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## Taking Away the Bad Guy's Gun: Designing Constitutional Measures to Prevent Dangerous Individuals from Acquiring Firearms

Michael F. Angarola

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# TAKING AWAY THE BAD GUY’S GUN: DESIGNING CONSTITUTIONAL MEASURES TO PREVENT DANGEROUS INDIVIDUALS FROM ACQUIRING FIREARMS

MICHAEL F. ANGAROLA\*

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\* Michael Angarola proudly served as Editor-in-Chief of *UIC Law Review*, is a former veteran police supervisor, and is a JD candidate (expected May 2024). He is grateful to his editors, Irene Rizzolatti and Jaylen Minefield, who went above and beyond to make this comment stronger. He also thanks Professor Debra Stark, whose valuable input included setting him on the path to write on this topic, and Professor Karen Halverson Cross, who served as a reader and was a constant source of support and encouragement. He thanks the entire *UIC Law Review* Editorial Board and staff for an amazing 2023-24 year. Finally, Michael could not have achieved his accomplishments without the limitless loyalty, support, and love of his wife Ivonne, and daughters, Celeste and Genevieve (“Gigi”). Any errors remain solely with the author.

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## I. INTRODUCTION

On the morning of July 4, 2022, twenty-one year old Robert Crimo III scaled the rooftop of a store along the route of the Highland Park, Illinois, Independence Day parade.<sup>1</sup> At 10:14 AM, using a Smith & Wesson M&P 15 rifle Crimo had legally purchased, he fired more than eighty rounds upon the innocent people down below.<sup>2</sup> What began as a peaceful celebration of the nation's independence turned into a gruesome war zone in a matter of seconds.<sup>3</sup> After committing his murderous act, Crimo scaled down

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1. See Eric Cox & Brendan O'Brien, *Fourth of July Rooftop Shooter Kills Six in Chicago Suburb*, REUTERS (July 5, 2022, 11:41 AM), [www.reuters.com/world/us/shooting-reported-july-4th-parade-route-chicago-suburb-county-sheriff-2022-07-04/](http://www.reuters.com/world/us/shooting-reported-july-4th-parade-route-chicago-suburb-county-sheriff-2022-07-04/) [perma.cc/N9AK-G6VH] (reporting the timeframe and location of the Highland Park shooting).

2. See Frank Main, *Illinois State Police Director Defends Decision to Give Suspected Highland Park Killer a Gun Permit in 2020*, CHI. SUN-TIMES (July 6, 2022, 7:48 PM), [chicago.suntimes.com/2022/7/6/23197100/highland-park-mass-shooting-gun-mith-wesson-mp15-semiautomatic-rifle-fourth-july-parade-robert-crimo](http://chicago.suntimes.com/2022/7/6/23197100/highland-park-mass-shooting-gun-mith-wesson-mp15-semiautomatic-rifle-fourth-july-parade-robert-crimo) [perma.cc/A96F-SW3X] (reporting the timeline of events related to the shooting); Andy Grimm, *Highland Park Mass Shooting Suspect Confessed to Firing More Than 80 Shots at Parade-Goers, Prosecutors Say*, CHI. SUN-TIMES (July 6, 2022, 10:47 AM), [www.wbez.org/stories/highland-park-suspect-confessed-to-firing-more-than-80-shots-prosecutors-say/0cae8496-0eb7-4708-bb6b-32cc7c3e9913](http://www.wbez.org/stories/highland-park-suspect-confessed-to-firing-more-than-80-shots-prosecutors-say/0cae8496-0eb7-4708-bb6b-32cc7c3e9913) [perma.cc/EC5W-66Y6] (noting that Crimo confessed to firing more than eighty rounds on the parade attendees and eighty-three shell casings were found on the roof); see also *History of M&P*, SMITH & WESSON, [www.smith-wesson.com/article/history-mp](http://www.smith-wesson.com/article/history-mp) [perma.cc/F9PY-JBLU] (last visited Oct. 2, 2022) (discussing the history of the M&P product line which was originally marketed as a military and police service revolver).

3. Rebecca Rosenberg, *Highland Park July 4th Parade Shooting Was "Like a War Zone," Witness Says*, FOX NEWS, [www.foxnews.com/us/highland-park-july-4th-parade-shooting-like-a-war-zone-witness-says](http://www.foxnews.com/us/highland-park-july-4th-parade-shooting-like-a-war-zone-witness-says) [perma.cc/P7MM-

from his rooftop perch, blended in with the fleeing crowd, dropped his rifle, and left the scene.<sup>4</sup> Police recovered the rifle rather quickly, but apprehending Crimo proved to be more difficult, highlighting the consequences of the absence of a national or state gun registry. The Bureau of Alcohol, Tobacco, and Firearms (ATF) had to conduct a time-consuming, manual trace using a paper file system, which identified Crimo as the first purchaser of the rifle.<sup>5</sup> Several hours after identifying Crimo as a suspect, police spotted his vehicle, and after a brief pursuit, he surrendered peacefully.<sup>6</sup> However, another legally purchased rifle was found in his vehicle, and it was later learned that Crimo had contemplated another mass shooting while driving to Madison, Wisconsin during his manhunt.<sup>7</sup>

Crimo's violent rampage killed seven people and injured an additional forty-seven people, including 8-year-old Cooper Roberts, who was permanently paralyzed.<sup>8</sup> Irina and Kevin McCarthy were killed in front of their toddler, who, after being rescued by bystanders, told his grandfather, "Mommy and Daddy are coming

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7WW4] (last visited Oct. 2, 2022).

4. See Grimm, *supra* note 2 (reporting Crimo had dressed in women's clothing that day to disguise himself and hide his tattoos and dropped the rifle while he fled the scene); Michael Daly, *Why it Took Grit – and Luck – To Trace the Parade Massacre Gun to Robert 'Bobby' Crimo*, THE DAILY BEAST (July 6, 2022, 4:25 AM), [www.thedailybeast.com/why-it-took-grit-and-luck-to-trace-the-parade-massacre-gun-to-robert-bobby-crimo](http://www.thedailybeast.com/why-it-took-grit-and-luck-to-trace-the-parade-massacre-gun-to-robert-bobby-crimo) [perma.cc/TKL2-RT5N] (reporting that due to federal prohibition for a national gun registry, the only way to possibly uncover the rifle's owner was through a Bureau of Alcohol, Tobacco, and Firearms ("ATF") "urgent trace"). This process begins by the ATF (1) contacting the gun manufacturer to discover which federal firearm dealer first sold the gun, and (2) contacting that dealer to pull its transaction form which it is required to keep on file but prohibited from entering into any kind of national or internal database. *Id.* The entire process is dependent on the availability of the manufacturer and dealer and the thoroughness and efficiency of their paperwork filing. *Id.*

5. Daly, *supra* note 4.

6. See *id.* (reporting that Crimo had driven to Madison, Wisconsin and contemplated a second shooting there before returning to Illinois).

7. *Id.*

8. *These Are the Victims of the Fourth of July Parade Shooting in Highland Park*, CHI. TRIBUNE (Aug. 3, 2022, 11:35 AM), [www.chicagotribune.com/news/ct-highland-park-victims-20220705-tgcgdx5bqbfzrakhzf6jian634-list.html](http://www.chicagotribune.com/news/ct-highland-park-victims-20220705-tgcgdx5bqbfzrakhzf6jian634-list.html) [perma.cc/2MG5-7GE9] (reporting the following seven murder victims: Katherine Goldstein, 64, spouses Irina McCarthy, 35, and Kevin McCarthy, 37, Stephen Straus, 88, Jacquelyn Sundheim, 63, Nicolas Toledo-Zaragoza, 78, and Eduardo Uvaldo, 69); Elizabeth Wolfe & Raja Razek, *8-Year-Old Boy Paralyzed in Highland Park Shooting No Longer Requires IV Pain Medicine and Feeding Tube, Family Says*, CNN (Aug. 23, 2022, 11:09 PM), [www.cnn.com/2022/08/23/us/highland-park-cooper-roberts-paralyzed-recovery/index.html](http://www.cnn.com/2022/08/23/us/highland-park-cooper-roberts-paralyzed-recovery/index.html) [perma.cc/CAG7-DS9F] (reporting the devastating injuries caused to eight-year-old shooting victim Cooper Roberts); *Highland Park Parade Mass Shooting Victims Now Include 7 Killed, 47 Injured*, NBC5 CHI. (July 5, 2022, 8:09 PM), [www.nbcchicago.com/news/local/injuries-in-highland-park-fourth-of-july-parade-mass-shooting-rise-to-38/](http://www.nbcchicago.com/news/local/injuries-in-highland-park-fourth-of-july-parade-mass-shooting-rise-to-38/) [perma.cc/BJ8B-EZ83] (reporting the mass casualties caused by Crimo's shooting rampage).

soon.”<sup>9</sup>

While the investigation that followed found that Crimo had prior police contacts – including threatening conduct toward family members – he was still able to legally obtain a Firearm Owner’s Identification Card (FOID), a statutory requirement in Illinois prior to legally purchasing or possessing firearms and ammunition.<sup>10</sup> In the aftermath of the shooting, the public and politicians reengaged in the regular debate as to what, if any, should be the legislative response to such an atrocity.<sup>11</sup> Typical proposals include stronger or looser gun control legislation, better enforcement of the laws already on the books, or reliance on the National Rifle Association’s (NRA) solution: “The only way to stop a bad guy with a gun, is a good guy with a gun.”<sup>12</sup>

The facts of Crimo’s crime stand in stark contrast to the NRA’s

9. Steve Helling, *After Parents Were Killed in Highland Park, 2-Year-Old Told Grandfather “Mommy and Daddy Are Coming Soon”*, PEOPLE (July 6, 2022, 4:08 PM), [www.people.com/crime/child-orphaned-highland-park-massacre-told-grandfather-mommy-daddy-coming-soon/](http://www.people.com/crime/child-orphaned-highland-park-massacre-told-grandfather-mommy-daddy-coming-soon/) [perma.cc/WEN5-WUB3] (reporting 2-year-old toddler Aiden McCarthy’s parents, Irina and Kevin McCarthy, were both killed in front of him, with Kevin using his body to shield Aiden from the bullets; Aiden was rescued by another family who took care of him for hours until he was reunited with relatives).

10. See Firearm Owners Identification Card Act, 430 ILL. COMP. STAT. 65/ et seq. (2013) (regulating the purchase and possession of firearms in Illinois to people who successfully obtain a state-issued identification card); 430 ILL. COMP. STAT. 65/4 (2023) (requiring that a FOID card holder be at least twenty-one years of age or requiring the written consent of a parent or guardian); Grimm, *supra* note 2 (reporting police recovered a total of five weapons from Crimo: two rifles and three handguns, all legally purchased using a FOID that Crimo was able to obtain with his father’s sponsorship).

11. Compare Mitch Smith et al., *Highland Park Shooting Reveals Limits of Illinois’s Gun Restrictions*, N.Y. TIMES (July 6, 2022), [www.nytimes.com/2022/07/06/us/highland-park-shooting-guns.html](http://www.nytimes.com/2022/07/06/us/highland-park-shooting-guns.html) [perma.cc/V8T8-Z485] (explaining how Crimo’s application for a gun license revealed that he informed Highland Park officers of his depression and drug use back in 2019), with Jonathan M. Metzl & Kenneth T. MacLeish, *Mental Illness, Mass Shootings, and the Politics of American Firearms* 105 AM. J. PUB. HEALTH 240, 240 (2015) (discussing the four assumptions that arise in popular and political discourse in the aftermath of a mass shooting: “(1) Mental illness causes gun violence (2) Psychiatric diagnosis can predict gun crime before it happens (3) US mass shootings teach us to fear mentally ill loners, and (4) because of the complex psychiatric histories of mass shooters, gun control ‘won’t prevent’ another Tucson, Aurora, or Newtown.”).

12. See Michael Luca et al., *The Impact of Mass Shootings on Gun Policy* 1-2 (Harv. Bus. Sch., Working Paper No. 16-126, Aug. 2019) (finding that in response to mass shootings, there is a rise in policy agenda discussions and a fifteen percent increase in the amount of gun legislation, but that typically the gun legislation has looser restrictions when passed by Republican-controlled legislatures and no stricter regulations when passed by Democratic-controlled legislatures); NRATV, *The Only Thing That Stops a Bad Guy With a Gun, Is a Good Guy With a Gun*, YOUTUBE (May 16, 2018), [www.youtube.com/watch?v=Bh\\_55H8U030](http://www.youtube.com/watch?v=Bh_55H8U030) [perma.cc/3GAF-LDLM] (memorializing NRA CEO Wayne LaPierre’s often repeated quote in a montage of several videos).

