stated that providing false information on a FOID card application alone is a basis for denying an application. R49. She also testified that ISP revoked Brown's FOID card because of his 2001 California misdemeanor conviction for inflicting corporal injury on a spouse. R40. Radosevic explained that this conviction was a MCDV under federal law, R40, 43-47, which meant that Brown could not possess firearms under federal law or have a FOID card in Illinois, R43-47.

The circuit court admitted Brown's FOID application file into evidence. R39; C227-81. That file included (1) Brown's 2013 application, C229; (2) his criminal history report, C234-44, 240-69; and (3) the arrest reports from his 2005 battery arrest in La Salle County, C273-80. In those arrest reports, an eyewitness stated that Brown and another man were fighting both inside a bar and outside in the parking lot. C274. When a police officer arrived at the scene, he found both men with their "hands . . . covered in blood." C275. Brown suffered several lacerations to his face, an apparent broken nose, and a

scraped elbow; the other man had a swollen left eye, lacerations on his face, and scratches on his neck. *Id.*

Additional documents were submitted into evidence by written stipulation of the parties. R61. These included a letter from the Putnam County Sheriff's Office stating that Brown had "no criminal record" in that county for "the last seven years," R17, 61; C284, and a letter from Brown's ex-wife, Suzie, R17, 61; C285. In her letter, Suzie wrote that in September 2001, she and Brown had "got involved in an argument outside the bar" near their motel, "which resulted in him picking [her] up over his shoulder with [her] climbing down his back." C285. She explained that this caused bystanders to call the police, who arrested him even though she was not injured and did not think that Brown intended to hurt her. *Id.* She said that she "did not feel threatened" by Brown, and that the California judge in the 2001 case imposed no order of protection. *Id.* She added that they remained on "friendly terms" since their divorce, and that she did not think he was likely to be a danger to public safety if his FOID card was restored. *Id.*

The circuit court issued an order concluding that Brown was entitled to relief "based on the unique circumstances presented herein, including the fact that guns are lawfully in the home of the petitioner, with the approval of the state." C287. The circuit court also noted that "the 'conviction' entered years ago in the California domestic battery case has been disputed by the alleged

victim." *Id.* Thus, the circuit court directed ISP to issue Brown a FOID card. *Id.*

ISP appealed, C288-92, and the appellate court reversed, *Brown v. Ill. State Police,* 2020 IL App (3d) 180409. The appellate court first noted that Brown was barred from possessing a firearm under section 922(g)(9) because his California conviction "clearly qualifyie[d]" as an MCDV. *Id.* ¶ 23. Accordingly, unless one of the three exceptions applied — expungement, pardon, or restoration of civil rights — "Brown is prohibited from possessing a firearm under federal law." *Id.* And, the court held, none of the exceptions applied "because Brown's California conviction was never expunged or set aside, Brown was never pardoned for that conviction, and Brown never had his civil rights revoked and restored in California as a result of that conviction." *Id.* ¶ 24.

In reaching this conclusion, the appellate court rejected Brown's argument that the restoration exception should apply based on *Johnson*'s holding "that the right to keep and bear arms is a civil right for purposes of that exception." *Id.* As the court explained, *Johnson* was limited to circumstances where "the prior disqualifying conviction took place in Illinois." *Id.* ¶ 24 n.2. Moreover, Brown had not shown that California, here the convicting jurisdiction, considered "that gun rights were civil rights or that the removal and automatic restoration of gun rights alone, and not other rights, satisfied the civil rights restored provision for the purpose of the federal

firearms prohibition." *Id.* Finally, the court held that Brown's as-applied challenge to section 922(g)(9) and section 10(c)(4) was premature because he still had "other remedies available to him to obtain relief such as a pardon or expungement." *Id.* ¶ 26. Because the appellate court held that Brown could not satisfy section 10(c)(4), it did not address the arguments, which ISP renewed on appeal, that Brown could not show that he was not likely to act in a manner dangerous to public safety or that granting him relief was not contrary to the public interest. *Id.* ¶¶ 17, 25.

Dissenting, Justice Holdridge would have held that Brown qualified for the "civil rights restored" exception to section 922(g)(9), reasoning that California Penal Code section 12021(c)(1) — now California Penal Code § 29805(a) — revoked a misdemeanant's eligibility to possess a firearm for 10 years. *Id.* ¶ 23 (Holdridge, J., dissenting). In the dissenting justice's view, because 10 years had passed since Brown's conviction, California had "dispens[ed]. . . forgiveness and demonstrated that, despite his conviction, he was sufficiently trustworthy to possess a firearm." *Id.* He also would have held that Brown satisfied the remaining requirements of section 10(c). *Id.* ¶ 34.

This Court granted leave to appeal.

ARGUMENT

It is undisputed that Brown has an MCDV conviction in California for inflicting corporal injury on his then-wife, C235, and that he is thus subject to the section 922(g)(9) federal prohibition on firearm possession. At issue is whether Brown has satisfied an exception to this prohibition through restoration of his civil rights. Because he has not, Brown remains ineligible for a FOID card under section 10(c)(4), as the appellate court correctly held. Alternatively, the appellate court's decision should be affirmed because, as ISP has consistently argued, Brown cannot satisfy the public interest or public safety requirements imposed by sections 10(c)(2) and 10(c)(3).

If this Court affirms the appellate court's holding that Brown did not satisfy the criteria for a FOID card based on the existence of a federal prohibitor under section 10(c)(4), it should also affirm its holding that his constitutional challenge to section 922(g)(9) is premature because, among other reasons, Brown has non-constitutional avenues of relief available to him, including applying for a pardon. If, however, this Court affirms the appellate court's decision on section 10(c)(2) or 10(c)(3) grounds — which do not involve the federal prohibitor — then it need not reach Brown's constitutional challenge to section 922(g)(9). Finally, to the extent this court reaches Brown's constitutional challenge, it should reject that challenge because section 922(g)(9) is constitutional, as every federal court of appeals to address the question has concluded.

