IN THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS—CHANCERY DIVISION

GUNS SAVE LIFE, INC., Plaintiff, v. BRENDAN KELLY, solely in his official capacity as Acting Director of the Illinois State Police, Defendant.	No. 2019-CH-180

DEFENDANT'S RESPONSE
TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

GSL advances only two arguments to support its claim that the Firearm Owners Identification Card Act ("FOID Card Act" or "FOID Act") violates the Second Amendment to the U.S. Constitution and Article I, Section 22 of the Illinois Constitution.[1] *First*, it argues there is no historical tradition of firearms regulation that supports the FOID Card Act because there were no restrictions analogous to the FOID Act in effect at the Founding and all other potentially analogous restrictions were enacted too late and in too few jurisdictions to establish a historical tradition. Pl.'s Mot. Summ. J. at 9–12. *Second*, GSL argues that the FOID Card Act imposes a general tax on the exercise of the right to keep and bear arms. Pl.'s Suppl. Mem. Supp. Mot. Summ. J. (hereinafter, "Pl's. Suppl. Mem.") at 2. Both arguments are wrong. More fundamentally, GSL's response rests on a deeply flawed understanding of *N.Y State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022). Contrary to GSL's view, *Bruen* validates the constitutionality of the FOID Act,

[1] GSL also made a third argument in its initial motion for summary judgment filed on July 15, 2020, contending that the FOID Card Act does not survive intermediate scrutiny because it is an ineffective and unnecessary outlier among firearms regulations. Pl.'s Mot. Summ. J. at 13–18. While GSL does not expressly disclaim this argument, it appears to have abandoned it, presumably because it is no longer valid after *N.Y State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), which eliminated the heightened scrutiny prong of the two-part test previously used by lower courts to evaluate Second Amendment claims. *See id.* at 2126–27. Because the Supreme Court removed heightened means-ends scrutiny from the constitutional analysis, Defendant does not address GSL's means-ends argument, and the Court should ignore it, as well.

because in that decision the Supreme Court explicitly and repeatedly explained that "shall-issue" permitting regimes—like the FOID Card Act—are presumptively constitutional, including those that require the payment of fees (so long as the fees are not "exorbitant"). 142 S. Ct. at 2138 n.9, 2161–62. GSL is also wrong to assert that *Bruen* held that the Founding Era is the only relevant period for evaluating the constitutionality of state laws under the Second Amendment. Pl's. Suppl. Mem. at 3–5 ("[a] regulation may be upheld *only if* the government can show, with Founding-era evidence, a 'historical tradition' of regulations that restricted the right to keep and bear arms in a similar way for similar reasons"). In actuality, *Bruen* expressly left open whether the relevant time period should be 1791 or, rather, 1868, when the ratification of the Fourteenth Amendment made the Second Amendment applicable against the States. 142 S. Ct. at 2138. And, indeed, when deciding a challenge to a state law—like the FOID Act—the most appropriate time frame to focus on is 1868.

In any event, as Defendant has already explained, the history of firearms regulations in America—including numerous analogous laws from the Founding era and from throughout the nineteenth century—establishes the constitutionality of the FOID Act. Def.'s Cross-Mot. Summ. J. at 17–26. GSL ignores this Founding-era history and outright dismisses the relevance of any nineteenth century laws on the constitutionality of the FOID Act—contrary to *Bruen*, binding Seventh Circuit law, and leading originalist scholars.

Finally, GSL also ignores that *Bruen* endorsed the use of fees in firearms licensing and, tellingly, does not even attempt to show that the FOID Act's decennial $10 fee is exorbitant—because, in fact, it is not. Moreover, the Appellate Court has already rejected GSL's argument that the FOID Act fee is an unconstitutional tax. *Guns Save Life*, 2019 IL App (4th) 190334 at ¶¶ 71–72. That finding—which is the law of the case—slams the door on GSL's attempt to revive the same argument here.

For all of these reasons, GSL's motion for summary judgment must fail, and the Defendant's motion for summary judgment should be granted.