“good guy” solution, as the parade route was saturated with “good guys with guns” (i.e., the police).<sup>13</sup> Yet, once the shooting began, the police were unable to efficiently cut short his rooftop murder spree as the scene was chaotic and his location could not be immediately identified.<sup>14</sup> This begs the question: can legislators do more to remove guns from the “bad guys” hands before they can kill?<sup>15</sup> While Congress has been largely unwilling or unable to respond to decades of national mass shootings, Illinois has generally been progressive and responsive in firearm regulation.<sup>16</sup> However, recent shootings demonstrate that Illinois law requires change that can survive constitutional challenges, including more effective enforcement efforts for the regulations already in force.<sup>17</sup>

This comment will propose a national model for constitutionally defensible firearm regulations by focusing on Illinois law: one, to show the likelihood that existing measures will survive constitutional challenges, and two, to propose improvements either by incorporating regulations from other states or improving enforcement of existing regulations. Part II of this comment provides the background of Illinois and other state laws

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13. See Aya Elamroussi et al., *Highland Park Shooter’s Rooftop Position Made It Hard for Police to Find Him Quickly as Parade Turned into Chaos, Chief Says*, CNN (July 8, 2022, 4:36 PM), [www.cnn.com/2022/07/08/us/highland-park-illinois-shooting-july-fourth-parade-friday/index.html](http://www.cnn.com/2022/07/08/us/highland-park-illinois-shooting-july-fourth-parade-friday/index.html) [perma.cc/LD3M-7S82] (discussing how Crimo’s rooftop position made it difficult for on-scene police to determine where the bullets were coming from).

14. See *id.* (discussing the shooting scene being chaotic, with noise bouncing between buildings making it too difficult to narrow down the source of the shooting by the time it stopped).

15. Sean Gregory & Chris Wilson, *6 Real Ways We Can Reduce Gun Violence in America*, TIME (Mar. 22, 2018, 6:29 AM), [www.time.com/5209901/gun-violence-america-reduction/](http://www.time.com/5209901/gun-violence-america-reduction/) [perma.cc/GC6B-T75T] (discussing six concrete steps to reduce gun violence: 1. Regulate gun ownership similar to vehicle registration; 2. Pass gun regulations that are shown to effectively reduce gun violence; 3. Permit doctors to discuss gun safety with patients; 4. Invest in smart gun technology; 5. Eliminate curbs on gun violence research; and 6. End laws that immunize gun manufacturers from liability).

16. See Bipartisan Safer Communities Act, Pub. L. 117-159 (regulating extended background checks for gun purchasers under twenty-one years of age and providing more funding for state red flag laws); Paul LeBlanc, *Gun Legislation is Stalled in Congress. Here’s Why That Won’t Change Anytime Soon*, CNN (May 25, 2022, 6:51 PM), [www.cnn.com/2022/05/25/politics/gun-laws-us-congress/index.html](http://www.cnn.com/2022/05/25/politics/gun-laws-us-congress/index.html) [perma.cc/CSV8-EAGT] (discussing political gridlock over any meaningful federal gun regulations); *Illinois*, EVERYTOWN GUN SAFETY, [www.everytown.org/state/illinois/](http://www.everytown.org/state/illinois/) [perma.cc/9WBA-HFGS] (last visited Oct. 2, 2022) (finding Illinois to be one of the strongest gun law states in the country since it requires background checks on all gun sales, has a red flag law, and has laws to prevent domestic abusers from possessing firearms).

17. Patrick Smith & Courtney Kueppers, *What Is and Isn’t Allowed by Illinois’ Gun Laws*, WBEZ (May 25, 2022, 2:12 PM), [www.wbez.org/stories/illinois-gun-laws-explained/ba5abc0e-6e42-4602-aef6-6e4c5fc2a09b](http://www.wbez.org/stories/illinois-gun-laws-explained/ba5abc0e-6e42-4602-aef6-6e4c5fc2a09b) [perma.cc/XC5D-NYSX] (summarizing Illinois gun regulations and failures due to lack of enforcement).

that seek to prevent dangerous individuals, such as Crimo, from legally purchasing firearms and empower police to seize any firearms already acquired. Part III analyzes the efficacy of these laws and their constitutionality. Part IV proposes constitutionally defensible changes in laws and enforcement efforts, such as maintaining a state registry of owned firearms, banning high powered assault weapons and high-capacity magazines, and requiring law enforcement follow up to seize the firearms of those found to be a danger to themselves or others. These measures will better protect the public from preventable firearm death and injury by targeting the possession of firearms by dangerous individuals.

## II. BACKGROUND

This section discusses the NRA's proposal for gun violence, the history and nature of current Illinois firearm regulations, other state regulations not currently employed in Illinois, and constitutional challenges to these regulations.

### A. *The NRA Approach*

There were 45,222 total deaths by firearm in the United States in 2020, by far the highest on record.<sup>18</sup> Among the sixty-four highest income countries and territories in the world, the United States ranks eighth in per capita deaths by firearm.<sup>19</sup> Two United States territories rank first and third (Puerto Rico and the U.S. Virgin Islands), and the only non-territory outranking the United States is Panama.<sup>20</sup> Studies show that firearm injuries are more frequent in

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18. See John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW RSCH. CTR. (Feb. 3, 2022), [www.pewresearch.org/fact-tank/2022/02/03/what-the-data-says-about-gun-deaths-in-the-u-s/](http://www.pewresearch.org/fact-tank/2022/02/03/what-the-data-says-about-gun-deaths-in-the-u-s/) [perma.cc/AQ5Z-K5WB] (revealing that seventy-nine percent of murders involved use of a firearm and fifty-three percent of all suicides; the total amount of deaths by firearm represents a fourteen percent increase from 2019, twenty-five percent increase from 2015, and forty-three percent increase from 2010; the per capita gun death rate is the highest it has been since the mid-1990s at 13.6 per 100,000 people, but still well below the peak of 16.3 per 100,000 in 1974)

19. See *On Gun Violence, the United States Is an Outlier*, INST. HEALTH METRICS & EVAL. (May 31, 2022), [www.healthdata.org/acting-data/gun-violence-united-states-outlier](http://www.healthdata.org/acting-data/gun-violence-united-states-outlier) [perma.cc/R3F8-84N2] (discussing that the United States is an outlier among developed nations as to gun violence); The Global Burden of Disease 2016 Injury Collaborators, *Global Mortality from Firearms, 1990-2016*, 320 J. AM. MED. ASS. 792, 795-804 (Aug. 28, 2018) (finding that Brazil and the United States alone make up a plurality of worldwide firearm deaths at thirty-two percent).

20. See *On Gun Violence, the United States Is an Outlier*, *supra* note 19 (finding the top ten per capita firearm violence rates are Puerto Rico, Bahamas, Virgin Islands, Trinidad and Tobago, Saint Kitts and Nevis, Panama, Barbados, United States, Uruguay, and Greenland).

countries with easy access to firearms.<sup>21</sup>

Nevertheless, former NRA CEO Wayne LaPierre<sup>22</sup>, typically in response to mass shooting events, has remained insistent that the only solution is more guns, positing that arming “good guys” will stop the “bad guys.”<sup>23</sup> However, a study of all national mass shootings from 2000-2021 shows that in 464 incidents, armed civilians stopped only twenty-four perpetrators (amounting to just five-percent of incidents).<sup>24</sup> Even relying on police is problematic because the average response time is three minutes - long after much of the killing has already taken place.<sup>25</sup> In Highland Park, there were numerous armed officers already on scene.<sup>26</sup> Despite their presence, they were unable to stop any of the killing, or even promptly locate and subdue the perpetrator, due to the rapidity of the shots fired and the inability to zero in on the location of the shooter.<sup>27</sup> Even when police arrive within moments of the start of a shooting, their response can still fail to prevent massive killings.<sup>28</sup> In Dayton, Ohio, the shooter was killed by police thirty-two seconds after first pulling the trigger, and yet he was still able to shoot twenty-six people, nine fatally.<sup>29</sup>

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21. See The Global Burden of Disease 2016 Injury Collaborators, *supra* note 19 (finding that countries with broad firearm access like the United States also had large rates of firearm death).

22. LaPierre was CEO of the NRA from 1991 until January 5, 2024. *Wayne LaPierre*, WIKIPEDIA, [www.en.wikipedia.org/wiki/Wayne\\_LaPierre](http://www.en.wikipedia.org/wiki/Wayne_LaPierre) [perma.cc/F9BD-CY2Z] (last visited Apr. 9, 2024).

23. See Meghan Keneally, *Breaking Down the NRA-backed Theory That a Good Guy with A Gun Stops a Bad Guy With a Gun*, ABC NEWS (Oct. 29, 2018, 1:03 PM), [abcnews.go.com/US/breaking-nra-backed-theory-good-guy-gun-stops/story?id=53360480](http://abcnews.go.com/US/breaking-nra-backed-theory-good-guy-gun-stops/story?id=53360480) [perma.cc/HHR8-7G52] (citing a study that found that broader concealed carry laws lead to a thirteen to fifteen percent increase in violent crime by the tenth year of enactment).

24. See *ALERT Active Attack Data*, ADVANCED L. ENF'T RAPID RESPONSE TRAINING, [www.activeattackdata.org/allattacks.html](http://www.activeattackdata.org/allattacks.html) [perma.cc/7RP3-98YX] (last visited Sept. 17, 2022) (finding that armed civilians on scene rarely stop a shooter).

25. See *Police Response Time to Active Shooter Attacks*, FBI, [leb.fbi.gov/image-repository/police-response-time-to-active-shooter-attacks.jpg/view](http://leb.fbi.gov/image-repository/police-response-time-to-active-shooter-attacks.jpg/view) [perma.cc/B59N-H5FJ] (last viewed Oct. 5, 2022) (finding that the average response time by police to an active shooter event is three minutes; however, that does not include time to locate and engage the shooter). See also Daniel L. Schwerin et al., *Active Shooter Response*, NAT'L INST. HEALTH (Feb. 15, 2022), [www.ncbi.nlm.nih.gov/books/NBK519067](http://www.ncbi.nlm.nih.gov/books/NBK519067) [perma.cc/8XUA-6ZXC] (finding that at least two-thirds of active shooter incidents are over by the time law enforcement arrives).

26. See Elamroussi et al., *supra* note 13 (discussing officers on scene of parade shooting).

27. See *id.* (discussing how Crimo's rooftop position made it difficult for on scene police to determine where the bullets were coming from).

28. See JILLIAN PETERSON & JAMES DENSLEY, *THE VIOLENCE PROJECT: HOW TO STOP A MASS SHOOTING EPIDEMIC* 169 (Abrams Press, 2021) (discussing difficulty in stopping mass casualties when shooters have large capacity magazines).

29. See *id.* (discussing the one-hundred round ammunition drum attached



Studies have shown that effective, targeted gun regulations, such as firearm identification requirements, prevent violence.<sup>30</sup> Nevertheless, in the United States, firearm regulations must be able to withstand constitutional challenges.<sup>31</sup> Illinois has several regulations in place that have survived such challenges, including Illinois' firearm owners' identification statute, the FOID Act.<sup>32</sup>

## B. Illinois Regulations

Illinois has several gun regulations in place that have, as of this writing, withstood constitutional challenges: the Illinois Firearm Owners Identification Card Act ("FOID Act"), the Illinois Firearms Restraining Order Act ("ILFRO"), the Illinois Domestic Violence Act ("ILDVA"), and the Protect Illinois Communities Act ("PICA").<sup>33</sup>

### 1. *The Illinois Firearm Owner's Identification Card Act (FOID Act)*

The FOID Act was enacted in 1967 to "provide a system of identifying persons not qualified to acquire or possess firearms and firearm ammunition within the State of Illinois."<sup>34</sup> The Illinois

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to the AR-15 used by the Dayton, Ohio shooter, which allowed him to successfully shoot twenty-six people, killing nine, despite police being on scene and engaging him contemporaneously with the start of the shooting).

30. Bindu Kalesan et al., *Firearm Legislation and Firearm Mortality in the USA: A Cross-Sectional, State-Level Study*, 387 THE LANCET 1847, 1855 (Apr. 30, 2016) (finding the "three state laws most strongly associated with reduced overall firearm mortality were universal background checks for firearm purchase, ammunition background checks, and identification requirement for firearms").

31. See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022) (holding that gun regulations must have a historical basis to withstand Constitutional scrutiny under the Second Amendment).