I. The Standards Of Review.

This court reviews questions of law *de novo, Bd. of Educ. of City of Chicago v. Moore*, 2021 IL 124785, ¶ 17, and reviews factual findings under the manifest weight of the evidence standard, *Corral v. Mervis Indus., Inc.*, 217 Ill. 2d 144, 151 (2004).

Questions of statutory construction, such as those presented by this case, are questions of law that are reviewed *de novo* by this Court. *See Johnson*, 2020 IL 124213, ¶ 13. Likewise, this Court reviews the constitutionality of a statute, also a question of law, *de novo*. *See State ex rel. Leibowitz v. Family Vision Care, LLC,* 2020 IL 124754, ¶ 75. Statutes are presumed to be constitutional, and this Court construes them as such whenever "reasonably possible." *People v. Ligon*, 2016 IL 118023, ¶ 11. For an as-applied challenge, this Court must consider the particular facts and circumstances of the case to determine if the statute's application in that context is unconstitutional. *People v. Gray*, 2017 IL 120958, ¶ 58.

Whether Brown satisfied sections 10(c)(2) and 10(c)(3) of the Act presents questions of fact, and therefore the circuit court's resolution of those questions is reviewed under the manifest weight of the evidence standard. C304; *see also Corral*, 217 Ill. 2d at 151 (In civil cases, the manifest weight of the evidence standard "'represents the typical appellate standard of review for findings of fact made by a trial judge[.]'") (quoting *People v. Coleman*, 183 Ill. 2d 366, 385-86 (1988)). A factual finding is against the manifest weight of the

evidence when the "opposite conclusion is clearly evident or the finding is arbitrary, unreasonable, or not based in evidence." *Best v. Best*, 223 Ill. 2d 342, 350-41 (2006).

II. The Appellate Court Properly Determined That Brown Was Statutorily Ineligible For A FOID Card.

A. The appellate court correctly concluded that Brown did not satisfy the "civil rights restored" exception to section 922(g)'s prohibition on firearm possession and thus was ineligible under section 10(c)(4) of the Act.

This Court should affirm the appellate court's conclusion that Brown does not qualify for the "civil rights restored" exception to section 922(g)(9) because, under the governing law of the convicting jurisdiction — here, California — Brown "never had his civil rights revoked and restored as a result of [his MCDV] conviction." *Brown*, 2020 IL App (3d) 180409, ¶ 24. This holding, as now explained, is not only consistent with binding precedent, but also constitutes a straightforward application of California law. Brown's arguments to the contrary — which are based on a misreading of both this Court's decision in *Johnson* and California law — should be rejected.

As discussed, *supra* pp. 5-7, section 921(a)(33)(B)(ii) of the Federal Gun Control Act provides an exception to section 922(g)(9)'s federal firearm prohibition for those who have had their "civil rights restored." 18 U.S.C. § 921(a)(33)(B)(ii). Although courts have reached different conclusions on the type of "civil rights" included in this exception, it is well established that if no civil rights have been revoked, then there is nothing to restore. *Logan*, 552

U.S. at 28. In those circumstances, the federal firearm prohibition endures. *Id.*

As this Court has recognized, the law of the convicting jurisdiction controls whether an individual's "civil rights" have been "restored." *Johnson*, 2020 IL 124213, ¶ 26 (citing *Caron v. United States*, 524 U.S. 308, 316 (1998)); *see also Beecham v. United States*, 511 U.S. 368, 371 (1994) (whether one's civil rights were restored was "governed by the law of the convicting jurisdiction" for purposes of section 921(a)(20)). This is so because "Congress sought to accommodate a state's judgment that a particular person is, despite a prior conviction, sufficiently trustworthy to possess firearms." *Johnson*, 2020 IL 124213, ¶ 26 (cleaned up); *see also, e.g.*, *United States v. Estrella*, 104 F.3d 3, 6-7 (1st Cir. 1997) ("by reinvesting a person with core civic responsibilities, the state vouches for the trustworthiness of that person to possess firearms"). The relevant inquiry is thus "whether an offender's legal status has been altered by a state's dispensation of forgiveness." *Johnson*, 2020 IL 124213, ¶ 26 (citing *Logan*, 552 U.S. at 26).

Because California is the convicting jurisdiction, its law controls the analysis. *Id.* And under California law, individuals with MCDV convictions do not lose their civil rights, which as defined in California include the rights to vote, hold public office, and serve on a jury. *United States v. Chovan*, 735 F.3d 1127, 1132 (9th Cir. 2013) (citing *Logan*, 552 U.S. at 37); *see also Enos v. Holder*, 855 F. Supp. 2d 1088, 1094-95 (E.D. Cal. 2002) (rejecting argument by

individuals with MCDVs that their right to possess firearms should be included in the formulation of "civil rights" in section 921(a)(33)(B)(ii)), *aff'd by Enos v. Holder*, 585 F. App'x. 447 (9th Cir. 2014). Indeed, in California, only felons lose the core civil rights to vote and serve on a jury upon conviction. *See* Cal. Const. Art. II, § 4, Art. V, § 8(a); Cal. Civ. Proc. Code § 203(a)(5); Cal. Elec. Code §§ 2201(a)(3), (b)(2). As a misdemeanant, Brown did not lose the right to vote, *see* Cal. Const. Art. II, § 4; Cal. Elec. Code §§ 2201(a)(3), (b)(2); *see also League of Women Voters of Calif, v. McPherson*, 145 Cal. App. 4th 1469, 1475 (Ct. App. 1st Div. 2006), hold public office, *see Eldridge v. Sierra View Local Hosp. Dist.*, 223 Cal. App. 3d 311, 316 (1990); West's Ann. Cal. Gov. Code § 1021; or serve on a jury, *see* Cal. Civ. Proc. Code § 203(a)(5). *See* C25. Accordingly, there is nothing to be "restored" to him, *Chovan*, 735 F.3d at 1132, and, as the appellate court correctly determined, he cannot obtain relief in Illinois courts from his federal firearm prohibition under the "civil rights restored" exception, *Brown*, 2020 IL App (3d) 180409, ¶¶ 24-25.

