No. 124100

In the
Supreme Court of Illinois

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

v.

VIVIAN CLAUDINE BROWN,

Defendant-Appellee.

Appeal from the Circuit Court of the Second Judicial Circuit,
White County, Illinois
No. 17 CM 60
The Honorable **Mark R. Stanley**, Judge Presiding

RESPONSE BRIEF OF DEFENDANT-APPELLEE

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ORAL ARGUMENT REQUESTED

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POINTS AND AUTHORITIES

INTRODUCTION

Though the scope of the Second Amendment has been the subject of much litigation since the Supreme Court's ruling in *District of Columbia v. Heller*, 554 U.S. 570 (2008), one thing that cannot be challenged is that law-abiding persons have a fundamental Second Amendment right to keep and bear arms in their homes for self-defense.

Vivian Brown was set up by an angry and sometimes-separated husband, and arrested for having a common bolt-action rifle in her bedroom (though sometimes *their* bedroom) for self-defense without possessing a FOID card. The State claims, without evidence, that intruding into the sanctity of Brown's home, and hampering her ability to exercise her Second Amendment right to self-defense with a long gun, somehow increases public safety, but the law does nothing of the sort. In fact, the statute potentially harms Brown, and all others in her shoes.

Brown abhors gun crimes as much as any law-abiding person, and indeed is only looking to prevent it within her home, but the State's claimed justifications for the infringements cannot validate a statute that, as applied to Brown, does not serve a governmental interest and criminalizes her efforts to protect her home and exercise her core fundamental Second Amendment rights. The circuit court should be affirmed.

ISSUES PRESENTED

Was the circuit court correct in ruling that requiring Defendant Vivian Brown, who was eligible to possess a FOID card and who wanted to possess a long gun in her home for self-defense, to obtain a FOID card with the payment of a fee and submission of a photograph violated Brown's rights under the Second Amendment to the United States Constitution?

Was the circuit court correct in ruling that requiring Defendant Vivian Brown, who was eligible to possess a FOID card and who wanted to possess a long gun in her home for self-defense, to obtain a FOID card with the payment of a fee and submission of a photograph violated Brown's rights under Article I, § 22 of the Illinois Constitution?

STANDARD OF REVIEW

Brown assents to the State's recitation of the standard of review.

JURISDICTION

Brown assents to the State's statement regarding jurisdiction.

STATUTES INVOLVED

Brown agrees that the statutory provisions of the FOID Card Act (430 ILCS 65/1, *et seq.*) cited by the State have been recited correctly.

STATEMENT OF FACTS[1]

1. On March 18, 2017, Vivian Claudine Brown, a person who is at least 21 years of age, resided in Carmi, White County, Illinois, and occupied a residence therein as her home (C-17).

2. On March 18, 2017, Brown did not have a Firearm Owner's Identification Card ("FOID card") issued pursuant to the FOID Card Act, nor had she ever had a FOID card revoked (C-17).

3. On March 18, 2017, Brown did not have any criminal record and was otherwise eligible to have and possess a firearm and be issued a FOID card pursuant to the FOID Card Act (C-17).

4. On March 18, 2017, at approximately 1:47 P.M., the White County Sheriff's Department ("Sheriff's Department") received a call from Brown's separated-husband, Scott Brown, who alleged that Brown was shooting a gun inside her Carmi, White County residence (C-18).

5. When the Sheriff's Department personnel arrived at Brown's home, they found a single shot, bolt action, .22 caliber Remington rifle beside Brown's bed which she had for protection. After conducting an investigation, the Sheriff's Department found no evidence that the rifle (or any other gun) had been fired in the residence. Further, Brown denied firing a gun and other occupants of the residence denied hearing a gunshot (C-18). In other

[1] Brown will cite to materials in the State's Appendix as "A-," and materials in the Common Law Record as C-."

words, the allegations were a lie, similar to other episodes of "swatting." (*See* https://www.cnn.com/2019/03/30/us/swatting-what-is-explained/index.html, last checked May 31, 2019).