32. See sources cited *infra* note 33.

33. See Firearm Owners Identification Card Act, 430 ILL. COMP. STAT. 65/ (2013) (regulating possession, sale, and purchase of firearms by Illinois residents to those who successfully obtain a State issued firearm owner's identification card); Firearms Restraining Order Act, 430 ILL. COMP. STAT. 67/ (2019) (empowering police and family members to petition the court to obtain a firearm restraining order and search warrant to authorize police to seize the weapons of individuals who pose a threat to themselves or others if they remain in possession of firearms); Illinois Domestic Violence Act of 1986, 750 ILL. COMP. STAT. 60/ (2013) (creating State protections for domestic violence survivors); Protect Illinois Communities Act, Pub. Act 102-1116 (2023); *infra* Section III.A (discussing the unsuccessful constitutional challenges to Illinois' firearm regulations or substantially similar regulations in other states).

34. Patrick W. Knepler, *FOID Card Act Changes and Mandated Hospital Reporting*, ILL. DEPT. OF HUMAN SERV. (Nov. 1, 2018), [www.team-ih.org/files/non-gated/education/foid-card-act-11-1-18.aspx](http://www.team-ih.org/files/non-gated/education/foid-card-act-11-1-18.aspx) [perma.cc/7CEA-EMSH] (introducing the origination of the FOID Card Act, its purpose, and who was charged with the administration of FOID).

State Police (“ISP”) was empowered by the statute to administrate FOID card applications, issuance, suspension, and revocation.<sup>35</sup> ISP screened FOID card applications for criminal history and against lists of patients admitted to state-run psychiatric facilities.<sup>36</sup>

In 1988, Laurie Dann, who had been under treatment for mental health issues at private facilities, was able to acquire a FOID card since ISP, at the time, did not routinely check applications against private treatment facilities.<sup>37</sup> Using her valid FOID, Dann legally purchased a .357 Smith & Wesson handgun, entered an elementary school in Winnetka, Illinois, killed eight-year-old student Nicholas Corwin, wounded five other children, and traveled to a nearby home where she shot and wounded the resident before turning the firearm on herself.<sup>38</sup> In response, the Illinois legislature amended the FOID Act to require private hospitals to submit a report to ISP of anyone admitted for mental health treatment so that individual’s FOID card could be revoked or any future application denied.<sup>39</sup>

Now, according to the FOID Act, ISP is required to deny the application or revoke the FOID of anyone convicted of a felony, domestic battery, or violation of an order of protection.<sup>40</sup> ISP has discretion to revoke someone’s FOID for a non-traffic related misdemeanor as well.<sup>41</sup> ISP must deny or revoke the FOID of

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35. 430 ILL. COMP. STAT. 65/3 (2023); 430 ILL. COMP. STAT. 65/8 (2023) (regulating the administration of FOID to the Illinois State Police, outlining issuance protocols along with triggering events that authorize suspension and revocation, and FOID card holder duties).

36. Knepler, *supra* note 34 (discussing the original protocol for screening FOID card applicants against public state hospital patient lists).

37. Violence Policy Center, *Where’d They Get Their Guns*, VIOLENCE POL’Y CTR. (May 20, 1988), [www.vpc.org/studies/wgun880520.htm](http://www.vpc.org/studies/wgun880520.htm) [perma.cc/3278-LCAH] (reporting that shooter Laurie Dann had a FOID and legally purchased three guns in Glenview); Knepler, *supra* note 34 (reporting that Laurie Dann’s private mental health treatment was not required to be reported to the State at the time of firearm purchase).

38. George Papajohn & Joel Kaplan, *The Many Faces of Laurie Dann*, CHI. TRIBUNE (June 5, 1988, 12:00 AM), [www.chicagotribune.com/news/ct-xpm-1988-06-05-8801040887-story.html](http://www.chicagotribune.com/news/ct-xpm-1988-06-05-8801040887-story.html) [perma.cc/CRT7-G67V] (reporting the timeline of events of Laurie Dann: her history of mental health struggles, violent behavior, purchasing three guns, and shooting six children and a local resident before turning the gun on herself).

39. Knepler, *supra* note 34 (discussing the legislative response to the loophole in the law that permitted Dann to obtain a FOID and legally purchase a gun). Because Dann lived in Winnetka and had financial resources, she was treated in private rather than public facilities, a contingency not foreseen in the original legislation. *Id.*

40. 430 ILL. COMP. STAT. 65/8 (2023) (regulating the types of criminal convictions that will disqualify an individual from obtaining or keeping a FOID).

41. *Id.* Examples of non-traffic misdemeanor convictions that could lead to FOID revocation include “battery, assault, aggravated assault” if convicted within the last five years. *Id.*

someone diagnosed with an intellectual or developmental disability or if that individual has been “a patient in a mental health facility” in the last five years.<sup>42</sup> Finally, ISP must revoke the FOID of an individual who “poses a clear and present danger.”<sup>43</sup>

The FOID Act defines a person that poses a clear and present danger as someone who: one, “communicates a serious threat of physical violence against a reasonably identifiable victim . . . [or to him- or herself] . . . or two, demonstrates threatening physical or verbal behavior . . . as determined by a physician, psychologist, school administrator or law enforcement official.”<sup>44</sup>

Health care providers have their own clear and present danger reporting protocols.<sup>45</sup> ISP has also created a reporting form for school and police officials.<sup>46</sup> In September 2019, Highland Park Police filed a clear and present danger form against Crimo related to threats he made about killing his family and took custody of numerous dangerous knives he had in his possession.<sup>47</sup> However, since Crimo had not yet obtained a FOID, ISP had no FOID card to revoke.<sup>48</sup> Additionally, at that time, ISP did not flag his record for denial should he later have applied for a FOID.<sup>49</sup> This was

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42. 430 ILL. COMP. STAT. 65/8 (f) (2023) (regulating possession by mental health patients or those whom psychiatrists, school officials, or law enforcement deem to pose a clear and present danger if permitted to have access to firearms.) Mental health patients are automatically disqualified for five years after their admission to a facility and can only be cleared after five years with a certification from a mental health professional. *Id.* The following mental conditions disqualify an individual from obtaining a FOID or will cause a FOID to be revoked: (1) intellectual disability; (2) treatment in mental health facility within the last five years or treatment more than five years ago without certification by mental health professional; or (3) developmental disability. *Id.*

43. 430 ILL. COMP. STAT. 65/1.1 (2023).

44. *Id.* (defining what constitutes a clear and present danger). Any party whose application is denied or FOID card revoked has appeal rights that include a hearing before a review board or remedy through the courts. 430 ILL. COMP. STAT. 65/10.

45. ILL. ADMIN. CODE tit. 20, § 1230.120 (a) (regulating the way health care providers submit a clear and present danger warning about a patient to ISP).

46. ILL. ADMIN. CODE tit. 20, § 1230.120 (b); *Person Determined to Pose a Clear and Present Danger*, ILL. STATE POLICE, [www.ispfsb.com/Public/Firearms/ClearAndPresentDanger.pdf](http://www.ispfsb.com/Public/Firearms/ClearAndPresentDanger.pdf) [perma.cc/SFV7-PRA6] (providing a way for police and school officials to notify ISP of their concerns about an individual’s danger if permitted to access firearms).

47. Soo Rin Kim et al., *Police Determined Highland Park Shooting Suspect Posed “Clear and Present Danger” After Past Threat*, ABC NEWS (July 7, 2022, 11:41 PM), [abcnews.go.com/US/police-determined-highland-park-shooting-suspect-posed-clear/story?id=86421734](https://abcnews.go.com/US/police-determined-highland-park-shooting-suspect-posed-clear/story?id=86421734) [perma.cc/4X2A-B9M5] (reporting that Crimo had “threatened to kill everyone in the house”). No one in the home wanted to sign a criminal complaint, so no arrest was made. *Id.* However, Highland Park Police removed a twelve-inch dagger and sixteen hand knives from Crimo’s house and submitted a Clear and Present Danger Form to ISP to prevent Crimo from obtaining any firearms. *Id.*

48. *Id.* (reporting that Crimo had no FOID card in September 2019, when the Clear and Present Danger form was sent in).

49. *Id.* (reporting that ISP found that at the time of his application, “there

consistent with ISP rules at the time.<sup>50</sup> Three months later, twenty-year-old Crimo, with his father's sponsoring signature, successfully applied for and obtained a FOID, which he used to legally purchase the rifle he used in the killings.<sup>51</sup>

If an individual has been issued a FOID which ISP later revokes, the card holder is notified by mail to one, surrender the FOID card to ISP or local law enforcement within forty-eight hours, and two, submit a disposition record listing all firearms under the individual's custody and control and the location where the firearms were lawfully turned over (e.g., a valid FOID card holder or police).<sup>52</sup> No additional follow up by ISP or local police is mandated by law to confirm compliance.<sup>53</sup> The statute allows local police discretion to "petition the circuit court to issue a warrant to search for and seize the [revoked FOID] and firearms" in the non-compliant individual's custody or control.<sup>54</sup>

A Chicago Tribune investigation revealed that eighty percent of revoked cardholders fail to submit their firearm disposition form with local police.<sup>55</sup> One such revoked cardholder was Gary Martin, who was issued a FOID card in 2014 despite having a 1995

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was insufficient basis to establish a clear and present danger and deny the FOID application.”).

50. See Press Release, Illinois State Police, Illinois State Police Continues to Strengthen Firearms Safety Efforts: Updates to Clear and Present Danger Rule and Model Policy for Firearms Restraining Order (Nov. 21, 2022), [www.isp.illinois.gov/Media/PressReleaseFile/781](http://www.isp.illinois.gov/Media/PressReleaseFile/781) [perma.cc/PG8G-V8SX] (“The rule change also allows ISP to maintain and use a Clear and Present Danger report in instances when the individual did not have a FOID card or was not actively seeking a card at the time the Clear and Present Danger report was submitted.”).

51. *Id.* (reporting Crimo subsequently applied for a FOID in December 2019, with a sponsored signature from his father, as required by the act when the applicant is under twenty-one).

52. 430 ILL. COMP. STAT. 65/9.5 (a) (2023) (outlining the statutory responsibilities of a FOID card holder once notified of a revocation; failure to comply is a Class A misdemeanor).

53. See *id.* (showing the statute does not mandate any follow up by ISP, the local law enforcement agency, or any other law enforcement agency).

54. 430 ILL. COMP. STAT. 65/9.5 (c) (2023) (empowering police to seek a warrant for the statutory violation of noncompliance with FOID surrender or firearm disposition; however, the police are not mandated to act).

55. Stacy St. Clair et al., *A Man with a Revoked Gun License Killed His 18-Month-Old Son in Joliet. Here's How He and Thousands of Others Slipped Through the System*, CHI. TRIBUNE (Feb. 14, 2020, 9:31 AM), [www.chicagotribune.com/news/breaking/ct-foid-revocations-henry-pratt-shooting-illinois-gun-laws-20200213-scqbb6tlencwdkv3r4p2ygrxde-story.html](http://www.chicagotribune.com/news/breaking/ct-foid-revocations-henry-pratt-shooting-illinois-gun-laws-20200213-scqbb6tlencwdkv3r4p2ygrxde-story.html) [perma.cc/6UB6-3YWW] (reporting that Christopher Miller had his FOID revoked after brutally beating a man in Naperville). Miller never complied with the statute, and no police agency ever followed up. *Id.* Twenty months later, Miller showed up at his estranged wife's home with a pistol in his waistband, choked her until she lost consciousness, and shot and killed his eighteen-month-old son. *Id.*

disqualifying felony conviction in Mississippi.<sup>56</sup> Using his FOID, Martin purchased a Smith & Wesson handgun.<sup>57</sup> ISP discovered Martin's felony conviction when he subsequently was fingerprinted while applying for a concealed carry permit.<sup>58</sup> Martin's FOID was subsequently revoked, but Martin did not surrender it, transfer his firearm, or send in the required firearm disposition form.<sup>59</sup> No law enforcement agency took any further action to enforce Martin's non-compliance.<sup>60</sup> Five years later, on February 15, 2019, Martin's managers at Henry Pratt Company (Aurora, Illinois) asked him to join them in a conference room where they terminated his employment.<sup>61</sup> Martin, using his illegal firearm, killed five co-workers and injured six responding police officers before he was killed by police.<sup>62</sup>

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56. Ben Bradley, *Aurora Shooter's FOID Card Was Revoked; Gun Never Confiscated*, WGN TV (Feb. 16, 2019, 6:50 PM), [wgntv.com/news/wgn-investigates/aurora-shooters-foid-card-was-revoked-gun-never-confiscated/](http://wgntv.com/news/wgn-investigates/aurora-shooters-foid-card-was-revoked-gun-never-confiscated/) [perma.cc/7EYL-KQUC] (reporting that lack of fingerprinting for the FOID application may have been the reason he was mistakenly issued a FOID because his Mississippi felony conviction was missed).