Brown argues, however, that this Court should apply the formulation of "civil rights" adopted in *Johnson* — in other words, that "civil rights" includes firearm rights — to his circumstances. AT Br. at 25-28. According to Brown, he would be entitled to relief under that framework because, he asserts, his firearm rights have been automatically restored through California Penal Code § 29805(a)(1). AT Br. at 25, 28-30. Brown is incorrect.

As an initial matter, Brown's position is based on a misreading of California law. Even if firearm rights were considered civil rights for purposes of California convictions (which they are not, as discussed below), Brown would not be entitled to a FOID card because his firearm rights have not been revoked and restored under California law. Section 29805(a)(1) provides that within 10 years of a misdemeanor conviction for inflicting corporal injury on a spouse, a misdemeanant may be jailed or required to pay a fine if found in possession of a firearm. But removing the consequences of jail time or a fine for firearm possession after 10 years does not mean that California has authorized those with MCDV convictions to possess firearms generally.

Instead, the California appellate court has indicated that under section 28905(a)(1) — previously California Penal Code § 12013 — those with MCDV convictions are not considered to be "law abiding citizens" who have Second Amendment rights under *District of Columbia v. Heller*, 554 U.S. 570 (2008). *See People v. Delacy,* 192 Cal. App. 4th 1481, 1492-93 (Cal. App. 1st Div. 2011) (emphasis omitted). On the contrary, section 28905(a)(1) merely removes the possibility of criminal prosecution should a misdemeanant need to use a firearm for self-defense in the home or be in the same vicinity as a gun. *Id.*

In other words, this Court need not reach whether *Johnson*'s formulation of "civil rights" applies to California convictions because it would not alter the outcome. But if it did, there is good reason to conclude that *Johnson* does not apply here. A paramount underlying consideration

articulated in *Johnson* was that the convicting jurisdiction is responsible for determining whether "a particular person is, despite a prior conviction, sufficiently trustworthy to possess firearms." 2020 IL 124213, ¶ 26 (internal quotation marks omitted). And in California, that determination is based on restoration mechanisms established for voting, holding public office, and serving on a jury, as explained. If this court were to apply *Johnson*'s formulation to Brown's California conviction, it would be replacing California's threshold judgment about which misdemeanants are trustworthy with its own.

Brown contends, however, that treating his California conviction in this manner would place him on unequal footing with Illinois misdemeanants, who have an additional restoration mechanism available to them. AT Br. at 28-29. But these kinds of disparities in this area of the law are inevitable (and tolerated), given the different restoration systems established in each State. *E.g.*, *Beecham*, 511 U.S. at 373 (recognizing that requiring the law of the convicting jurisdiction to control whether an individual's firearm rights have been restored may lead to differing results because many States have "no restoration procedures" whatsoever for civil rights); *Skoien*, 614 F.3d at 645 ("true the statute tolerates different outcomes for persons convicted in different states, but this is true of all situations in which a firearms disability . . . depends on state law. The justices held in *Logan* that this variability does not call into question federal firearm limits based on state convictions that

have been left in place under the states' widely disparate approaches to restoring civil rights[.]").

This case is no exception. If this Court applies *Johnson* to California convictions, then California misdemeanants living in Illinois (like Brown) could be exempted from section 922(g)(9) while California misdemeanants living in California would remain subject to the federal bar. And if this Court applies California law, then Illinois misdemeanants could be exempted from section 922(g)(9) while California misdemeanants would not. Stated differently, both scenarios create disparities, but based on different metrics: the law of the State of residence governs the analysis in the former, whereas the law of the State of conviction controls in the latter. And when faced with this choice, *Johnson* counsels in favor of respecting the convicting State's judgment on parameters for restoration because it is consistent with congressional intent and judicial comity. By applying California's interpretation of "civil rights" in section 921(a)(33)(B)(ii), the decisions that a co-equal sovereign has made about the meaning of its own convictions, rights restoration, and collateral consequences will be respected. So, while there may be a disparity between Illinois and California as to how to restore firearm rights for MCDV convictions, such disparities are tolerated as an inevitable consequence of the system established by Congress.

B. Alternatively, the circuit court's findings that Brown satisfied sections 10(c)(2) and (c)(3) of the Act were against the manifest weight of the evidence.

The appellate court's decision should be upheld for the independent reason that Brown was statutorily ineligible to hold a FOID card under sections 10(c)(2) and 10(c)(3) of the Act. To grant relief under section 10, the circuit court must be satisfied that the applicant has established that he or she meets each of the section 10(c) factors. 430 ILCS 65/10(c). Relevant here, the circuit court examines the "circumstances regarding a criminal conviction," as well as the petitioner's "criminal history and [ ] reputation" to determine if he or she would be "likely to act in a manner dangerous to public safety." 430 ILCS 65/10(c)(2). The court is also required to find that "granting relief would not be contrary to the public interest." 430 ILCS 65/10(c)(3). Although the circuit court here did not articulate specific findings on either of these factors, it must have implicitly found that Brown satisfied them in order to grant him relief. C304. As now explained, however, these findings were against the manifest weight of the evidence.