6. The Sheriff's Department made a report of the incident and forwarded it to the White County State's Attorney (C-18).

Procedural History

7. The White County State's Attorney filed a criminal Information in the above-entitled cause charging Brown with Possession of Firearm without Requisite Firearm Owner's I.D. Card, a class A misdemeanor, in violation of 430 ILCS 65/2(a)(1). The specific charge reads as follows:

> That on March 18th, 2017, in White County, Vivian Claudine Brown, committed the offense of Possession of Firearm without Requisite Firearm Owner's I.D. Card in that said defendant, knowingly possessed a firearm, within the State of Illinois, without having in her possession a Firearm Owner's identification card previously issued in her name by the Department of State Police under the provisions of the Firearm Owners Identification Card Act in violation of 430 ILCS 65/2(a)(1).

(C-8, 18)

8. On February 14, 2018, pursuant to Brown's Motion, the circuit court held the requirements of 430 ILCS 65/4(a)(1) (license application requirement), 430 ILCS 65/4(a-20) (photograph requirement), and 430 ILCS 65/5 (licensing fee requirement), as applied to Brown, violated her rights to self-defense with a firearm under both the Second Amendment to the United States Constitution and Article I, § 22 of the Illinois Constitution (A-9).

9. The State intervened and on March 19, 2018, filed a Motion to Reconsider the finding that the challenged statutes violated the Second Amendment (C-30).

10. On October 16, 2018, the State's Motion to Reconsider was denied. In the circuit court's Order of that date, the circuit court gave additional reasons why the statutes violated Brown's rights under the federal and State Constitutions (A-12; C-59).

11. On November 5, 2018, the State appealed directly to this Court as per Sup. Ct. Rule 302(a) (A-6; C-62).

ARGUMENT

The circuit court correctly found the FOID card requirement violates Defendant's rights under the Illinois Constitution, and the State has waived any argument to the contrary.

Supreme Court Rule 341(h)(7) states that "[p]oints not argued are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."

The circuit court found that the FOID card requirement violated not just the Second Amendment to the United States Constitution, but also Article I, § 22 of the Illinois Constitution. While the State argued in its motion below and in its opening brief against the circuit court's findings as to the Second Amendment of the Federal Constitution, the State did not even mention the State Constitution in its arguments. Therefore, any such

argument that the circuit court was wrong as to the State Constitution has been forfeited.

This is not an insignificant omission or harmless error. This Court has made clear that the two constitutional provisions are not identical.

> Article I, section 22, added to the Illinois Constitution in 1970, provides:
>
> "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.)
>
> The section does not mirror the second amendment to the Federal Constitution (U.S. Const., amend. II); rather it adds the words "[s]ubject only to the police power," omits prefatory language concerning the importance of a militia, and substitutes "the individual citizen" for "the people." The majority report of the Bill of Rights Committee of the constitutional convention, which framed the provision, makes clear that the latter two changes were intended to broaden the scope of the right to arms from a collective one applicable only to weapons traditionally used by a regulated militia (*see United States v. Miller* (1939), 307 U.S. 174, 83 L. Ed. 1206, 59 S. Ct. 816) to an individual right covering a wider variety of arms.

Kalodimos v. Morton Grove, 103 Ill.2d 483, 491 (1984).

"The [State constitutional] debates indicate that the category of arms protected by section 22 is not limited to military weapons; the framers also intended to include those arms that 'law-abiding persons commonly employed' for "recreation or the protection of person and property." 6 Proceedings 87." *Quilici v. Morton Grove*, 695 F.2d 261, 266 (7th Cir. 1982). Though the litigation in *Quilici*, as in *Kalodimos*, was about handguns, there

can be no doubt that long guns are part of the class of protected firearms commonly employed by law-abiding persons for self-defense and recreation.

Though of course the collective right theory of *Miller* was rejected in *District of Columbia v. Heller*, 554 U.S. 570 (2008), as well as the State's ability to ban law-abiding persons from possessing handguns for lawful purposes including self-defense, that did not suddenly equate the rights to bear arms in the two Constitutions.