57. *Id.* (reporting that Martin went to an Aurora, Illinois gun dealer and purchased the firearm after successfully obtaining his FOID card).

58. *Id.* (reporting that fingerprints are not required for FOID process, but they are for a concealed carry permit, which is more conclusive in locating criminal history than merely running someone's name through a national criminal record database).

59. *Id.* (reporting that Martin's conviction was discovered upon his concealed carry application in 2014, his FOID was subsequently revoked, and Martin did nothing to comply with the law for five years leading up to his mass shooting in 2019).

60. *Id.* (reporting that neither ISP nor Aurora police attempted to confiscate Martin's FOID or any guns in his possession); Megan Crepeau, *Aurora Shooter Should Not Have Had a Gun Due to Felony Conviction, But State Law Failed to Stop Him*, CHI. TRIBUNE (Feb. 16, 2019, 7:20 PM), [www.chicagotribune.com/suburbs/aurora-beacon-news/ct-met-aurora-gary-martin-gun-20190216-story.html](http://www.chicagotribune.com/suburbs/aurora-beacon-news/ct-met-aurora-gary-martin-gun-20190216-story.html) [perma.cc/7W5K-B8H2] (quoting Mark Jones, an adviser for a gun control group in regards to the requirements of the FOID card holder when they are revoked: "[i]t's an honor system. There's no real teeth in it, there's no reasonable expectation that the cops are going to show up at your door.").

61. Madeline Holcombe, *Aurora Gunman Opened Fire on His Coworkers as Soon as He Lost His Job*, CNN (Feb. 18, 2018, 10:02 AM), [www.cnn.com/2019/02/17/us/aurora-shooting-termination/index.html](http://www.cnn.com/2019/02/17/us/aurora-shooting-termination/index.html) [perma.cc/4N6T-DJBM] (reporting that Martin, a fifteen-year employee, had been written up before and was going through a discipline procedure when it was determined his employment would be terminated).

He was called into a meeting and upon learning of his termination he shot and killed several people involved in that meeting. *Id.*

62. Doha Madani, *Five People Killed in Shooting at Aurora, Illinois, Manufacturing Plant*, NBC NEWS (Feb. 15, 2019, 2:41 PM), [www.nbcnews.com/news/us-news/heavy-police-response-active-shooting-aurora-ill-manufacturing-plant-n972226](http://www.nbcnews.com/news/us-news/heavy-police-response-active-shooting-aurora-ill-manufacturing-plant-n972226) [perma.cc/8L6V-NE7G] (reporting a massive police response that included searching the 29,000 square foot plant). It took ninety minutes to locate Martin in the plant before police got into a shootout with Martin. *Id.* Martin shot and injured five officers before police were

## 2. Firearm Restraining Orders

In response to numerous mass shooting events, the District of Columbia and nineteen States, including Illinois, have passed red flag laws to temporarily remove the firearms of people who demonstrate a danger to self or others.<sup>63</sup> Illinois' red flag law, the Illinois Firearm Restraining Order Act ("ILFRO"), was enacted in 2019.<sup>64</sup> The law allows a family member or law enforcement to file a petition to seize firearms from a person posing a danger of causing injury to self or others.<sup>65</sup> A family member is defined as a "spouse, former spouse, [co-parent], parent, child, step-child . . . any person related by blood or present marriage . . . or a person who shares a common dwelling."<sup>66</sup>

If the individual poses an imminent danger, then the petitioner may file an emergency order and an *ex parte* hearing must be held that day.<sup>67</sup> If the petitioner establishes that probable cause of an immediate danger exists from the respondent having access to firearms, then the court will issue the restraining order along with a search warrant to seize the firearms and FOID.<sup>68</sup> If granted, the court will schedule a full hearing during the period of the emergency order, with the respondent being provided notice.<sup>69</sup> At the hearing, the petitioner must show, "by clear and convincing evidence", that the respondent having access to firearms poses a danger to self or others.<sup>70</sup> If the court denies the petition, any previously seized firearms and FOID will be returned.<sup>71</sup> If granted, the petitioner may file for a renewal during the last three months of every granted six- to twelve-month plenary order.<sup>72</sup> The respondent may request

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able to kill him. *Id.*

63. See Alysson Gatens, *Firearm Restraining Orders in Illinois*, ILL. CRIM. JUST. INFO. AUTH. (Mar. 11, 2022) [icjia.illinois.gov/researchhub/articles/firearm-restraining-orders-in-illinois/](https://icjia.illinois.gov/researchhub/articles/firearm-restraining-orders-in-illinois/) [perma.cc/X69S-V3SP] (discussing FRO laws being passed in nineteen states and the District of Columbia in response to suicide, mass shootings, domestic and other firearm related violence); *Extreme Risk Protection Order: A Tool To Save Lives*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH, [americanhealth.jhu.edu/ImplementERPO](https://americanhealth.jhu.edu/ImplementERPO) (last visited Oct. 7, 2022) [perma.cc/F8FF-9AX3] (outlining nineteen states' and the District of Columbia's "red flag" laws).

64. 430 ILL. COMP. STAT. 67 et seq. (2019) (regulating the process to petition the court for an order to remove firearms from the possession of an individual posing an extreme risk).

65. *Id.*

66. 430 ILL. COMP. STAT. 67/5 (2022).

67. 430 ILL. COMP. STAT. 67/35 (2022) (requiring the court receiving the petition to have the hearing the same day or, if closed, the next open court date). The hearing is *ex parte*, meaning it is held without notice to the respondent. *Id.*

68. *Id.*

69. *Id.*

70. 430 ILL. COMP. STAT. 67/40 (2013).

71. *Id.*

72. *Id.*

a termination hearing while the plenary order is in effect.<sup>73</sup>

Although Firearm Restraining Orders (“FROs”) have been in effect in Illinois since 2019, they were used fifty-three times in the entire state in 2019 and 2020.<sup>74</sup> Of those, police filed only thirty-eight, nine were by family members, and the other six were filed by someone with an unknown relationship.<sup>75</sup> The Illinois legislature passed a bill in May 2021 which included a provision for expanding training and awareness of FROs to police and other groups.<sup>76</sup>

By contrast, in response to the 2018 mass shooting in Parkland, Florida, the Florida State legislature enacted its red flag law which was utilized 1,700 times throughout the State in just the first year.<sup>77</sup> While some sheriffs initially resisted the use of red flag laws as making it too easy to seize someone’s guns, many of these same sheriffs have later found the usefulness of these regulations.<sup>78</sup> Failure to enforce red flag laws can lead to tragic consequences. In Maine, a sheriff’s office failed to act where there was probable cause to seize a threatening, mentally disturbed individual’s numerous firearms.<sup>79</sup> One month later, the man shot and killed eighteen people.<sup>80</sup>

### 3. Domestic Violence and Orders of Protection

Studies have confirmed that there is a high correlation between domestic violence and mass shootings.<sup>81</sup> Sixty-eight

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73. *Id.*

74. Gatens, *supra* note 63 (showing thirty-four FROs filed in 2019, nineteen in 2020, and no county in Illinois filed more than two FROs in any given year, except DuPage County, where twelve were filed in each year).

75. *Id.*

76. *Id.*; 20 ILL. COMP. STAT. 2310/2310-705 (2022).

77. Ryan J. Foley, *Gun Seizure Laws Grown in Popularity Since Parkland Shooting*, ASSOCIATED PRESS (Feb. 10, 2019, 6:01 AM), [www.apnews.com/article/suicides-parkland-florida-school-shooting-ut-state-wire-in-state-wire-nv-state-wire-3d5722abc06245b4b931933f253e3743](http://www.apnews.com/article/suicides-parkland-florida-school-shooting-ut-state-wire-in-state-wire-nv-state-wire-3d5722abc06245b4b931933f253e3743) [perma.cc/YY48-V6Z3].

78. Markian Hawryluk, *Some Sheriffs Who Condemned Red Flag Laws Are Putting Them to Use*, CNN (June 27, 2022, 6:00 AM), [www.cnn.com/2022/06/27/health/red-flag-laws-colorado/index.html](http://www.cnn.com/2022/06/27/health/red-flag-laws-colorado/index.html) [perma.cc/6ENR-2VLW] (reporting that twenty of thirty-seven counties declared themselves “Second Amendment Sanctuaries” in response to red flag law passage). These same counties have since utilized the orders, filed by the very police agency heads who had previously condemned the law. *Id.*

79. Steve Gorman, *Maine Sheriff Had Cause to Seize Shooter’s Guns Before Mass Killing, Panel Finds*, REUTERS (Mar. 18, 2024), [www.reuters.com/world/us/maine-sheriff-had-cause-seize-shooters-guns-before-mass-killing-panel-finds-2024-03-16/](http://www.reuters.com/world/us/maine-sheriff-had-cause-seize-shooters-guns-before-mass-killing-panel-finds-2024-03-16/) [perma.cc/YN26-EVSR].

80. *Id.*

81. *E.g.*, Lisa B Geller, Marisa Booty & Cassandra K. Crifasi, *The Role of Domestic Violence in Fatal Mass Shootings in the United States, 2014-2019*, INJURY EPIDEMIOLOGY (2021), [doi.org/10.1186/s40621-021-00330-0](https://doi.org/10.1186/s40621-021-00330-0) [perma.cc/RR4R-G37X] (finding most mass shootings have a link to domestic violence: either the shooting was a domestic violence incident itself or the

percent of mass shootings between 2014 and 2019 either directly involved domestic violence against an intimate partner or family member, or involved a perpetrator with a history of committing domestic violence.<sup>82</sup> Illinois mass shooters also fit this profile.<sup>83</sup> Crimo had a prior report of domestic violence against his family just months prior to applying for his FOID card.<sup>84</sup> Gary Martin, the Aurora, Illinois mass shooter, had multiple prior arrests, including a felony aggravated assault conviction for stabbing his girlfriend in Mississippi.<sup>85</sup> He also had two orders of protection filed against him by a former girlfriend, who alleged Martin threatened to kill her, beat her, and threw rocks at her.<sup>86</sup> Similarly, Northern Illinois University mass shooter Steven Kaczmierczak also had a history of unreported domestic violence against his girlfriend.<sup>87</sup>

Recognizing the danger firearms pose in the hands of domestic abusers, Illinois enacted a provision in the Illinois Domestic Violence Act (“ILDVA”) to prohibit gun possession by abusers.<sup>88</sup> The prohibition takes effect when a domestic abuse survivor petitions the court for an order of protection against the abuser and seeks the firearm possession prohibition remedy.<sup>89</sup> The respondent must be given notice and an opportunity to be heard before the court can grant this remedy.<sup>90</sup> To issue the prohibition of firearm possession, the court must find that the respondent poses “a credible threat . . . [to an] intimate partner or child.”<sup>91</sup> If the firearm remedy is

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shooter had a history of domestic violence). The study defined a history of domestic violence as “violence . . . or threats of violence against a current or former intimate partner or family member. . . .” *Id.*

82. *Id.* Limiting those with a history of domestic violence to those who committed or threatened violence against an intimate partner or family member would indicate this percentage may be far higher if the broader definition of conduct constituting domestic violence were included. *Id.*

83. *See infra* notes 84-87.

84. Kim et al., *supra* note 47 (reporting domestic abuse by Crimo where he “threatened to kill everyone in the house”, which included family members).

85. Amanda Sakuma, *The Aurora Shooter Had a History of Domestic Violence and Assault. He Never Should Have Had a Gun*, VOX (Feb. 16, 2019, 4:11 PM), [www.vox.com/2019/2/16/18227655/aurora-shooter-gun-domestic-violence](http://www.vox.com/2019/2/16/18227655/aurora-shooter-gun-domestic-violence) [perma.cc/NV9D-ESS6] (reporting that a woman filed two orders against Martin, one for stalking, and that Martin was charged with violating one of the orders in 2008); Hannah Leone & Jeremy Gerner, *Gary Martin, Gunman in Aurora Shooting, Had Long History of Violence: Stabbing One Girlfriend, Threatening to Kill Another*, CHI. TRIBUNE (Feb. 16, 2019, 7:05 PM), [www.chicagotribune.com/news/breaking/ct-met-gary-martin-aurora-shooter-20190216-story.html](http://www.chicagotribune.com/news/breaking/ct-met-gary-martin-aurora-shooter-20190216-story.html) [perma.cc/CS5J-WLAL].