As an initial matter, there are numerous indications in the record that Brown was likely to act in a manner dangerous to public safety, and thus did not satisfy section 10(c)(2). In assessing this factor, the Act instructs the court to review both the circumstances of an applicant's convictions and his or her criminal history. In other words, section 10(c)(2) contemplates that a court will review the entirety of the applicant's contacts with law enforcement,

including arrests. *Cf. Jankovich v. Ill. State Police*, 2017 IL App (1st) 160706, ¶ 55 (defining criminal history to include convictions and arrests in context of concealed carry licensure process).

Here, the circumstances surrounding Brown's conviction at issue, as well as his criminal history generally, show that he is likely to act in a manner dangerous to public safety. For starters, Brown has a 2001 California MCDV conviction for picking up his then-wife after an argument, throwing her over his back, and causing her to fall off so hard that she got "road rash." R13-15. He also has two other arrests involving potential or incurred bodily harm: (1) a 1997 arrest for fifth-degree misdemeanor assault in Minnesota, C236-37, and (2) a 2005 arrest for battery in Illinois, C275, 279. In fact, his 2005 arrest followed a "bar fight" where he fought in public, threw punches, and drew blood from the other participant. C275-79. Also in 2005, Brown placed his fellow citizens at risk by driving a motor vehicle while intoxicated, resulting in a DUI conviction in Bureau County, Illinois. C269.

Furthermore, Brown has deflected responsibility and downplayed the seriousness of many of these offenses. For example, he submitted evidence on the MCDV conviction that the offense was contested, even though he pleaded guilty, *see* R13; C285, and described the incident as "kind of a playful moment," thus minimizing its gravity, *see* R13-14. He also attempted to characterize the bar fight as a dispute over money during which he acted in self-defense. R12. Overall, Brown's criminal history record shows that he has

a tendency to make poor choices and often resorts to aggression that places others in harm's way. Accordingly, the circuit court's finding that he was not likely to act in a manner dangerous to public safety was against the manifest weight of the evidence.

Likewise, the circuit court's finding that granting Brown relief would not be "contrary to the public interest" is also against the manifest weight of the evidence. This factor allows the circuit court to review additional considerations that may not be encompassed by the other section 10(c) factors, but that nevertheless are related to an applicant's suitability to possess a firearm. Stated differently, it is a catchall factor that enables the court to take a holistic view of the applicant, with a focus on matters of public concern.

One example of such a consideration is Brown's misrepresentation of his criminal history on his FOID application. The public has a vested interest in ensuring that those who are not entitled to possess firearms are not allowed to do so in Illinois. 430 ILCS 65/1 ("in 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 . . . by the establishment of a system of [FOID] Cards[.]"). In order to determine who may possess a firearm, individuals must be forthright and honest on their FOID applications. In fact, the General Assembly has made it a class 2 felony offense to provide a false statement on a FOID application, *see* 430 ILCS 65/14(d-5), and allows ISP to revoke or deny a FOID

application for providing a false statement on a FOID card application, R48-49; 430 ILCS 65/8(h).

Brown's false statement — which he admitted making during the hearing before the circuit court, *see* R. 24-25 — is not part of his criminal history. Nevertheless, it is relevant to the question whether issuing him a FOID card would be in the public interest. Here, the record shows that Brown acted contrary to the public interest when he concealed his MCDV conviction on his FOID application in 2013, though he knew it was an offense that involved elements of domestic battery. C220; R8 (characterizing the offense as a "domestic battery"). When asked during section 10 proceedings why he did not reveal this MCDV conviction on his FOID card application, he stated that he was "not trying to deny something happened but it was supposed to be under supervision." R20-21. And although Brown may have served the sentence for inflicting corporal injury on his then-wife in California, he is not entitled to possess firearms there, *see supra* pp. 18-23, and has not accepted responsibility for the offense by openly noting it on his application. As a result, Brown was able to improperly possess a FOID card undetected for several years until the offense was uncovered when Brown was trying to purchase a firearm. Because Brown betrayed the public interest by possessing a FOID card when he was not entitled to one, the circuit court's finding that granting Brown relief was not "contrary to the public interest" is against the manifest weight of the evidence.

III. The Appellate Court Correctly Denied Brown's Constitutional Challenge As Premature.

Although Brown does not qualify for an exception to section 922(g)(9) through the "civil rights restored" provision of section 921(a)(33)(B)(ii), he can still apply for a pardon from the California governor. Brown has not done this, R24, and while this potential avenue for relief remains, his constitutional challenge is premature, as the appellate court below correctly held, *see Brown*, 2020 IL App (3d) 180409, ¶ 26.

In *Coram v. State*, 2013 IL 113867, a case similarly involving a FOID card applicant's Second Amendment challenge to section 922(g)'s prohibition on the possession of firearms by domestic violence misdemeanants, this Court determined that it did not need to reach the applicant's constitutional claim, because the Court was able to resolve the case on non-constitutional grounds. *Id.* ¶ 74. However, two Justices would have found that the applicant's claim was premature because he had not applied for a pardon, making it "yet unknown whether [he] can satisfy section 921(a)(33)(B)(ii)." *Id.* ¶ 134 (Theis, J., dissenting, joined by Garman, J.). The Justices reasoned that the Court need and should not "determine whether the statute is an unconstitutional perpetual ban which violates . . . second amendment rights," when the applicant had "not availed himself of a potential state remedy available to him under the statute." *Id.* A conclusion otherwise would violate the "elementary" rule that "'constitutional principles should be addressed only as

a last resort, when a case cannot be resolved another way.'" *Id.* ¶ 135 (quoting *In re Haley D.*, 2011 IL 110886, ¶ 54).