The circuit court evidently believed that the challenged FOID Card Act requirements exceed the State's police power of Article I, § 22 (*See*, *e.g.*, *Haller Sign Works v. Physical Culture Training School*, 249 Ill. 436, 440 (1911) ("Necessarily, there are limits beyond which legislation cannot constitutionally go in depriving individuals of their natural rights and liberties. To determine where the rights of the individual end and those of the public begin is a question which must be determined by the courts")). That finding has gone unchallenged and unmentioned by the State both below and in this appeal.

This Court has ruled that "[w]hile a reviewing court has the power to raise unbriefed issues pursuant to Supreme Court Rule 366(a)(5), we must refrain from doing so when it would have the effect of transforming this court's role from that of jurist to advocate. [Citation.] Were we to address these unbriefed issues, we would be forced to speculate as to the arguments that the parties might have presented had these issues been properly raised

before this court. To engage in such speculation would only cause further injustice; thus we refrain from addressing these issues *sua sponte*." *Jackson v. Bd. of Election Comm'rs*, 2012 IL 111928, P34 (2012) (citing *People v. Givens*, 237 Ill. 2d 311, 324 (2010) (quoting *People v. Rodriguez*, 336 Ill.App.3d 1, 14 (1st Dist. 2002)).

While the State's forfeiture of this issue is by itself enough to affirm the ruling of the circuit court and the dismissal of the charges against Brown, she will also address how the circuit court also correctly found the FOID card requirement, as applied to Brown, violated her Second Amendment rights.

The circuit court was correct that the FOID card requirement impermissibly infringes on law-abiding persons' rights to bear long arms in their own homes for self-defense.

The Second Amendment to the United States Constitution provides as follows:

> A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

The Second Amendment protects the right to keep and bear arms for the purpose of self-defense and is fully applicable against the States. *McDonald v. City of Chicago*, 561 U.S. 742, 749 (2010).

McDonald, quoting *Heller*, stated as follows:

> Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is 'the central component' of the Second Amendment right . . . (stating that the 'inherent right of self-defense of self, family, and property is most acute' in the home. . .).

McDonald, 561 U.S. at 767.

In *Heller*, the Supreme Court held:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government--even the Third Branch of Government--the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.

Heller, 554 U.S. at 634-35.

Indeed, the *Heller* Court stated that the Second Amendment itself "is the very product of an interest balancing by the people . . . [a]nd whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635.

"*Heller* established that the scope of the Second Amendment right—and thus the constitutionality of gun bans and regulations—is determined by reference to text, history, and tradition." *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1272-73 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

"A requirement of newer vintage is not, however, presumed to be valid." *Heller II*, 670 F.3d at 1253. *Heller II* noted that only registration of

handguns was longstanding. *Id.* at 1253. Registration requirements for long guns are novel, not historic. *Id.* at 1255. And the *Heller II* Court found that requirements that amount to registering the gun owner as opposed to the gun are novel, not historic and long-standing. *Id.* Whether an interest-balancing means-end scrutiny analysis is used or not, the FOID licensing regime is not grounded in text, history, and tradition, and therefore is "not consistent with the Second Amendment individual right." *Id.* at 1285.

While the State argues that a FOID card challenge fails at the first step, clearly the requirements of the FOID Card Act, as they restrict the core fundamental right as stated in *Heller*, infringe on Second Amendment activity:

> The requirements that are not longstanding, which include, . . . all the requirements as applied to long guns, also affect the Second Amendment right because they are not *de minimis*. All of these requirements, . . . , make it considerably more difficult for a person lawfully to acquire and keep a firearm, including a handgun, for the purpose of self-defense in the home — the "core lawful purpose" protected by the Second Amendment.

Heller II, 670 F.3d at 1255 (citing *Heller*, 554 U.S. at 630).

This Court, in *Wilson v. Cook County*, 2012 IL 112026 (2012):

> The threshold question we must consider is whether the challenged law imposes a burden on conduct falling within the scope of the second amendment guarantee. That inquiry involves a textual and historical inquiry to determine whether the conduct was understood to be within the scope of the right at the time of ratification. *Heller*, 554 U.S. at 634-35; *McDonald*, 561 U.S. at ___, 130 S. Ct. at 3047. If the government can establish that the challenged law regulates activity falling outside the scope of the second amendment right, then the regulated

> activity is categorically unprotected. *Ezell*, 651 F.3d at 702-03.
>
> However, "if the historical evidence is inconclusive or suggests that the regulated activity is not categorically unprotected—then there must be a second inquiry into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights."