86. Leone & Gerner, *supra* note 85.

87. *See Police Investigate NIU Shooter’s Two Sides*, ASSOCIATED PRESS (Feb. 16, 2008, 5:08 PM), [www.nbcnews.com/id/wbna23200851](http://www.nbcnews.com/id/wbna23200851) [perma.cc/F2L7-TP28] (discussing Kaczmierczak’s controlling, abusive relationship with his girlfriend that went unreported to authorities until after the shooting).

88. 750 ILL. COMP. STAT. 60/214 (2021).

89. 750 ILL. COMP. STAT. 60/214 (b)(14.5) (2021).

90. 750 ILL. COMP. STAT. 60/214 (b)(14.5)(a)(1) (2021).

91. 750 ILL. COMP. STAT. 60/214 (b)(14.5)(a)(3) (2021).



granted, then the court issues an order for the surrender of respondent's FOID card and a warrant authorizing local law enforcement to seize and hold any firearms in the respondent's possession during the pendency of the order.<sup>92</sup>

Despite the existence of a remedy under the ILDVA to seize firearms from a domestic abuser, the remedy is not often sought by domestic violence survivors, and, even when sought, may not be granted by the court.<sup>93</sup> In a study of ninety-three order of protection cases in Cook County domestic violence court, only eleven survivors sought the remedy, and of those, none were granted.<sup>94</sup> The study opined that judges possibly refuse to grant the firearm remedy because they find it difficult to enforce or they have concerns of Second Amendment violations.<sup>95</sup>

In addition to the previously discussed laws and regulations, in Illinois, certain felony and all domestic battery arrests require the court to order as a condition of pretrial release that the defendant surrender his/her FOID card and firearms.<sup>96</sup> However, the statute allows the court discretion as to whether to order the firearm condition if circumstances "clearly do not warrant it or when imposition [of the condition] would be impractical."<sup>97</sup> These statutes have withstood constitutional scrutiny so far. However, the Supreme Court is currently considering a challenge to Texas' law prohibiting firearm possession by those under a domestic violence protection order.<sup>98</sup>

#### 4. *Protect Illinois Communities Act*

In response to the Highland Park shooting, the Illinois legislature passed a bill, known as the Protect Illinois Communities Act ("PICA") to "regulate the sale and distribution of assault weapons [and] high-capacity magazines."<sup>99</sup> On January 10, 2023, Illinois Governor Pritzker signed PICA into law.<sup>100</sup> PICA's provisions had immediate effect, including banning the purchase and possession of assault weapons, high-capacity magazines, among

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92. 750 ILL. COMP. STAT. 60/214 (b)(14.5)(a) (2021).

93. See Debra Stark, *What's Law Got to Do with It? Confronting Judicial Nullification of Domestic Violence Remedies*, 10 NW. J.L. & SOC. POL'Y, 130, 160 (2015) (finding that of ninety-three domestic violence order of protection cases studied in a Cook County Domestic Violence courtroom in 2011, only eleven survivors sought the firearm restraining order remedy and the court granted none).

94. *Id.*

95. *Id.* at 162.

96. 725 ILL. COMP. STAT. 5/110-10(a)(5) (2023).

97. *Id.*

98. *United States v. Rahimi*, No. 22-915 (U.S. argued Nov. 7, 2023).

99. *Protect Illinois Communities Act, Regulation on Assault Weapons*, ILL. STATE POLICE, [isp.illinois.gov/Home/AssaultWeapons](http://isp.illinois.gov/Home/AssaultWeapons) [perma.cc/RUS7-T4KQ] (last visited Jan. 29, 2024).

100. *Id.*

other firearm related devices.<sup>101</sup> However, PICA provided a grandfathering exception to those already in possession of assault weapons prior to the Act's effective date.<sup>102</sup>

To be grandfathered under PICA, individuals must sign an endorsement affidavit, by January 1, 2024, swearing that the banned assault weapon was already in their possession prior to the effective date of the Act, or inherited from a person with an existing endorsement affidavit.<sup>103</sup> The Constitutional challenges to PICA were swift, as were the challenges to many of the gun regulations reviewed above.<sup>104</sup>

### C. Other State Firearm Regulations

While Illinois is generally considered a progressive state in its firearm regulation, there are several states that have enacted broader firearm regulations than Illinois.<sup>105</sup> This section focuses on three regulations used by other states, two of which were recently enacted in Illinois: assault weapons bans, high-capacity magazine bans, and mandatory firearm sales records sent to law enforcement.<sup>106</sup>

#### 1. Assault Weapons Bans

The following states ban assault weapons: New York, Massachusetts, New Jersey, Connecticut, Maryland, Delaware, California, Hawaii, and as of 2023, Illinois.<sup>107</sup> In Maryland, assault weapons are defined as long gun rifles, such as the Colt AR-15, AK-47, and any copycat weapon with substantively similar characteristics.<sup>108</sup> The weapons in Maryland's definition are generally described as the semi-automatic versions of the military's M-16 rifle.<sup>109</sup> The military's M-16 has a semi-automatic mode

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101. 720 ILL. COMP. STAT. 5/24-1.9 (2023).

102. *Id.*

103. *Id.*

104. *See infra* Section II.D.4.

105. *See Gun Laws in Illinois*, EVERYTOWN RSCH. & POL'Y, everytownresearch.org/rankings/state/illinois/ [perma.cc/5XSU-U95A] (last updated Jan. 19, 2022) (collating all gun regulations in Illinois compared to regulations used in other states).

106. *See id.* (showing three commonly used regulations that Illinois has not yet enacted).

107. *Which States Prohibit Assault Weapons*, EVERYTOWN RSCH. & POL'Y, everytownresearch.org/rankings/law/assault-weapons-prohibited/ [perma.cc/G46F-9AFM] (last updated Jan. 19, 2022).

108. MD. CODE ANN., PUB. SAFETY § 5-101(r)(2) (West 2013); MD. CODE ANN., CRIM. LAW § 4-301(h) (West 2013).

109. Kastalia Medrano, *What's the Difference Between an AR-15 & An M16?*, BUSTLE (June 16, 2016), www.bustle.com/articles/167436-whats-the-difference-between-an-ar-15-an-m16-theyre-frighteningly-similar [perma.cc/DH5J-2LW9] (explaining that the AR-15 and similar type weapons are the civilian version of

(meaning one round fired per trigger pull), and a fully automatic mode (continuous rounds fired while the trigger is depressed).<sup>110</sup> Other than the inability to fire in fully automatic mode, the rifles are substantively similar to the M-16, the military's primary weapon of combat.<sup>111</sup> Although there is dispute about whether the term assault weapon is limited to fully automatic weapons,<sup>112</sup> for purposes of this comment, the term will include semi-automatic M-16 style long gun rifles as described in the Maryland statute.<sup>113</sup>

Although handguns are most often used in mass shootings, at least fifty-four mass shootings have been perpetrated using assault weapons.<sup>114</sup> Four of the five deadliest mass shootings were carried out using assault weapons, including Sandy Hook, the Orlando nightclub shooting, Texas First Baptist Church massacre, and the worst mass shooting in U.S. history in Las Vegas, Nevada.<sup>115</sup> In the Las Vegas shooting, Stephen Paddock went to his hotel room with twenty-three AR-15-style assault rifles, twelve of which had one-hundred round magazines, and approximately 5,280 rounds of ammunition.<sup>116</sup> On the evening of October 1, 2017, Paddock fired over 1,000 rounds from his hotel room into a nearby music festival

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the M16 military rifle).

110. Joshua Gillian, *The Difference Between Automatic and Semi-Automatic Weapons*, POLITIFACT (Oct. 2, 2017), [www.politifact.com/article/2017/oct/02/difference-between-automatic-and-semi-automatic-we/](http://www.politifact.com/article/2017/oct/02/difference-between-automatic-and-semi-automatic-we/) [perma.cc/VZL7-WGQW].

111. Medrano, *supra* note 109.

112. See *The Truth About So-Called "Assault Weapons,"* NAT'L RIFLE ASS'N INST. FOR LEGIS. ACTION, [www.nrila.org/the-truth-about-so-called-assault-weapons/](http://www.nrila.org/the-truth-about-so-called-assault-weapons/) [perma.cc/TU4K-HGSJ] (last visited Apr. 3, 2024) (arguing that the Army definition of assault weapon/rifle is a fully automatic firearm).

113. John Haltiwanger & Azmi Haroun, *A Breakdown of Gun Terminology To Help You in Discussions on Mass Shootings and Debates Over Gun Control*, BUS. INSIDER (July 5, 2022, 7:32 PM), [www.businessinsider.com/terms-to-know-about-guns-when-discussing-mass-shootings-2019-8](http://www.businessinsider.com/terms-to-know-about-guns-when-discussing-mass-shootings-2019-8) [perma.cc/8LR9-RYHQ].

114. *Weapon Types Used in Mass Shooting in the United States Between 1982 and October 2022, By Number of Weapons and Incidents*, STATISTA (Oct. 18, 2022), [www.statista.com/statistics/476409/mass-shootings-in-the-us-by-weapon-types-used/](http://www.statista.com/statistics/476409/mass-shootings-in-the-us-by-weapon-types-used/) [perma.cc/CBH9-PHJ9].

115. *Id.*; *Sandy Hook Shooting: The Unprecedented \$73M settlement with Gunmaker Remington*, CBS NEWS (May 29, 2022, 9:25 AM), [www.cbsnews.com/news/sandy-hook-shooting-the-unprecedented-73m-settlement-with-gunmaker-remington/](http://www.cbsnews.com/news/sandy-hook-shooting-the-unprecedented-73m-settlement-with-gunmaker-remington/) [perma.cc/62F3-YNRN]; Bart Jansen, *Weapons Gunman Used in Orlando Shooting are High-Capacity, Common*, USA TODAY (June 14, 2016), [www.usatoday.com/story/news/2016/06/14/guns-used-kill-49-orlando-high-capacity-common-weapons/85887260/](http://www.usatoday.com/story/news/2016/06/14/guns-used-kill-49-orlando-high-capacity-common-weapons/85887260/) [perma.cc/NGY6-BFHR]; David Montgomery et al., *Gunman Kills At Least 26 in Attack on Rural Texas Church*, N.Y. TIMES (Nov. 5, 2017), [www.nytimes.com/2017/11/05/us/church-shooting-texas.html](http://www.nytimes.com/2017/11/05/us/church-shooting-texas.html) [perma.cc/2T4X-P5LT]; *Criminal Investigative Report of the 1 October Mass Casualty Shooting*, LAS VEGAS METRO. POLICE DEP'T 96-104 (Aug. 3, 2018) [hereinafter *Criminal Investigative Report*], [www.lvmpd.com/home/showpublisheddocument/134/638298568313170000](http://www.lvmpd.com/home/showpublisheddocument/134/638298568313170000) [perma.cc/J43A-NXPV].

116. *Criminal Investigative Report*, *supra* note 115, at 96-104.

crowd.<sup>117</sup> The shooting resulted in 58 deaths and approximately 546 injuries.<sup>118</sup> Crimo's shooting in Highland Park, the Parkland, Florida school shooting, and the Uvalde school shooting were also perpetrated by use of assault weapons.<sup>119</sup>

## 2. *High-Capacity Magazine Bans*

Magazines are the ammunition receptacles that continuously feed rounds into the chambers of semi and fully automatic firearms.<sup>120</sup> High-capacity magazines are commonly defined as holding more than ten rounds and can hold as many as one-hundred rounds, as seen in the Las Vegas shooting.<sup>121</sup> The following states have banned high-capacity magazines: Washington, Colorado, California, Hawaii, Vermont, New York, New Jersey, Maryland, Massachusetts, Connecticut, Delaware, Rhode Island, and as of 2023, Illinois.<sup>122</sup> High-capacity magazines have led to five times as many people being shot during mass shootings as opposed to shootings without high capacity magazines, and are used in twenty-two to thirty-six percent of all gun crimes.<sup>123</sup>

## 3. *Reporting State Firearms Sales to Law Enforcement*

Although the federal government, by statute, is prohibited from keeping a national gun registry, there is nothing stopping states from doing so.<sup>124</sup> The following states have enacted a statewide registry by requiring law enforcement notification of all firearm sales transactions: Washington, Oregon, California,

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117. *Id.* at 34-37, 106-07.

118. Statista Research Department, *Weapon Types Used in Mass Shooting in the United States Between 1982 and October 2022, By Number of Weapons and Incidents*, STATISTA (Oct. 18, 2022), [www.statista.com/statistics/476409/mass-shootings-in-the-us-by-weapon-types-used/](http://www.statista.com/statistics/476409/mass-shootings-in-the-us-by-weapon-types-used/) [perma.cc/JG96-V4W5].