Since *Coram*, two appellate districts have adopted this reasoning, holding — under circumstances similar to those here — that a FOID card applicant's Second Amendment challenge was premature because the applicant could have, but had not, applied for a pardon. *See Heitmann*, 2017 IL App (3d) 160527, at ¶¶ 36-40; *Baumgartner v. Greene Cnty. State's Atty's Off.*, 2016 IL App (4th) 140035, ¶¶ 60-61.[2] Similarly, the Ninth Circuit ruled that a petitioner was "in no position to argue that" the State of Hawaii's restoration mechanisms were "constitutionally insufficient" because he had "failed to avail himself of the one restoration mechanism that is available to him" (a gubernatorial pardon) under state law. *Fisher v. Kealoha*, 855 F.3d 1067, 1071 (9th Cir. 2017).

Brown still has a potential avenue open to seek relief from the federal firearm prohibition caused by his California MCDV conviction: he may pursue a gubernatorial pardon in California. Cal. Const. Art. V, § 8, (a) (California's governor has power to grant pardons for convictions); Cal. Penal Code § 4800. In California, the Board of Parole Hearings investigates pending pardon applications on behalf of the Governor and considers factors such as an

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[2] As even Brown appears to recognize, this portion of *Heitmann* remains good law. *See* AT Br. at 38 (arguing that *Johnson* "implicitly overrul[ed] *Heitmann*'s conclusion" that restoration of firearm rights does not constitute restoration of civil rights for purposes of the "civil rights restored" provision of section 921(a)(33)(B)(ii)). And Brown does not acknowledge *Baumgartner*.

applicant's self-development and use of rehabilitative programs, the age and circumstances of the offense, and "any extraordinary circumstances that justify restoration of firearm rights." Office of Governor Gavin Newsom, *Pardons*, https://www.gov.ca.gov/pardons/ (last accessed Apr. 20, 2021); *see also* Cal. Penal Code § 4852.16(b). The Governor then acts on the pardon application. *Id.*

Brown has not availed himself of the pardon process in California. R24. During the section 10 proceedings in the circuit court, Brown admitted that his section 10 petition was his "first course" to seek relief from his firearms prohibition due to his MCDV conviction, and that he had not tried to obtain a pardon from California's governor. *Id.* On appeal, Brown contends that he should not have to apply for a pardon in California because such relief is discretionary and because there is no time limit within which California's governor must decide whether to grant or deny a pardon. AT Br. 34, 39.

But that is wrong. That a pardon is discretionary does not make the relief "unavailable" to Brown. *Coram,* 2013 IL 113867, ¶ 134 (Theis, J., dissenting, joined by Garman, J.). Indeed, a remedy cannot be deemed "futile without ever being tried." *Id.* For similar reasons, Brown's speculation about the amount of time that it may take to receive a decision on a pardon application is irrelevant because he has not even tried to avail himself of California's pardon procedure. R24. Accordingly, as the appellate court correctly held, Brown's constitutional challenge is premature.

IV. Prematurity Aside, Brown's Second Amendment Challenge Lacks Merit.

If this Court were to overlook Brown's failure to pursue a pardon (and it should not), it should reject his Second Amendment challenge to section 922(g)(9), including section 921(a)(33)(B)(ii)'s requirement that those seeking relief from a federal firearms prohibition obtain an expungement or a pardon or have their civil rights restored. Brown argues that section 922(g)(9) violates the Second Amendment because it operates as an impermissible "perpetual ban, via indefinitely waiting on a pardon," on the firearm rights of persons convicted of misdemeanor domestic violence. AT Br. at 34-37 (quoting header). He is incorrect, as the federal courts of appeals have consistently held when sustaining section 922(g)(9) against similar challenges. *See United States v. Stimmel*, 879 F.3d 198, 210-11 (6th Cir. 2018); *Chovan*, 735 F.3d at 1139-42; *United States v. Staten*, 666 F.3d 154, 167 (4th Cir. 2011); *United States v. Booker*, 644 F.3d 12, 25-26 (1st Cir. 2011); *Skoien*, 614 F.3d at 643-44; *United States v. White*, 593 F.3d 1199, 1205-06 (11th Cir. 2010); *In re United States*, 578 F.3d 1195, 1199-1200 (10th Cir. 2009).[3]

[3] On the final page of his opening brief, Brown states that the "effectively lifetime ban, on him possessing firearms" violates both the Second Amendment and "Article I, Section 22 of the Illinois Constitution." AT Br. at 40. This Court should not consider any challenge under the Illinois Constitution because Brown developed no argument on this issue, and thus forfeited it. *See* Ill. S. Ct. R. 341(h)(7); *Vancura v. Katris*, 238 Ill. 2d 351, 369 (2010) ("this court has repeatedly held that the failure to argue a point in the appellant's opening brief results in forfeiture on the issue").

Of course, federal decisions are "persuasive but not binding [on this Court] in the absence of a decision of the United States Supreme Court." *State Bank of Cherry v. CGB Enters., Inc.*, 2013 IL 113836, ¶ 34. However, when faced with a challenge to the constitutionality of a federal statute, the Court gives "considerable weight" to federal court decisions concerning the statute's constitutionality, *Bowman v. Am. River Transp. Co.*, 217 Ill. 2d 75, 91 (2005), and "generally follow[s] the decisions of federal courts to ensure that the statutory scheme is uniformly applied," *Wilson v. Norfolk & Western Ry. Co.*, 187 Ill. 2d 369, 374 (1999), *accord State Bank of Cherry*, 2013 IL 113836, at ¶ 34 (recognizing "the importance of maintaining a uniform body of law in interpreting federal statutes if the federal courts are not split on an issue"). Here, Brown provides no basis for this Court to break with the unanimous federal authority confirming the constitutionality of section 922(g)(9).