Wilson, 2012 IL 112026 at PP41-42.

In *Heller II*, the D.C. Circuit applied intermediate scrutiny because it found "one of the District's registration requirements prevents an individual from possessing a firearm in his home or elsewhere, whether for self-defense or hunting, or any other lawful purpose." *Heller II*, 670 F.3d. at 1258. This case is the complete opposite. It *specifically* prevents Brown from possessing a firearm in her home for lawful purposes. Strict scrutiny should therefore apply.

Even though "public safety" will always qualify as an important, if not compelling governmental interest, just as in *Heller II*, the State has not shown any sort of "tight fit" between the requirements and the purported interest of keeping firearms from felons and the mentally ill. Federal law already prohibits both (18 U.S.C. § 922(g)(1), (4))[2], and a law-abiding person keeping a long gun in her home for self-defense is not a danger to the public

[2] The National Instant Criminal Background Check System (NICS) lists individuals who are federally prohibited from being in possession of firearms, and Illinois can update the NICS system with individuals prohibited under state law. The NICS system is the database used to conduct background checks for firearm sales in the rest of the United

at all. It is far less intrusive to punish actual criminals than to create them through regulations, especially if they infringe on a fundamental right. The State claims it needs to know who Brown is, but if her long gun never leaves her home, and she is not disqualified from possessing said long gun, there is nothing for the State to "determine."

This Court should thus adopt of the reasoning of the *Heller II* Court as to this issue, when it stated:

> For example, the Committee Report asserts "studies show" that "laws restricting multiple purchases or sales of firearms are designed to reduce the number of guns entering the illegal market and to stem the flow of firearms between states," and that "handguns sold in multiple sales to the same individual purchaser are frequently used in crime." *Id.* at 10. The Report neither identifies the studies relied upon nor claims those studies showed the laws achieved their purpose, nor in any other way attempts to justify requiring a person who registered a pistol to wait 30 days to register another one. The record does include testimony that offers cursory rationales for some other requirements, such as safety training and demonstrating knowledge of gun laws, see, e.g., Testimony of Cathy L. Lanier, Chief of Police, at 2 (Oct. 1, 2008), but the District fails to present any data or other evidence to substantiate its claim that these requirements can reasonably be expected to promote either of the important governmental interests it has invoked (perhaps because it was relying upon the asserted interests we have discounted as circular).

Heller II, 670 F.3d at 1258-1259.

By offering nothing to support its supposed connection between requiring law abiding persons wishing to possess a long gun in their homes

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States. With the Nlets national criminal background system, NICS is used across the

for self-defense to also possess a FOID card and the claimed governmental interest, rather just asking this Court to assume it is true, the State has failed to meet its burden under any heightened level of scrutiny.

This infringements are more egregious because the Supreme Court has repeatedly emphasized the importance of the sanctity of one's home. *See*, *e.g.*, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home -- that right takes on an added dimension.")

Further, "[a] state may not impose a charge for the enjoyment of a right granted by the Federal Constitution." *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943). This is also the law in Illinois: "[A] person cannot be compelled 'to purchase, through a license fee or a license tax, the privilege freely granted by the constitution.'" *Murdock*, 319 U.S. at 114 (quoting *Blue Island v. Kozul*, 379 Ill. 511, 519 (1942)).

Thus, Brown, who was merely exercising her right to keep a long gun in her own home for self-defense, cannot be made to purchase a card or obtain a license to exercise this fundamental right guaranteed by the Constitution.

A government entity "may enact regulations in the interest of public safety, health, welfare or convenience, within the limits permitted by law, but in every case this power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the freedom protected by the United

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Nation to determine if someone is legally prohibited from possessing firearms.

States constitution and by the constitution of the State of Illinois." *Kozul*, 319 Ill. at 520. The power to tax is the power to control or suppress. *See Murdock*, 319 U.S. at 112.