ARGUMENT

I. The *Bruen* Decision Supports the Constitutionality of the FOID Act

GSL argues in its Supplemental Brief that, as a result of *Bruen*, "[t]he FOID Act's unconstitutionality is . . . even clearer now." Pl's. Suppl. Mem. at 2. GSL's position is contradicted by *Bruen* itself. As explained in Defendant's Cross-Motion for Summary Judgment, *Bruen* forecloses GSL's claims about the unconstitutionality of the FOID Act because the Supreme Court repeatedly opined that "shall-issue" permitting regimes—like the FOID Card Act—are presumptively constitutional. *See Bruen*, 142 S. Ct. at 2130, 2123, 2138 n.9; *see also* Def.'s Cross-Mot. Summ. J. at 12–14. GSL ignores this key point, despite spending four pages of its seven-page supplemental brief describing the *Bruen* decision. Shall-issue permitting regimes—like the FOID Card Act and like those that exist in 42 other States—eliminate discretion for government officials to deny a firearm permit "based on a lack of need or suitability." *Bruen*, 142 S. Ct. at 2123. Rather, it is open-ended discretion that "in effect den[ies] the right to carry handguns for self-defense to many 'ordinary, law-abiding citizens.'" *Id.* at 2161 (Kavanaugh, J., *concurring*).

In contrast, Illinois officials "must issue" FOID Cards under specifically defined objective criteria relevant to the possession of firearms, such as a prior felony conviction or serious mental illness. *See* 430 ILCS 65/8. Thus, the FOID Card Act provides an effective and practical means for Illinois to determine whether individuals who seek to exercise their constitutional right to bear arms are disqualified from doing so for valid, constitutional reasons. *See id*. That is entirely consistent with the Supreme Court's repeated assurances that the Second Amendment is "not unlimited," that its proper interpretation allows a "variety" of gun regulations, and that it "by no means eliminates [the States'] ability to devise solutions to social problems that suit local needs

and values." *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Bruen*, 142 S. Ct. at 2128, 2162; *McDonald v. City of Chicago*, 561 U.S. 742, 785 (2010).

II. GSL Misreads *Bruen* Regarding the Relevant Time Period of Historical Analysis

GSL also misreads *Bruen* by asserting that the Supreme Court held that the only relevant historical time period for analyzing the Second Amendment is 1791. Pl's. Suppl. Mem. at 3–5. GSL does not locate this holding in the actual decision; rather, it cites a blog post by a political commentator. *See* Pl.'s Supp. Mem. at 3 (citing Mark W. Smith, "*Not All History Is Created Equal": In the Post*-Bruen *World, the Critical Period for Historical Analogues Is when the Second Amendment Was Ratified in 1791, and not 1868*). In reality, *Bruen* expressly left open whether courts should primarily look to 1791 or 1868 (when the Fourteenth Amendment was ratified) to find the public understanding of the right to bear arms. 142 S. Ct. at 2138. At the same time, in *Bruen* and in *Heller*, the Supreme Court included a review of nineteenth century laws, treatises, and other sources in its analysis. *Bruen* at 2133; *Heller* at 577–78, 581, 593, 601, 602–603, 608, and 610–619. The *Bruen* Court also pointed to "ongoing scholarly debate" about the appropriate period of historical analysis, citing two scholars who support the view that 1868 is the proper period for defining the scope of the Second Amendment, and none who supports 1791. *Bruen* at 2138.

When courts assess the constitutionality of a State law, as a matter of original meaning the appropriate focus should be 1868, because that was when the right to bear arms expressed in the Second Amendment was first made applicable against the States. *See* 142 S. Ct. at 2137 (a State "is bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second."). Several circuits, including the Seventh Circuit, concluded that 1868 is the proper focus of historical analysis when applying the first step of the pre-*Bruen* framework. *See Gould v. Morgan*, 907 F.3d 659, 669 (1st Cir. 2018) ("Because the challenge here is [to] a state law, the

pertinent point in time would be 1868 (when the Fourteenth Amendment was ratified)."), *criticized on other grounds by Bruen*, 142 S. Ct. at 2124, 2126–27; *Ezell v. City of Chicago*, 651 F.3d 684, 702 (7th Cir. 2011) ("*McDonald* confirms that if the claim concerns a state or local law, the 'scope' question asks how the right was publicly understood when the Fourteenth Amendment was proposed and ratified."); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (following *Ezell*); *see also Drummond v. Robinson Twp.*, 9 F.4th 217, 227 (3d Cir. 2021) ("[T]he question is if the Second and *Fourteenth Amendments'* ratifiers approved [the challenged] regulations …." (emphasis added)); *Binderup v. Att'y Gen.*, 836 F.3d 336, 362 (3d Cir. 2016) (*en banc*) (Hardiman, J., *concurring in part and in the judgments*) (quoting *Ezell*). Thus, GSL is wrong to contend that only Founding-era evidence is relevant. Rather, evidence from the Founding period through the nineteenth century (and particularly around the ratification of the Fourteenth Amendment) can and does shed light on the public understanding of the right to bear arms at the time the Second Amendment became applicable against Illinois.