119. Main, *supra* note 2; Terry Spencer, *Florida School Shooter's AR-15 Rifle Shown to Jurors*, ASSOCIATED PRESS (July 25, 2022), [apnews.com/article/education-florida-fort-lauderdale-parkland-school-shooting-60791bdf38785f494400c43b90a97c39](https://apnews.com/article/education-florida-fort-lauderdale-parkland-school-shooting-60791bdf38785f494400c43b90a97c39) [perma.cc/Y77Q-BEQR]; Aimee Picchi, *Maker of Gun Used in Uvalde Shooting, Daniel Defense, Accused of Targeting "At-Risk" Young Men*, CBS NEWS (July 20, 2022, 12:45 PM), [www.cbsnews.com/news/daniel-defense-uvalde-ar-15-lawsuit-post-malone-pewpew/](https://www.cbsnews.com/news/daniel-defense-uvalde-ar-15-lawsuit-post-malone-pewpew/) [perma.cc/8YWC-FC7Q].

120. The Range 702, *Clip vs. Magazine: What's the Difference?*, THE RANGE 702 (May 9, 2022), [www.therange702.com/blog/clip-vs-magazine/](http://www.therange702.com/blog/clip-vs-magazine/) [perma.cc/C8LA-3F4R].

121. *Prohibit High-Capacity Magazines*, EVERYTOWN FOR GUN SAFETY (May 9, 2022), [www.everytown.org/solutions/prohibit-high-capacity-magazines/](http://www.everytown.org/solutions/prohibit-high-capacity-magazines/) [perma.cc/RM5T-AWPP].

122. *Id.*

123. *Id.*

124. See 18 U.S.C. § 926 (prohibiting national registry of firearms from being maintained).

Hawaii, Michigan, Pennsylvania, Maryland, New York, New Jersey, Massachusetts, and Connecticut.<sup>125</sup> Maintaining a statewide gun registry aids law enforcement in identifying the owners of firearms used in crimes, and knowing what firearms are registered to an individual who is rendered prohibited from further firearm possession.<sup>126</sup> However the fate of these regulations remains unknown given the Supreme Court’s 2022 decision in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*.

#### *D. Constitutional Status of Illinois and Other State Firearm Regulations*

This section analyzes the Supreme Court’s current requirements for challenged firearm regulations and reviews the constitutional status of relevant state regulations.

##### *1. Analysis for Firearm Regulations*

In analyzing the constitutionality of any firearm regulation, courts must apply the analytical framework established by the Supreme Court’s decisions in *District of Columbia v. Heller*, *McDonald v. City of Chicago*, and *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*.<sup>127</sup> In *Heller* and *McDonald*, the Supreme Court rejected the Second Amendment as a “collective right”, holding that central to the Second Amendment is the *individual* right to keep and bear arms for self-defense both in and outside the home.<sup>128</sup> Applying *Heller*, many federal circuits followed a two-part test created by the Third Circuit, requiring the government to show that one, there was a historical basis for the gun regulation, and two, if no historical basis could be shown, the regulation must survive an intermediate scrutiny means-end analysis.<sup>129</sup> *Heller* noted several

125. *Which States Require Handgun Sales Records Be Sent to Law Enforcement?*, EVERYTOWN RSCH. & POL’Y (Jan. 2022), [www.everytownresearch.org/rankings/law/sales-records-sent-to-law-enforcement/](http://www.everytownresearch.org/rankings/law/sales-records-sent-to-law-enforcement/) [perma.cc/8GWM-92V6].

126. *Id.*

127. See Margaret J. Finerty, *The Supreme Court’s Bruen Decision and Its Impact: What Comes Next?*, N.Y. STATE BAR ASS’N (Aug. 9, 2022), [www.nysba.org/the-supreme-courts-bruen-decision-and-its-impact-what-comes-next/](http://www.nysba.org/the-supreme-courts-bruen-decision-and-its-impact-what-comes-next/) [perma.cc/GJ8H-PAS5] (noting that *Bruen*, *McDonald*, and *Heller* are the seminal cases for Second Amendment analysis) (citing *Bruen*, 597 U.S. at 1; *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008)).

128. See *McDonald*, 561 U.S. at 749; *Heller*, 554 U.S. at 592, 628.

129. Coleman Gay, “Red Flag” Laws: How Law Enforcement’s Controversial New Tool to Reduce Mass Shootings Fits Within Current Second Amendment Jurisprudence, 61 B.C. L. REV. 1491, 1513 n.132 (2020) (citing *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (announcing the Third Circuit’s two-part rule which was adopted by the following circuits: Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C.)).

“presumptively lawful” measures were “outside the scope of Second Amendment protections,” including restricting firearms to felons, the mentally ill, banning firearms in “sensitive places”, and regulating the commercial sale of firearms.<sup>130</sup>

In 2022, the two-part *Heller* test was reduced to a more rigorous one-part test in *Bruen*.<sup>131</sup> Post-*Bruen*, the test for the constitutionality of a gun regulation rests on the government demonstrating that the firearm regulation is “part of the historical tradition that delimits the outer bounds” of the Second Amendment.<sup>132</sup> Under this controlling standard, the first question is whether the Second Amendment’s plain text covers an individual’s conduct. If so, the Constitution presumptively protects that conduct and the analysis turns next to the historical evidence. Outside of a historical basis, the Supreme Court closed the door on any other avenue of upholding gun regulations, such as a means-end analysis.<sup>133</sup> Notably, Justice Kavanaugh’s concurrence in *Bruen*, while not binding, pointed out the majority decision should not negate the presumptively lawful regulatory measures previously mentioned in *Heller*.<sup>134</sup> Applying these principles, we now review how courts have analyzed Illinois and other state regulations to date.

## 2. *Constitutional Challenges to FOID – People v. Gunn, People v. Brown, and Guns Save Life, Inc. v. Raoul*

FOID has withstood all constitutional challenges to date, both pre- and post-*Bruen*.<sup>135</sup> In *People v. Gunn*, a post-*Bruen* challenge, the Illinois Appellate Court found that FOID survived using the analysis that follows.<sup>136</sup>

FOID is a shall-issue licensing regime, meaning that if the applicant meets the screening requirements, the licensing authority must issue the FOID.<sup>137</sup> Justice Kavanaugh’s concurrence in *Bruen* pointed out that shall-issue firearm licensing regimes are

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130. *Heller*, 554 U.S. at 626-27, 627 n.26.

131. *Bruen*, 597 U.S. at 19 (rejecting the two-part means-end analysis because it involved “one step too many” and replacing it with the “text and tradition” test).

132. *Id.*

133. *Id.*

134. *Id.* at 80-81 (Kavanaugh, J., concurring).

135. See Jennifer Mascia, *Tracking the Effects of the Supreme Court’s Gun Ruling*, THE TRACE (Sep. 20, 2022), [www.thetrace.org/2022/08/nysrpa-v-bruen-challenge-gun-regulations/](http://www.thetrace.org/2022/08/nysrpa-v-bruen-challenge-gun-regulations/) [perma.cc/DWC9-5YFB] (summarizing court challenges to various state gun regulations post-*Bruen*, with no activity in Illinois yet); *People v. Gunn*, 2023 IL App (1st) 221032, 227 N.E.3d 824 (holding FOID survived under *Bruen*).

136. *Gunn*, 2023 IL App (1st) 221032, ¶ 20, 227 N.E.3d at 830.

137. 430 ILL. COMP. STAT. 65/5(a) (2022) (requiring the Illinois State Police to approve FOID for every applicant found to be qualified).

constitutionally permissible.<sup>138</sup> No showing of special need by the applicant is required, nor does the licensing authority have discretion to deny the FOID if the applicant meets the screening requirements, both of which were conditions found to be impermissible in *Bruen*.<sup>139</sup> Since FOID avoids these two impermissible conditions, the *Gunn* court, applying Kavanaugh's *Bruen* analysis, upheld the constitutionality of FOID.<sup>140</sup>

Additionally, two recent pre-*Bruen* challenges to FOID's constitutionality have failed in Illinois courts, *People v. Brown* and *Guns Save Life, Inc. v. Raoul*.<sup>141</sup> In *People v. Brown*, police responded to a domestic disturbance at the home of Vivian Brown.<sup>142</sup> Police located a firearm that belonged to Ms. Brown inside her home and then charged her with violating Section 2(a)(1) of the FOID Act because she did not possess a FOID.<sup>143</sup> The Circuit Court of White County dismissed the criminal charge finding one, the FOID statute does not apply to possession in the home and two, the statute was unconstitutional as applied.<sup>144</sup>

The circuit court's constitutional analysis did not facially challenge the entirety of the FOID Act, but only as applied to Brown in her home.<sup>145</sup> The court relied on *Heller* and *McDonald*, holding that since Brown possessed a gun in her house for self-defense purposes, there was no historical basis for the regulation and requiring her to apply for a FOID before exercising that right was unconstitutional.<sup>146</sup>

The Illinois Supreme Court twice refused to rule on the merits of the circuit court's constitutional analysis and remanded the case.<sup>147</sup> The court ordered the lower court to dismiss the criminal

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138. See *Bruen*, 597 U.S. at 79-80 (Kavanaugh, J., concurring) (noting that shall-issue firearm licensing regimes currently in place by forty-three states are constitutionally permissible).

139. *Id.* at 79-80.

140. *Gunn*, 2023 IL App (1st) 221032, ¶ 20, 227 N.E.3d at 830.

141. *People v. Brown*, 2022 IL 127201, 211 N.E.3d 339; *Guns Save Life, Inc. v. Raoul*, 2019 IL App (4th) 190334, 146 N.E.3d 254.

142. Greg Bishop, *Illinois Supreme Court 'Side Stepped' Constitutional Question of Required FOID to Keep Guns in Home*, THE CTR. SQUARE (June 16, 2022), [www.thecentersquare.com/illinois/illinois-supreme-court-side-stepped-constitutional-question-of-required-foid-to-keep-guns-in-home/article\\_594b3b58-ed96-11ec-93a4-9f7f30877765.html](http://www.thecentersquare.com/illinois/illinois-supreme-court-side-stepped-constitutional-question-of-required-foid-to-keep-guns-in-home/article_594b3b58-ed96-11ec-93a4-9f7f30877765.html) [perma.cc/W93S-RJTT].

143. *Brown*, 2022 IL 127201 at ¶ 3, 211 N.E.3d at 341.

144. *Id.* at ¶ 6, 211 N.E.3d at 342 (holding that since the statute requires a FOID to be on the person of an individual in possession of a firearm, the legislature could not have intended that to apply in the home). Further, the court held it would be unreasonable for people to always have a FOID on their person in their home merely because a gun was in the home. *Id.*

145. *Id.* at ¶ 3, 211 N.E.3d at 341.

146. Order Finding Statute Unconstitutional, 9-10, *People v. Brown*, No. 2017-CM-60 (Cir. Ct. 2d Cir. Ct., White County, IL) (citing *McDonald*, 561 U.S. at 749; *Heller*, 554 U.S. at 628).

147. *Brown*, 2022 IL 127201 at ¶¶ 11, 31-32, 211 N.E.3d at 343, 346-47.

complaint solely based on its statutory analysis, not on constitutional grounds.<sup>148</sup> The court based its order on the common-law doctrine that courts should not declare legislation unconstitutional when it is not required for case resolution.<sup>149</sup>

In *Guns Save Life, Inc. v. Raoul*, a facial challenge to enjoin the FOID act was sought by Guns Save Life, Inc. (“GSL”), a not-for-profit organization that challenges Illinois gun regulations.<sup>150</sup> GSL argued that the FOID Act burdens firearm owners in the exercise of their Second Amendment rights by requiring a FOID.<sup>151</sup> The Fourth District Court of Appeals for the State of Illinois did not rule on the correctness of the argument, but held an injunction was not warranted because the public safety interest outweighed the private interests of the GSL’s members.<sup>152</sup> However, the court held that GSL had established that FOID’s restrictions were more than mere inconveniences and had raised a fair question as to whether the FOID Act could survive the two-prong test used at the time by many federal and state courts post-*Heller*.<sup>153</sup>

### 3. *Constitutional Challenges to Red Flag Laws*

No one has yet made constitutional challenges to ILFRO.<sup>154</sup> Nor have FRO laws been challenged in federal court.<sup>155</sup> However, there have been two unsuccessful pre-*Bruen* state court challenges to FROs in Connecticut and Indiana.<sup>156</sup>

Connecticut developed the nation’s first “red flag law” in response to a 1998 mass shooting at the Connecticut Lottery.<sup>157</sup> The shooter, Matthew Beck, had a previous suicide attempt and received treatment for depression.<sup>158</sup> Beck, using a handgun he owned, murdered four of his coworkers before killing himself.<sup>159</sup> After the law was passed, Connecticut law enforcement rarely filed petitions until the mass shooting at Virginia Tech in 2007.<sup>160</sup>

A Connecticut court of appeals upheld the constitutionality of the statute in *Hope v. State*.<sup>161</sup> The court applied the pre-*Bruen* two-

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148. *People v. Brown*, 2020 IL 124100, ¶¶ 36-37, 164 N.E.3d 1187, 1197.