By way of comparison, in *Tee & Bee v. City of W. Allis*, 936 F. Supp. 1479 (E.D.Wis. 1996), the town's licensing and permitting requirements for adult businesses served the purpose of ensuring that said business complied generally with the City's adult use ordinance. *Id.* at 1487. Here, there is no allegation that Brown has committed any crime, ever, much less of violence with a firearm (except the phony allegation by her spiteful sometimes-separated-husband), so the infringement at issue does not serve to ensure compliance with anything except itself.

The State cites to *People v. Mosley*, 2015 IL 115872 (2015), but that case is not as the State represents. The *Mosley* Court did *not* find the FOID card requirement outside the scope of the Second Amendment, and thus failing at the first step of the two-part *Wilson* inquiry; rather, it was the restriction on "the possession of handguns by minors." *Mosley*, 2015 IL 115872 at *P36. This is further explained by that Court's conclusion that "under the *Wilson* approach, neither subsection (a)(3)(C), nor subsection (a)(3)(I) violates the second amendment rights of defendant or other 18- to 20-year-old persons." *Mosley*, 2015 IL 115872 at *P38. Further, *Mosley* was a public possession case involving the State's AUUW statute (720 ILCS 5/24-

1.6), and did not involve long gun possession by law-abiding persons for self-defense in one's home.

People v. Taylor, 2013 IL App (1st) 110166 (1st Dist. 2013) also involved the AUUW statute requiring a FOID card to carry a firearm in public (720 ILCS 5/24-1.6(a)(1), (a)(3)(C), which is *not* the issue in this case. There is simply no issue of public safety when the firearm is never taken in public.

The cases outside Illinois which the State cites are likewise no help to its argument, and non-binding on this Court in any event. Though the State cites numerous cases involving licensing in other jurisdictions, in *Kwong v. Bloomberg*, 723 F.3d 160, 166 (2d Cir. 2013), the Second Circuit held that evidence presented to the District Court demonstrated that the $340 licensing fee was designed to defray (and did not exceed) the administrative costs associated with the licensing scheme. Here, the State presented no information regarding the purpose of the fee. Further, in *Murdock*, the Supreme Court struck down a license tax that was "not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question." 319 U.S. at 113-14.

Drake v. Filko, 724 F.3d 426 (3d Cir. 2013) involved licensing for the concealed carry of handguns (*Id.* at 437), an issue not presented here. Nor is this case about handguns, as was *Heller II*. 670 F.3d 1254. While *Heller II* discussed the history of registering handguns, it did not find the same long-

standing tradition as to registering long guns, which is why it only found the handgun registration requirement constitutional. *Id.* at 1255. Similarly, in *Matter of Delgado v. Kelly*, 127 A.D.3d 644 (N.Y. App. Div. 2015), and *People v. Perkins*, 62 A.D.3d 1130 (N.Y. App. Div. 2009), a home handgun/pistol licensing scheme was declared constitutional, but that issue is not presented in this case. This is why the Wintemute study cited by the State (Appellant Brief at p.11) should be disregarded as irrelevant; the study specifically involves handgun use.

Williams v. Puerto Rico, 910 F.Supp.2d 386 (D.P.R. 2012) also focused on the right to carry outside of the home, which it described as a "privilege and not a right," *Id.* at 392, specifically distinguishing *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), which this Court specifically cited with approval in *People v. Aguilar*, 2013 IL 112116 (2013). *Hertz v Bennett*, 751 S.E.2d 90 (Ga. 2013) involved the constitutionality of requiring a permit to carry a handgun. *Id.* at 94. Specifically, that Court noted the plaintiff, though denied a public carry permit for a handgun, was allowed to possess a handgun or long gun in his home, car, and place of business. *Id.* *Hertz* has nothing to do with this case.

Commonwealth v. McGowan, 982 N.E.2d 495 (Mass. 2013) referenced the licensing of firearm possession, but made clear from the facts of the case, plus other language explaining its rationale, that it was primarily discussing handguns. *Id.* at 501 ("'the basic requirement to register a handgun is

longstanding in American law' and is presumptively lawful." (quoting *Heller II*, 670 F.3d at 1254).