Both this Court and federal courts employ the same two-step test to determine whether a statute violates the Second Amendment. *See In re Jordan G.*, 2015 IL 116834, ¶ 22; *see also*, *e.g.*, *Stimmel*, 879 F.3d at 204; *Chovan*, 735 F.3d at 1136-38; *Staten*, 666 F.43d at 159. First, they ask whether the challenged law "imposes a burden on conduct understood to be within the scope of the second amendment's protection at the time of ratification." *Jordan G.*, 2015 IL 116834, ¶ 22; *accord Stimmel*, 879 F.3d at 204; *Chovan*, 735 F.3d at 1136; *Staten*, 666 F.3d at 159. If the regulated activity is "categorically unprotected" by the Second Amendment, the analysis

"can stop there," and the restriction is "not subject to further Second Amendment review." *Stimmel*, 879 F.3d at 204; *Staten*, 666 F.3d at 159; *accord Jordan G.,* 2015 IL 116834, ¶ 22. But if evidence on this point is "inconclusive" or suggests that the regulated activity is categorically protected, then courts proceed to the second step and look "into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights." *Stimmel*, 879 F.3d at 204; *accord*, *e.g.*, *Chovan*, 735 F.3d at 1138-39; *Staten*, 666 F.3d at 159; *see also People v. Chairez*, 2018 IL 121417, ¶¶ 49-50.

Brown's constitutional challenge fails at both steps. To begin, Brown, as a person with an MCDV conviction, is outside the group of persons the Second Amendment protects. In *Heller*, the Supreme Court explained that it was not "'cast[ing] doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill,'" as well as other "'presumptively lawful regulatory measures.'" *White*, 593 F.3d at 1205 (quoting *Heller*, 128 S. Ct. at 2816-17 & n.26). Thus, courts have recognized, after *Heller*, "the Second Amendment permits categorical regulation of gun possession by classes of persons." *Booker*, 644 F.3d at 23; *accord Skoien*, 614 F.3d at 640 ("That *some* categorical limits are proper is part of the original meaning" of the Second Amendment.) (emphasis in original).

In addition, courts have also recognized, section 922(g)(9)'s prohibition against the possession of firearms by persons convicted of MCDV "fits

comfortably among the categories of regulations that *Heller* suggested would be 'presumptively lawful.'" *Booker*, 644 F.3d at 24. Section 922(g)(9) is "historically and practically, a corollary outgrowth of the federal felon disqualification statute" that *Heller* stated remained permissible. *Id.* Indeed, Congress enacted section 922(g)(9) to close the loophole created by existing felon-in-possession laws, which allowed domestic abusers to keep firearms as their crimes were often underreported and undercharged. *See Skoien*, 614 F.3d at 643 (citing 142 Cong. Rec. 22985, 22986 (statements of Sen. Lautenberg)). Thus, as two federal courts of appeals have held, persons with MCDV convictions fall outside the protections of the Second Amendment. *See White*, 593 F.3d at 1205 (section 922(g)(9) "warrants inclusion on *Heller*'s list of presumptively lawful longstanding prohibitions"); *In re United States*, 593 F.3d at 1206 ("Nothing suggests that the *Heller* dictum, which we must follow, is not inclusive of § 922(g)(9) involving those convicted of misdemeanor domestic violence."); *but see*, *e.g.*, *Chovan*, 735 F.3d at 1137 (holding that section 922(g)(9) implicates Second Amendment rights).

Because individuals who are unable to possess firearms under section 922(g)(9) fall outside of Second Amendment protection, this Court may end the constitutional inquiry at the first step. But if this Court proceeds to the second step, the parties agree (and the federal courts have unanimously held) that intermediate scrutiny should be applied to resolve the constitutionality of 922(g)(9). *See* AT Br. at 32-33; *see also Stimmel*, 879 F.3d at 210-11 (applying

intermediate scrutiny to Second Amendment challenge to section 922(g)(9)); *Chovan*, 735 F.3d at 1138 (same); *Staten*, 666 F.3d at 160-61 (same); *Booker*, 644 F.3d at 25-26 (same); *Skoien*, 614 F.3d at 643-44 (same). Applying intermediate scrutiny, section 922(g)(9) is constitutional.

Intermediate scrutiny requires the government to establish, first, a "significant, substantial, or important objective," and, second, "a reasonable fit between the challenged restriction and that objective." *Stimmel*, 879 F.3d at 206; *Skoien*, 614 F.3d at 201-02; *accord Chairez*, 2018 IL 121417, ¶ 50. To begin, "'[i]t is self-evident'" that the government interest in preventing gun violence, and domestic gun violence in particular, is important. *Stimmel*, 879 F.3d at 206 (quoting *Chovan*, 735 F.3d at 1139); *accord Staten*, 666 F.3d at 161; *Booker*, 644 F.3d at 25; *Skoien*, 614 F.3d at 642. Indeed, Brown does not argue that reducing armed violence — including domestic gun violence — is an insufficiently important government objective. *See generally* AT Br. at 32-39. Nor could he. As the Supreme Court has recognized, "[t]his country witnesses more than a million acts of domestic violence, and hundreds of deaths from domestic violence, each year." *Castleman*, 572 U.S. at 159-60.

The question, then, is whether there is a "reasonable fit" between the important government interest in preventing gun violence, and domestic gun violence in particular, and disarming individuals with MCDV convictions. As the federal courts of appeals have held, there is. *See Stimmel*, 879 F.3d at 207-11; *Chovan*, 735 F.3d at 1140-41; *Staten*, 666 F.3d at 167; *Booker*, 644 F.3d at

25-26; *Skoien*, 614 F.3d at 643-44. As these courts have explained, studies establish that those with domestic violence convictions are likely to reoffend. *Stimmel*, 879 F.3d at 208-09; *Chovan*, 735 F.3d at 1140; *Staten*, 666 F.3d at 164-65; *Booker*, 644 F.3d at 26; *Skoien*, 614 F.3d at 644. Indeed, there is "an overall estimated recidivism rate range between 40% and 80%" for those with domestic violence convictions. *E.g.*, *Stimmel*, 879 F.3d at 208 (internal citations omitted); *see also Skoien*, 614 F.3d at 644 (describing study finding that within three years of conviction, approximately 52% of abusers did not "suspend" their abusive behavior).