149. *Id.* at ¶ 27, 164 N.E.3d at 1194-95.

150. *Raoul*, 2019 IL App (4th) 190334 at ¶¶ 1,4, 146 N.E.3d at 263-64.

151. *Id.* at ¶ 46, 146 N.E.3d at 275.

152. *Id.* at ¶ 65, 146 N.E.3d at 283.

153. *Id.* at ¶ 66, 146 N.E.3d at 283.

154. *See Gatens, supra* note 63 (surveying FRO challenges that Connecticut and Indiana, but not yet in Illinois).

155. *Gay, supra* note 129, at 1517.

156. *Id.*

157. *Id.* at 1499.

158. *Id.*

159. *Id.*

160. *See id.* (noting that it took several years and a mass shooting incident to motivate law enforcement to take advantage of the statute).

161. *Hope v. State*, 133 A.3d 519, 524 (Conn. App. Ct. 2016).



part test and found a historical basis to uphold the law.<sup>162</sup> The court reasoned that FRO fell into a presumptively lawful category, as the Second Amendment does not extend to persons found to be a danger to themselves or others.<sup>163</sup>

The Indiana Appeals Court also upheld its red-flag law but created a more complex two-part test that first applied rational basis means-end scrutiny, and then asked a three-part inquiry for step two.<sup>164</sup> However, given the Supreme Court's *Bruen* holding, the Indiana court's test is no longer applicable.

#### 4. Constitutional Challenges to PICA

PICA was challenged swiftly after passage, with three different federal challenges being filed in Illinois: *Bevis v. City of Naperville* and *Herrera v. Raoul* in the Northern District of Illinois and *Barnett v. Raoul* in the Southern District of Illinois.<sup>165</sup> The two Northern District cases declined to issue an injunction, while the judge in *Barnett*, enjoined PICA.<sup>166</sup> These cases were consolidated and went before the Seventh Circuit, which refused to enjoin PICA, finding that assault weapons were not the type of bearable Arms covered by the Second Amendment, and therefore, PICA survives the *Bruen* analysis.<sup>167</sup>

The Illinois Supreme Court contemporaneously heard a challenge to PICA that was raised on equal protection rather than Second Amendment grounds.<sup>168</sup> The Plaintiffs alleged that allowing police officers and other trained professionals to be excepted under the ban violated the Equal Protection Clause.<sup>169</sup> The Illinois Supreme Court rejected this argument, holding that trained professionals are not similarly situated as members of the general public.<sup>170</sup>

### III. ANALYSIS

This section analyzes how the Illinois firearm regulations reviewed in Part II may withstand the post-*Bruen* challenges that have come and will assuredly continue. Additionally, this section will compare Illinois with other states' statutes and enforcement

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162. *Id.*

163. *Id.* at 524-25.

164. *Redington v. State*, 992 N.E.2d 823, 825 (Ind. Ct. App. 2013).

165. *Bevis v. City of Naperville*, 657 F. Supp. 3d 1052 (N.D. Ill. 2023); *Herrera v. Raoul*, 670 F. Supp. 3d 665 (N.D. Ill. 2023); *Barnett v. Raoul*, 671 F. Supp. 3d 928 (S.D. Ill. 2023).

166. *Bevis*, 657 F. Supp. 3d at 1077; *Herrera*, 670 F. Supp. 3d at 683; *Barnett*, 671 F. Supp. 3d at 948.

167. *Bevis v. City of Naperville*, 85 F.4th 1175, 1202 (7th Cir. 2023).

168. *Caulkins v. Pritzker*, 2023 IL 129453, 228 N.E.3d 181.

169. *Id.* at ¶ 2, 228 N.E.3d at 185-86.

170. *Id.* at ¶ 81, 228 N.E.3d at 197-98.

efforts and will analyze their constitutionality.

### A. *Constitutional Analysis*

Most challenges to Illinois gun regulations have been and will likely continue to be based on the Second Amendment.<sup>171</sup> However, given that some of these gun regulations are based on threatening speech, First Amendment challenges could be brought as well.<sup>172</sup> Additionally, since the regulations provide for a process to seize firearms – the deprivation of a property and liberty interest – there could also be due process challenges to these regulations.<sup>173</sup> The constitutional analysis of the regulations in this comment will address all three types of challenges.

#### 1. *Second Amendment Analysis: Viability of Illinois Regulations Post-Bruen*

The fundamental individual right identified by *Heller*, *McDonald*, and *Bruen* is the “right to keep and bear arms for self-defense.”<sup>174</sup> Any gun regulation affecting that right must pass constitutional muster.<sup>175</sup> *Bruen* makes clear that the question as to the constitutionality of a gun regulation affecting this fundamental right is to first analyze whether the regulation falls within the plain text of the Second Amendment.<sup>176</sup> If so, then the regulation is only constitutional if it falls within the historical tradition of gun regulations, or has a historical analogue.<sup>177</sup> This analogue need not

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171. Matt Vasilogambros, *Supreme Court’s Gun Rights Decision Upends State Restrictions*, PEW CHARITABLE TRUSTS (July 8, 2022), [www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/07/08/supreme-courts-gun-rights-decision-upends-state-restrictions](http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/07/08/supreme-courts-gun-rights-decision-upends-state-restrictions) [perma.cc/Z3RV-KX65] (discussing how gun rights advocates plan on overturning many state restrictions with the *Bruen* holding).

172. Clay Calvert & Ashton Hampton, *Raising First Amendment Red Flags About Red Flag Laws: Safety, Speech and the Second Amendment*, 30 GEO. MASON U. CIV. RTS. L.J. 351, 354 (2020) (discussing the possible First Amendment arguments to strike down Red Flag Laws as violative of free speech).

173. John R. Richardson, *Red Flag Laws and Procedural Due Process: Analyzing Proposed Utah Legislation*, 21 UTAH L. REV. 743, 753 (2021) (discussing how procedural due process challenges could be made to red flag laws).

174. *Heller*, 554 U.S. at 628 (holding absolute bans on handguns within the home violates “the inherent right of self-defense central to the Second Amendment”); *McDonald*, 561 U.S. at 750 (holding the Second Amendment is fully applicable to the states); *Bruen*, 597 U.S. at 8-10, 76 (holding that the fundamental right extends to bearing arms “outside the home for self-defense”).

175. *Bruen*, 597 U.S. at 17 (holding that to justify a regulation affecting the Second Amendment, the government must show there is a historical basis for the regulation).

176. *Id.* at 19.

177. *Id.* at 19, 30.

be a “historical twin” or “dead ringer”, but must be relevantly similar.<sup>178</sup>

a. Plain Text Analysis

The plain text of the Second Amendment reads: “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.”<sup>179</sup> The Seventh Circuit upheld Illinois’ ban on assault weapons and high-capacity magazines (PICA) on a plain text analysis.<sup>180</sup> In *Bevis*, the court reasoned that assault weapons and high-capacity magazines fall outside the “arms” protected by the Second Amendment because “arms” refers to personal use weaponry, not the military-type weaponry regulated by PICA.<sup>181</sup>

However, the other regulations discussed above limit or restrict possession of all firearms by people of a certain status: felons, mentally ill, and dangerous individuals.<sup>182</sup> Attempts to carve people of these statuses outside of the plain text “people” referred to in the Second Amendment likely violates the “strong presumption that the Second Amendment right . . . belongs to all Americans.”<sup>183</sup> Therefore, even if the Seventh Circuit’s plain text analysis of PICA survives Supreme Court scrutiny, it is safe to assume any Second Amendment challenges to the remaining Illinois regulations will depend on whether the Court identifies a historical tradition of the challenged regulation, or a relevantly similar analogue.<sup>184</sup>

b. Historical Tradition

(a) Presumptively Lawful Regulations

While *Bruen* did not provide a list of modern-day gun regulations that have a historical basis or historical analogues, dicta in *Heller* and Justice Kavanaugh’s *Bruen* concurrence may offer some aid.

Presumptively lawful regulations, such as those identified in *Heller*, fall within the historical tradition of gun regulations.<sup>185</sup> Justice Kavanaugh confirmed, in his *Bruen* concurrence, that these presumptively lawful regulations were unaffected by the *Bruen* majority, which was largely silent on the matter.<sup>186</sup> The

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178. *Id.* at 29-30.

179. U.S. CONST. amend. II.

180. *Bevis*, 85 F.4th at 1202.

181. *Id.*

182. *See infra* Section II.B.

183. *Heller*, 554 U.S. at 581.

184. *See Bruen*, 597 U.S. at 19, 30.

185. *Heller*, 554 U.S. at 627 n.26.

186. *Bruen*, 597 U.S. at 80-81 (Kavanaugh, J., concurring) (noting that the *Bruen* holding does not override *Heller*’s acknowledgment of presumptively

presumptively lawful regulations that *Heller* identified include restricting firearms from felons and the mentally ill, prohibiting firearms in sensitive places, and limiting the commercial sale of arms.<sup>187</sup> Moreover, footnote 26 of the *Heller* opinion clarifies that the Court's list of presumptively lawful regulations is non-exhaustive.<sup>188</sup>

The purpose of the Illinois FOID Act is to identify people “not qualified to acquire or possess firearms.”<sup>189</sup> The process screens out individuals of several categories, including those who are convicted felons and those who have disqualifying mental illness.<sup>190</sup> Therefore, where the FOID Act screens out these two groups, it conforms with regulations that *Heller* explicitly identified as presumptively lawful.<sup>191</sup>

Applying the presumptively lawful analysis, courts of appeals between *Heller* and *Bruen* have generally upheld prohibitions against certain types of dangerous individuals.<sup>192</sup> The Eleventh Circuit held that firearm prohibitions against domestic violence misdemeanor offenders were presumptively lawful, in the same fashion as prohibitions against felons and the mentally ill.<sup>193</sup> Conversely, the Fourth Circuit found that there was inconclusive evidence of a historical basis banning firearm possession by domestic violence misdemeanants.<sup>194</sup>

However, as noted above, *Heller*'s dicta and Justice Kavanaugh's *Bruen* concurrence on presumptively lawful regulations is not binding.<sup>195</sup> Therefore, this comment will briefly address some possible historical bases for gun prohibitions on three categories of people targeted by Illinois regulations: felons, mentally

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lawful gun regulations).

187. *Heller*, 554 U.S. at 626 (discussing sensitive places to include schools and government buildings); *Bruen*, 597 U.S. at 29-31 (discussing sensitive places can be expanded by analogy to other historically defined places where firearms were prohibited, such as legislative assemblies, polling places, and courthouses, but cannot be as broad as any place where large numbers of people gather and law enforcement is present, such as the entire island of Manhattan).

188. *Heller*, 554 U.S. at 627 n.26.

189. 430 ILL. COMP. STAT. 65/1 (2013).

190. 430 ILL. COMP. STAT. 65/8 (2023) (regulating the types of criminal convictions that will disqualify an individual from obtaining or keeping a FOID).

191. *Heller*, 554 U.S. at 626 (identifying presumptively lawful firearms regulations are those targeting felons and mentally ill as these are people “outside the scope of Second Amendment protections”).

192. Gay, *supra* note 129, at 1518.

193. *United States v. White*, 593 F.3d 1199, 1206 (11th Cir. 2010) (upholding the Lautenberg Amendment under 18 U.S.C. § 922(g)(9) to prevent domestic violence offenders, including misdemeanants, from acquiring firearms).

194. *United States v. Chester*, 628 F.3d 673, 681 (4th Cir. 2010). The court went on to analyze the constitutionality of the law under the now abrogated step two intermediate scrutiny step two analysis. *Id.*

195. *See Bruen*, 597 U.S. at 80-81 (Kavanaugh, J., concurring) (affirming that *Heller*'s presumptively lawful regulations are still constitutionally valid).

ill, and otherwise dangerous individuals.