United States v. Skoien, 614 F.3d 938 (7th Cir. 2010) is also no help to the State. In *Skoien*, the defendant was convicted of possessing a firearm while being a convicted domestic abuser under 18 U.S.C. § 922(g)(9). He attempted to argue that domestic violence misdemeanants who had been law-abiding for a longtime should be able to have their right to possess firearms restored. However, the defendant had not been law-abiding for a long time; he had twice been convicted of domestic violence and illegally possessed firearms while on probation. *Id.* at 645. In noting that the defendant was not situated to make as an-applied challenge, the Court stated: "Whether a misdemeanant who has been law abiding for an extended period must be allowed to carry guns again, even if he cannot satisfy § 921(a)(33)(B)(ii), is a question not presented today." *Id.* Both the *Skoien* Court and the State cite to *United States v. Salerno*, 481 U.S. 739, 745 (1987), but *Salerno* purely involved a facial challenge. Therefore, when the cases cited by the State are reviewed, they do not support the State's position.

The circuit court was correct in ruling that the statute is unconstitutional as applied to law-abiding persons bearing long arms for lawful uses in their own homes.

The State argues that the trial court could not make an as-applied ruling as to Brown, but that ignores who Brown is: a law-abiding FOID-eligible person who wishes to be able to exercise her right to possess a long

gun in her home for self-defense purposes. Further, it can also fairly be interpreted that, despite the trial court's language that its ruling applied only to this case, the trial court was also ruling on a broader as-applied basis, not just to Brown, but to those similarly-situated.

The State cites to *People v. Thompson*, 15 IL 115181 (2015), but that case is inapposite. In *Thompson*, this Court explained:

> 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. Garvin*, 219 Ill.2d 104, 117, 847 N.E.2d 82, 301 Ill. Dec. 423 (2006). In contrast, a facial challenge requires a showing that the statute is unconstitutional under any set of facts, *i.e.*, the specific facts related to the challenging party are irrelevant.

Thompson, 2015 IL 118151 at P36.

The defendant in *Thompson* was attempting to advance his 5/2-1401 petition, which he filed 17 years after his conviction and sentence. *Id.* at P30. He argued that, although he did not have a facial void *ab initio* challenge (which can be raised at any time, even beyond the 5/2-1401 limitations period), the court should consider his as-applied constitutional challenge as equivalent. *Id.* at P34. This Court rejected the proposed equivalency, and then explained the difference as noted above.

Here, the trial court's ruling applies both individually to Brown and in a broader as-applied context, and counters the chilling argument the State is urging. When anyone who lives in a house with someone with a FOID is at risk of violating 430 ILCS 65/2 because they can be interpreted as possessing

a firearm, or when anyone can be found in violation of the statute because "possessing" a FOID card means something different than "possessing" a firearm, that is a system that is unconstitutionally stacked against the citizen. When a law-abiding person wishing to avail herself of her core Second Amendment right of self-defense in her home with a long gun, and not only has to comply with an intrusive and unconstitutional licensing scheme, but also has to comply with a system where the individual is set up to fail, this Court can interpret this situation as applying to Brown and those like her, or as to anyone who may be forced to participate in the system. This is why a fact-finding hearing, as referenced in *People ex rel. Hartrich v. 2010 Harley-Davidson*, 2018 IL 12163 (2018), is unnecessary, as all the problems with the FOID system as applied to Brown and those like her have already been laid bare.

Either way one views the situation, 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. As the Court in *People v. Elders*, 63 Ill. App. 3d 554 (5th Dist. 1978) held:

> The offense of failure to possess a State firearm owner's identification card is committed when a defendant possesses a firearm without having in his possession a firearm owner's identification card. (*People v. Brownlee*, 17 Ill. App. 3d 535, 308 N.E.2d 377 (1st Dist. 1974).) The mere ownership of a card by a person arrested in possession of a firearm is not sufficient under section 83-2; he must then also have the card on his person. (*People*

> *v. Cahill*, 37 Ill. App. 3d 361, 345 N.E.2d 528 (2d Dist. 1976).) However, there is no requirement that a person must carry the card at all times, even when he is not in possession of his registered weapon.