Here, in addition to numerous Founding-era historical analogues to the FOID Act, the Defendant supplied the Court with historical analogues from the nineteenth century, both before and after the ratification of the Fourteenth Amendment, and these analogues further support the constitutionality of the FOID Act. Def.'s Cross-Mot. Summ. J. at 24–26.

III. GSL Is Wrong About The History Of Firearms Regulations

GSL argues that there is no historical tradition of firearms regulations to support the constitutionality of the FOID Act. Pl.'s Supp. Mem. at 5–6. This is wrong, as Defendant has already explained. Def.'s Mot. Summ. J. at 17–26. This historical evidence includes Founding-era disarmament statutes and militia laws, as well as nineteenth century surety statutes and state taxes on firearm possession—all of which support the constitutionality of the FOID Act. *Id.* Thus, this

Court can uphold the FOID Act regardless of whether it focuses on the period around 1791 or 1868.

IV. FOID Act Fees Are Constitutional Under *Bruen* and Other Precedents

Finally, GSL also persists in arguing in the alternative that the FOID Act fees—$10 every ten years—amount to an impermissible tax on the exercise of a constitutional right. Pl.'s Mot. Summ. J. at 18–23. GSL asserts that the "*Bruen* decision does not impact" this argument. This is flatly incorrect. The Supreme Court in *Bruen* expressly stated that firearm permit fees are constitutionally permissible, so long as they are not "exorbitant," such that they effectively deny the right to keep and bear arms. *Bruen*, 142 S. Ct. at 2138 n.9. GSL makes no mention of this at all, and makes no attempt to show that the FOID Act's decennial $10 fee is exorbitant. This alone forecloses its argument.

Even if *Bruen* were not dispositive of this issue, GSL's argument also fails under pre-*Bruen* precedents governing taxes on constitutional rights in the First Amendment and other contexts. GSL relies on cases holding that various taxes on the exercise of fundamental rights—such as free speech, voting, and marriage—are unconstitutional because they "single out" those rights for special tax consideration. *Id.* at 23. At the same time, GSL acknowledges that the Supreme Court has allowed fees on the exercise of constitutional rights when the fee is used to "meet the expense incident to the administration of the [licensing law] and to the maintenance of public order in the matter licensed." *Id.* at 22 (quoting *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941)). This concession defeats GSL's argument entirely.

As explained in Defendant's Cross-Motion, the FOID Card Act fee is deposited in two funds: the State Police Firearm Services Fund and the State Police Revocation Enforcement Fund. 430 ILCS 65/5(a); P.A. 102-237. The Appellate Court has already found that the funds deposited in the State Police Firearm Services Fund are used for the Illinois State Police's lawful purposes,

mandates, functions and duties under the FOID Card Act and Firearm Concealed Carry Act, and that therefore that portion of the fee is constitutional because it is "clearly imposed to defray the cost of the licensing program." *Guns Save Life*, 2019 IL App (4th) 190334, ¶ 72. The portion of the fee deposited in the State Police Revocation Fund is expressly designated for the State Police to establish task forces, hire and train State Police officers, and prevent violent crime. 30 ILCS 105/6z-127(b), (c). This purpose likewise "corresponds with the FOID Act's purpose 'to promote and protect the health, safety and welfare of the public' and 'provide a system of identifying persons who are not qualified to acquire or possess firearms . . . .'" *Guns Save Life*, 2019 IL App (4th) 190334, ¶ 73. Thus, the FOID Card Act fee is also constitutional as a matter of the law of the case, which properly found the FOID Card Act fee lawful under existing precedents that govern fees attached to the exercise of constitutional rights.

CONCLUSION

For all of the foregoing reasons and the arguments presented in Defendant's Motion for Summary Judgment, incorporated herein by reference, the Court should deny GSL's Motion for Summary Judgment and grant the Defendant's Motion for Summary Judgment.

Respectfully submitted,

BRENDAN KELLY

Defendant,

By: /s/ Laura K. Bautista

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CERTIFICATE OF SERVICE

Laura K. Bautista, Assistant Attorney General, certifies that she has caused a copy of the foregoing to be served upon:

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s/ Laura K. Bautista
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