Not only are people convicted of domestic violence likely to reoffend, but adding a firearm to a domestic violence situation makes the situation even more dangerous: "domestic violence often escalates in severity over time, and the presence of a firearm increases the likelihood that it will escalate to homicide." *Castleman*, 572 U.S. at 159-60. As a result, "domestic assaults with firearms are approximately 12 times more likely to end in the victim's death than are assaults by knives or fists." *Skoien*, 614 F.3d at 643 (internal citations omitted); *accord id.* ("The presence of a gun in the home of a convicted domestic abuser is strongly and independently associated with an increased risk of homicide.") (internal quotations omitted); *see also Stimmel*, 879 F.3d at 209-10; *Chovan*, 735 F.3d at 1140; *Booker*, 644 F.3d at 26; *Staten*, 666 F.3d at 166. "This risk of death extends beyond those in an intimate or familiar relationship with the abuser," and can include, for example, risk to

law enforcement officers who respond to domestic violence calls. *Stimmel*, 879 F.3d at 210.

Because individuals with a history of domestic violence are likely to engage in recidivist conduct, and adding a firearm to a domestic violence situation increases the risk of serious injury and death, a reasonable fit exists between section 922(g)(9) and the government's interest in preventing gun violence. "The belief underpinning [section] 922(g)(9) is that people who have been convicted of violence once — toward a spouse, child or domestic partner no less — are likely to use violence again." *Skoien*, 614 F.3d at 642. Disarming those who have been convicted of domestic abuse helps to ensure that firearms will be kept "out of the hands of domestic abusers," *Hayes*, 555 U.S. at 426, thereby reducing the likelihood that such individuals will use firearms to inflict harm. For these reasons, all federal courts of appeals to have considered Second Amendment challenges to section 922(g)(9) have held that the statute satisfies intermediate scrutiny.

The fact that section 922(g)(9) does not afford an opportunity to demonstrate – beyond the exceptions contained in section 921(a)(33)(B)(ii) – that an individual is qualified to possess firearms notwithstanding a past MCDV conviction does not change this result. To establish reasonable fit, the government need only demonstrate that the challenged restriction's "scope is in proportion to the interest served," not that it "represents . . . the single best disposition." *Id.*; *see also Staten*, 666 F.3d at 162 (government need not prove

that challenged provision "is the least intrusive means of reducing gun violence or that there be no burden whatsoever" on Second Amendment rights). Thus, the fit between the government's interest and section 922(g)(9) does not need to be a perfect one, and some over-inclusiveness is constitutionally permissible. *See Stimmel*, 879 F.3d at 207; *accord Harley v. Wilkinson*, 988 F.3d 766, 769 (4th Cir. 2021) ("A statute may meet this [intermediate scrutiny] standard despite being overinclusive in nature.").

Applying these principles, each federal appellate court to consider the issue has "decline[d] to read into Section 922(g)(9) an exception for good behavior or for the passage of time following a disqualifying conviction for a misdemeanor crime of domestic violence," yet held that the provision passes constitutional muster. *Harley*, 988 F.3d at 771; *accord Stimmel*, 879 F.3d at 210-11; *Chovan*, 735 F.3d at 1142. These courts have correctly reasoned that the Second Amendment does not "require an individualized hearing to determine whether the government has made an improper categorization." *Stimmel*, 879 F.3d at 210 (internal quotations omitted); *see also Chovan*, 735 F.3d at 1127 (with section 922(g)(9), "Congress permissibly created a broad statute that only excepts those individuals with expunged, pardoned, or set aside convictions and those individuals who have had their civil rights restored"). And, as they have explained, to accept an "as applied challenge" (such as Brown's) would "create an exception to § 922(g)(9) that Congress did not establish and would undermine [its] judgment that risk or potential, not

likelihood, probability or certainty of violence is sufficient." *Stimmel*, 879 F.3d at 211 (internal quotations omitted); *see also Harley*, 988 F.3d at 770-71 ("Harley's request that we review his individual characteristics as part of our consideration of his as-applied challenge to Section 922(g)(9) . . . is fundamentally flawed because it effectively would create an exception to the statute that does not exist."); *Chovan*, 735 F.3d at 1142 (similar).

Brown cites no cases for a different result. Contrary to his suggestion, *see* AT Br. at 35, the Seventh Circuit in *Skoien* did not "recognize[ ]" that an as-applied challenge to section 922(g)(9) would be "appropriate in particular cases." Instead, *Skoien* reserved that question for another day. *See* 614 F.3d at 645 (declining to decide "[w]hether 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)"). *Schrader v. Holder*, 704 F.3d 980 (D.C. Cir. 2013), considered a challenge to 18 U.S.C. § 922(g)(1), *not* section 922(g)(9). *See id.* at 982. This difference is critical. As the Fourth Circuit explained in *Harley*, "cases involving as-applied challenges to Section 922(g)(1) [have] limited relevance in the context of Section 922(g)(9)," because "the prohibition in Section 922(g)(1)" — disarming individuals convicted of a crime punishable by more than one year's imprisonment — "encompasses an innumerable range of possible convictions and conduct, including some that potentially could exceed the statutory purpose of Section 922." 988 F.3d at 771. And *United States v. Miller*, 588 F.3d 418 (7th Cir. 2009), also cited by

Brown, *see* AT Br. at 35, is even further afield: it does not involve a constitutional challenge to any aspect of Section 922.