Elders, 63 Ill.App.3d at 559. *See also People v. Mourecek*, 208 Ill.App.3d 87, 93 (2nd Dist, 1991) ("The mere ownership of a card by a person in possession of a firearm or firearm ammunition is not sufficient compliance with the statute; he must then also have the card on his person."); *See also People v. Williams*, 266 Ill.App.3d 752, 79-60 (1st Dist. 1994) ("A person in possession of a firearm must have a FOID card on his person because mere ownership of a FOID card by a person in possession of a firearm is not sufficient to comply with the statute").

In contrast to the State's argument that possession of a FOID card and possession of a firearm mean the same thing, the *Elders* Court distinctly held there is a difference. While possession of a FOID card must be actual, and on one's person, the *Elders* Court noted that when it comes to possessing firearms the opposite is true:

> [C]riminal possession [of a firearm] can be either actual or constructive, and that constructive possession may be established by the actual possession of the locus in or on which the pistol is found.

Elders, 63 Ill.App.3d at 559 (citing *People v. White*, 33 Ill.App.3d 523, 338 (1st Dist. 1975)).

In *Hicks v. Poppish*, 2011 U.S. Dist. LEXIS 95222, *15 (N.D.Ill. 2011), the federal District court noted in a 42 U.S.C. § 1983 case that, for the crime

of possession of a firearm without a FOID card, a showing of "actual physical possession" of the firearm is not required. (citing *People v. Curry*, 100 Ill.App.3d 405 (1st Dist. 1981)). The *Hicks* Court noted that: "[r]ather, 'proof of constructive possession of the gun by [a] defendant is sufficient.' (citing *Curry*, *see also* [*Elders*], 63 Ill.App.3d 554 (5th Dist. 1978). "To establish that a person is in constructive possession of a firearm, the State must prove: '(1) that defendant had knowledge of the presence of the weapon; and (2) that defendant exercised immediate and exclusive control over the area when the weapon was found.'" *Hicks*, 2011 U.S. Dist. LEXIS 95222 at *16 (quoting *People v. Ross*, 407 Ill.App.3d 931 (1st Dist. 2011). The State's efforts to paint the definition of firearm possession as something different is simply incorrect, belied by both State and federal case precedent.

The State cites to *People v. McIntyre*, 2011 IL App. (2d) 100889 (2nd Dist. 2011), but in *McIntyre* the defendant was driving a vehicle in which his passenger was in actual possession of a firearm. The Court held the defendant could not have been in constructive possession of the firearm because "a defendant's 'status as owner-driver of the vehicle does not put him into [constructive] possession of everything within the passenger area when there are passengers present who may, in fact, be the ones in possession of the contraband.'" *Id.* at P17 (quoting *People v. Day*, 51 Ill.App.3d 916, 918 (4th Dist. 1977)). The *McIntyre* Court went on to hold:

> Here, the evidence revealed that the gun was found in an opening between the plastic base of the front-passenger

> seat and the leather portion of that seat, on the side of the seat that was closest to the front-passenger door. Given that, we cannot conclude that the evidence established that defendant had control, or the ability to exercise control, over the weapon.
>
> Having concluded that the State failed to establish defendant's guilt of unlawful possession of a weapon by a felon, we next consider whether defendant's conviction of possessing a weapon without a FOID card may stand. We conclude that it may not, as the State failed to establish that defendant possessed the weapon. *See People v. Seibech*, 141 Ill.App.3d 45, 50, 489 N.E.2d 1138, 95 Ill. Dec. 410 (1986) (noting that a defendant must knowingly possess a weapon, either actually or constructively, in order to be found guilty of unlawful possession of a weapon without a FOID card).

McIntyre, 2011 IL App (2d) 100889 at P18-P19. Therefore, even the State's cited case, *McIntyre*, supports Brown's and the trial court's position.