Moreover, contrary to Brown's suggestion, *see* AT Br. at 36-37, Judge Kozinski, writing separately in *Fisher*, did not indicate that he would have held that section 922(g)(9) is unconstitutional because in Hawaii, where Fisher was convicted, relief from section 922(g)(9)'s prohibition was limited to those who can obtain a gubernatorial pardon; Judge Kozinski merely noted that this question might be raised in a future case. *See* 855 F.3d at 1072 (Kozinski, J., "ruminating") ("And while Fischer's case gives us no occasion to seek better refuge, others will."). And, in any event, as explained, the *Fisher* panel held (and Judge Kozinski did not disagree) that Fisher's constitutional challenge was premature because he had not yet applied for a pardon. *See supra* p. 29.

Thus, should this Court reach the issue, the Court should follow the federal courts of appeals and hold that section 922(g)(9) does not violate the Second Amendment. These courts have correctly recognized that "in the context of gun safety, the expense and other difficulties of individual determinations may necessitate the inherent precision of a prophylactic rule." *Stimmel*, 879 F.3d at 211 (cleaned up). That section 922(g)(9) is "arguably somewhat overinclusive given that every domestic violence misdemeanant would not necessarily misuse a firearm . . . if permitted to possess one . . . merely suggests that the fit is not perfect"; it "does not undermine the

statute's constitutionality because a *reasonable* fit is all that intermediate scrutiny requires." *Id.* (cleaned up) (emphasis in original).

CONCLUSION

Accordingly, Respondents-Appellees People of the State of Illinois and Illinois State Police ask that this Court affirm the appellate court's judgment.

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 10 pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 42 pages.

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STATUTORY APPENDIX

Section 10 of the Act provides, in relevant part:

> (a) Whenever an application for a Firearm Owner's Identification Card is denied, whenever the Department fails to act on an application within 30 days of its receipt, or whenever such a Card is revoked or seized as provided for in Section 8 of this Act, the aggrieved party may appeal to the Director of State Police for a hearing upon such denial, revocation or seizure, unless the denial, revocation, or seizure was based upon a forcible felony, stalking, aggravated stalking, domestic battery, any violation of the Illinois Controlled Substances Act, the Methamphetamine Control and Community Protection Act, or the Cannabis Control Act that is classified as a Class 2 or greater felony, any felony violation of Article 24 of the Criminal Code of 1961, or any adjudication as a delinquent minor for the commission of an offense that if committed by an adult would be a felony, in which case the aggrieved party may petition the circuit court in writing in the county of his or her residence for a hearing upon such denial, revocation, or seizure.
>
> (b) At least 30 days before any hearing in the circuit court, the petitioner shall serve the relevant State's Attorney with a copy of the petition. The State's Attorney may object to the petition and present evidence. At the hearing the court shall determine whether substantial justice has been done. Should the court determine that substantial justice has not been done, the court shall issue an order directing the Department of State Police to issue a Card. However, the court shall not issue the order if the petitioner is otherwise prohibited from obtaining, possessing, or using a firearm under federal law.
>
> (c) Any person prohibited from possessing a firearm under Sections 24-1.1 or 24-3.1 of the Criminal Code of 1961 or acquiring a Firearm Owner's Identification Card under Section 8 of this Act may apply to the Director of State Police or petition the circuit court in the county where the petitioner resides, whichever is applicable in accordance with subsection (a) of this Section, requesting relief from such prohibition and the Director or court may grant such relief if it is established by the applicant to the court's or Director's satisfaction that:
>
> > (0.05) when in the circuit court, the State's Attorney has been served with a written copy of the petition at least 30 days before any such hearing in the circuit court and at the hearing the State's Attorney was afforded an opportunity to present evidence and object to the petition;

> (1) the applicant has not been convicted of a forcible felony under the laws of this State or any other jurisdiction within 20 years of the applicant's application for a Firearm Owner's Identification Card, or at least 20 years have passed since the end of any period of imprisonment imposed in relation to that conviction;
>
> (2) 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;
>
> (3) granting relief would not be contrary to the public interest; and
>
> (4) granting relief would not be contrary to federal law.

430 ILCS 65/10(a)–(c) (2018).

Section 921 of the Federal Gun Control Act provides, in relevant part:

> (a) As used in this chapter --
>
> (33)(A) Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that--
>
> > (i) is a misdemeanor under Federal, State, or Tribal[3] law; and
> >
> > (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.
>
> (B)(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless--
>
> > (I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and
> >
> > (II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

(ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter 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) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(33)(B)(ii) (West 2021).

Section 922 of the Federal Gun Control Act provides, in relevant part:

(g) It shall be unlawful for any person-- . . .

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(9) (West 2021).

Section 273.5 of the California Penal Code provides, in relevant part:

(a) Any person who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, corporal injury resulting in a traumatic condition, is guilty of a felony, upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars ($6,000) or by both that fine and imprisonment. . .

(c) as used in this section, "traumatic condition" means a condition of the body, such as a wound or external or internal injury, whether of a minor or serious nature, caused by a physical force. . .

Cal. Penal Code § 273.5 (eff. Jan 1. 2001).

Section 29805 of the California Penal Code provides, in relevant part:

> . . . any person who has been convicted of a misdemeanor violation of . . . Section 273.5 . . ., and who, within 10 years of the conviction, owns purchases, receives, or has in possession or under custody or control, any firearm is guilty of a public offense, which shall be punishable by imprisonment in a county jail not exceeding one year or in the state prison, by a fine not exceeding one thousand dollars ($1,000) or by both that imprisonment and fine. . .

Cal. Penal Code § 29805 (eff. Jan 1., 2012).

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 17, 2021, I electronically filed the foregoing Brief Respondents-Appellees with the Clerk of the Supreme Court, by using the Odyssey eFileIL system.

I further certify that that the other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served by the Odyssey eFileIL system.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

/s/ Katelin B. Buell
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