The narrow definition of FOID card possession, when dovetailed with the broad definition of criminal possession of a firearm, means that the circuit court was absolutely correct: any Illinois resident with a firearm in the house who is not always carrying their wallet or purse, or always wearing their FOID card around their necks, is violating 430 ILCS 65/2. This is an unconstitutional and absurd result which invites law enforcement abuses and makes criminals out of law-abiding people, whether the trial court's ruling is considered on an as-applied basis to Brown individually, or in a broader as-applied context to any other person who wishes to keep a long gun in their home for self-defense, to which the circuit court's opinions also lends itself.

The State's solution to this is onerous: force everyone in a house with a firearm in it to have a FOID card, regardless of whether all the residents ever plan to even touch the firearm (State's Brief at p.15). It is probably true that if the FOID cardholder keeps the firearm in a safe and no one else knows the combination then the family members may not be found to have constructive possession. But the converse is true: if the firearm leaves the safe and is not on the FOID cardholder's person (picture the stereotypical shotgun in the closet), everyone else in the house is breaking the law.

So the State not only wishes to unconstitutionally force lawful firearm users to go through its requirements simply to be able to defend their own homes,[3] but the State is now arguing that everyone in the house should be forced to fulfill those requirements or, presumably, face criminal penalties. Since it is unconstitutional to force the licensing scheme upon the homeowner, forcing said scheme upon non-firearm-using residents is an outrageous suggestion which exposes the State's true intentions as to the infringements of the FOID Card system. This Court should emphatically reject the State's assertion.

[3] Though the circuit court singled out the license requirement as a whole, and the fee and photograph requirements in particular, at this moment the Illinois Legislature has SB1966 in the Senate Judiciary Committee, which, if it becomes law, would make the FOID requirements even more arduous, in that it would quadruple the application fee, and force the applicant to get fingerprinted at her own expense, among other requirements. This also means, however, that the restrictions being defended by the State in this matter may not exist in that form by the time the Court schedules oral argument.

CONCLUSION

The FOID Card Act requires individuals to pay a fee and obtain a license to enjoy a right that is protected by the Constitution, even in one's own home. Even if the fee may be considered nominal, which is of course in the eye of the payor, the entire process suppresses a fundamental right that is recognized to be enjoyed in the most private of areas, such as the home. No other fundamental right as guaranteed by the Bill of Rights requires a fee and/or a license to exercise in one's home.

Further, the FOID regime puts law-abiding people at risk of injury and death. Because the Illinois State Police may take up to 30 days to process an application (430 ILCS 65/5(a)), people who find themselves in danger in their homes, whether from home-invading criminals or violent ex-domestic partners, in those times when a self-defense situation is called for, they will be unable to exercise their fundamental Second Amendment right, all for want of a license. This is not what the Framers intended, nor was it what the Illinois Legislature intended when it (then) broadened the right to bear arms for home self-defense purposes.

In light of the above, the Defendant-Appellee, VIVIAN CLAUDINE BROWN, respectfully requests this Honorable Court to affirm the Orders of the circuit court that 430 ILCS 65(a)(2), as-applied to her, unconstitutionally infringes on her Second Amendment rights, as it does upon law-abiding

persons who wish to possess a long gun in their homes for lawful purposes, and affirm the dismissal of the case against her in White County.

Defendant-Appellee also requests any and all such further relief as this Court deems just and proper.

Dated: June 3, 2019

Respectfully submitted,

/s David G. Sigale
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No. 124100

In the
Supreme Court of Illinois

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

v.

VIVIAN CLAUDINE BROWN,

Defendant-Appellee.

Appeal from the Circuit Court of the Second Judicial Circuit,
White County, Illinois
No. 17 CM 60
The Honorable **Mark R. Stanley**, Judge Presiding

ILLINOIS SUPREME COURT RULE 341(c) CERTIFICATION OF COMPLIANCE

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ORAL ARGUMENT REQUESTED

ILLINOIS SUPREME COURT RULE 341(c) CERTIFICATION OF COMPLIANCE

I, David G. Sigale, attorney for Defendant-Appellee, certify that this Appellee's Response brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding any Appendix, is 6028 words.

/s/ David G. Sigale
David G. Sigale
Attorney for Plaintiffs-Appellees

Signed and sworn under penalty of perjury
pursuant to 735 ILCS 5/1-109 this 3rd day of June, 2019.

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