(b) Felons, Mentally Ill, and Dangerous Individuals

Illinois regulations prohibit felons, mentally ill, and dangerous individuals from possessing firearms under the FOID Act, ILFRO, the ILDVA, and those on pretrial release for violent offenses.<sup>196</sup> The question here is whether these regulations have a historical basis in American history.<sup>197</sup>

In English history and during the colonial period, there were numerous laws passed to prohibit possession of arms by those deemed “dangerous” and “disaffected.”<sup>198</sup> While these laws were often used against political dissidents, the “justification was always that those being disarmed were dangerous.”<sup>199</sup> Additionally, during the Founding Era, Samuel Adams proposed a constitutional amendment to protect “peaceable” citizens’ right to keep their own arms.<sup>200</sup> This proposal was widely seen to have influenced the Second Amendment.<sup>201</sup> Dictionaries of the time, on which the *Heller* Court relied upon, defined “peaceable” as not violent, bloody, quarrelsome, or turbulent, and free from tumult and war.<sup>202</sup> Further, Pennsylvania’s ratifying convention suggested that the right to bear arms contained a restriction against those who posed a “real danger of public injury.”<sup>203</sup>

Additionally, British, colonial, and Revolutionary War era loyalty oaths disarmed individuals deemed to be

196. See statutes cited *supra* notes 33.

197. See Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 273-75 (2020) (discussing the historical justification for regulating firearm possession by dangerous individuals).

198. *Id.* at 258-59 (discussing dangerous persons often being those “sympathetic to rebellions and insurrections” and disaffected as those disloyal to the current government).

199. *Id.* at 265.

200. *Id.* at 265-66.

201. *Editorial*, Boston Independent Chronicle, Aug. 20, 1789, at 2, col. 2 at 10-11; see also STEPHEN HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 86 (revised ed. 2013) (finding that “the Second Amendment . . . originated in part from Samuel Adams’s proposal . . . that Congress could not disarm any peaceable citizens.”).

202. *E.g.*, SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (5th ed. 1773); THOMAS SHERIDAN, *A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE* 438 (2d ed. 1789); *Peaceable*, *AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE: WEBSTER’S DICTIONARY* 1828, [www.webstersdictionary1828.com/Dictionary/peaceable](http://www.webstersdictionary1828.com/Dictionary/peaceable) [perma.cc/2D72-ARD9] (last visited Apr. 6, 2024).

203. Greenlee, *supra* note 197, at 267 (quoting NATHANIEL BREADING ET AL., *THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION, OF THE STATE OF PENNSYLVANIA, TO THEIR CONSTITUENTS* (Dec. 12, 1787)).

“untrustworthy.”<sup>204</sup> At that time, presumptively untrustworthy individuals included members of pacifist groups, such as the Quakers.<sup>205</sup> If it was acceptable in the Founding era to disarm pacifists as untrustworthy to keep firearms, it would seem historically consistent that felons, particularly those with violent pasts, would also fall into that category.

Interpreting the historical context pre-*Bruen*, Judge Hardiman of the Court of Appeals for the Third Circuit, in an *en banc* concurrence, explained that the “ratifying conventions . . . were highly influential” to the *Heller* Court in establishing the historical basis for gun regulations.<sup>206</sup> Moreover, the debates that occurred during these conventions confirm that people “likely to commit violent offenses” were not included under the right to keep and bear arms.<sup>207</sup>

In contrast, post-*Bruen*, the Fifth Circuit in *United States v. Rahimi* struck down a law prohibiting firearm possession for those under a domestic violence protection order.<sup>208</sup> The Fifth Circuit held that there was no historical basis for such a provision.<sup>209</sup> However, indications from the oral arguments are that the Supreme Court will likely uphold the regulation enforced on Rahimi.<sup>210</sup>

Additionally, three recent cases in the Northern District of Illinois, struck down a federal law prohibiting firearm possession by felons.<sup>211</sup> While the respective judges all expressed concerns on the public policy implications of their decisions, they reasoned the current state of the law under *Bruen* left them no choice, finding no relevantly similar historical analogue existed to survive *Bruen*’s demanding test.<sup>212</sup>

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204. See *Range v. Lombardo*, 69 F.4th 96, 126 (3d Cir. 2023) (Shwartz, J., dissenting) (citing Act of June 13, 1777, § 3 (1777), 9 The Statutes at Large of Pennsylvania from 1652-1801 110, 112 (William Stanley Ray ed., 1903)) (noting that presumptively untrustworthy pacifist groups, such as Quakers, had their firearm right restored only after taking a loyalty oath).

205. *Range*, 69 F.4th at 126 (Shwartz, J., dissenting).

206. *Binderup v. Atty Gen. United States*, 836 F.3d 336, 368 (3d Cir. 2016) (*en banc*) (Hardiman, J., concurring in part and concurring in judgment).

207. *Id.*

208. *United States v. Rahimi*, 61 F.4th 443, 461 (5th Cir. 2023).

209. *Id.*

210. Nina Totenberg, *High Court Seems Likely to Uphold Law Banning Guns for Accused Domestic Abusers*, NPR (Nov. 7, 2023, 4:43 PM), [www.npr.org/2023/11/07/1211226091/supreme-court-guns-domestic-abuse](http://www.npr.org/2023/11/07/1211226091/supreme-court-guns-domestic-abuse) [perma.cc/H6Z9-9HHM].

211. *United States v. Neal*, No. 20-cr-00335, 2024 U.S. Dist. LEXIS 26118 (N.D. Ill. Feb. 7, 2024); *United States v. Griffin*, No. 21-cr-00693, 2023 U.S. Dist. LEXIS 213137 (N.D. Ill. Nov. 30, 2023); *United States v. Prince*, No. 22-CR-00240, 2023 U.S. Dist. LEXIS 196874 (N.D. Ill. Nov. 2, 2023).

212. See *Griffin*, 2023 U.S. Dist. LEXIS 213137, at \*9 (“This Court is disheartened by the Supreme Court’s decision to rely on an analysis of laws that existed at this nation’s founding to determine the constitutionality of modern gun regulations. Indeed, to interpret modern regulations pertaining to the critically important Second Amendment right to bear firearms for self-defense,

Rahimi and the Northern District of Illinois cases illustrate that either more clarification is needed from the Supreme Court as to what types of regulations would pass the historical test, or that the historical test should be abrogated as unworkable in the modern era. While an argument can be made post-*Bruen* that these regulations fall within a historical tradition or analogue of firearm regulation, it remains a difficult burden to overcome. Unless there is further clarification from the Supreme Court, specifically on the constitutional legitimacy of prohibiting felons, mentally ill, and dangerous individuals from possessing firearms, then these Illinois regulations remain at risk of being overturned.

## 2. First Amendment Analysis

While the First Amendment protects freedom of speech, similar to the Second Amendment, there are limitations.<sup>213</sup> The Illinois gun regulations that may invoke a First Amendment challenge are ILFRO and the ILDVA's firearm restriction remedy.<sup>214</sup> Per these regulations, the speech of the subject of the restriction order is a factor to be considered by the court in whether to grant the order and seize the subject's firearms.<sup>215</sup> If the order is granted based on the individual's speech, then that speech is chilled and may be subject to a First Amendment challenge.<sup>216</sup> Unless the speech at issue falls within an unprotected category, any government conduct infringing speech is subject to strict scrutiny, an extremely difficult burden for the government to overcome.<sup>217</sup>

Before applying a strict scrutiny analysis, the courts will first consider if the chilled speech is in a category the Supreme Court has defined as unprotected, such as true threats.<sup>218</sup> In *Virginia v. Black*,

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the Supreme Court requires that this Court rely on a history and tradition of a nation that at the time would have regarded individuals, including Griffin and this Judge, as three-fifths of a person at best and property at worst.”); *Neal*, 2024 U.S. Dist. LEXIS, at \*32-33 (“Striking down § 922(g)(1) will inevitably lead to more gun violence, more dead citizens, and more devastated communities.”); *Prince*, 2023 U.S. Dist. LEXIS 196874, at \*30 (“The court also recognizes that gun violence plagues our communities and that allowing those who potentially pose a threat to the orderly functioning of society to be armed is a dangerous precedent.”).

213. *Heller*, 554 U.S. at 595 (noting that the Second Amendment, like the First, has limits).

214. See statutes cited *supra* note 33.

215. See 430 ILL. COMP. STAT. 67/40 (2023) (citing the evidence to be considered before granting a firearm seizure order).

216. *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015) (holding that “content-based restrictions on speech” are subject to a First Amendment analysis).

217. *City of L.A. v. Alameda Books*, 535 U.S. 425, 455 (2002) (Souter, J., dissenting) (noting that “strict scrutiny leaves few survivors”).

218. See *Virginia v. Black*, 538 U.S. 343, 359-60 (2003) (discussing the true threat exception to First Amendment protected speech). See also *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (establishing fighting words exception to First Amendment protected speech); *Brandenburg v. Ohio*, 395 U.S.

several subjects who were members of the Ku Klux Klan were convicted under a statute that prohibited cross-burning with the intent to intimidate.<sup>219</sup> The Supreme Court held that cross-burning with the intent to intimidate was not protected speech under the First Amendment because it constituted a true threat.<sup>220</sup> The Court defined true threats as statements “where the speaker means to communicate an act of unlawful violence to a particular individual or group of individuals.”<sup>221</sup>

Where the government is regulating speech under the true threat doctrine, it need not show that the speaker intends to carry out the violence.<sup>222</sup> However, the Court in *Counterman* recently specified that there must be at minimum a showing of subjective awareness that the statements could be understood as threats.<sup>223</sup> The subjective awareness could be as minimal as showing a reckless disregard of a substantial risk that communications would be viewed as threatening violence.<sup>224</sup>

Under ILFRO, before granting a plenary firearm restraining order, the courts are directed to consider numerous factors, including violent acts and drug abuse.<sup>225</sup> Among these factors are the following types of speech: “history of threatened use of physical force against another person, . . . a recent threat of violence by the respondent directed toward self or other, . . . [or] a pattern of violent threats directed toward self or another.”<sup>226</sup> Even if a court authorized firearm seizures solely based on the speech-based factors, the *Counterman* subjective awareness requirement is met. The presence of the type of speech where specific threats are made

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444, 447 (1969) (establishing incitement exception to First Amendment protected speech).

219. *Black*, 538 U.S. at 348.

220. *Id.* at 363.

221. *Id.* at 359.

222. *Id.* at 360.

223. *Counterman v. Colorado*, 600 U.S. 66, 75-76 (2023).

224. *Id.*

225. 430 ILL. COMP. STAT. 67/40 (e) (2023) (citing the evidence the court should consider to include the following factors: “(1) the unlawful and reckless use, display, or brandishing of a firearm, ammunition, and firearm parts that could be assembled to make an operable firearm by the respondent, (2) the history of use, attempted use, or threatened use of physical force by the respondent against another person, (3) any prior arrest of the respondent for a felony offense, (4) evidence of the abuse of controlled substances or alcohol by the respondent, (5) a recent threat of violence or act of violence by the respondent directed toward himself, herself, or another, (6) a violation of an emergency order of protection issued under 217 of the Illinois Domestic Violence Act of 1986 or Section 112A-17 of the Code of Criminal Procedure of 1963 or of an order of protections issued under Section 214 of the Illinois Domestic Violence Act of 1986 or Section 112A-14 of the Code of Criminal Procedure of 1963, (7) a pattern of violent acts or violent threats, including, but not limited to, threats of violence or acts of violence by the respondent directed toward himself, herself, or another”).

226. *Id.*



to harm self or others along with a consideration of patterns and history of threatened and actual violence meets at minimum the reckless disregard that a person hearing those threats would take them seriously. Therefore, the statute's standard for analyzing threatening speech would likely be within the unprotected speech exception under the true threat doctrine. Moreover, the statute places the burden of proof upon the petitioner to show by "clear and convincing evidence" that the respondent's speech falls within the unprotected category.<sup>227</sup> If a firearms restraining order is issued, the respondent is entitled to one subsequent hearing to rebut petitioner's assertions.<sup>228</sup> These procedural safeguards help ensure no First Amendment violation occurs.

Under the ILDVA, a petitioner for an order of protection may also request the court grant the prohibition of firearm possession remedy.<sup>229</sup> The firearm remedy can only be granted with a finding by the court that the person represents a credible threat to an intimate partner or child.<sup>230</sup> Similar to ILFRO, many factors are considered by the court in issuing orders of protection, including speech and conduct.<sup>231</sup> Even if speech alone is the basis for the

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227. 430 ILL. COMP. STAT. 67/40 (f) (2023).

228. 430 ILL. COMP. STAT. 67/40 (k) (2023).

229. 750 ILL. COMP. STAT. 60/214 (b) (14.5) (2021).

230. 750 ILL. COMP. STAT. 60/214 (b)(14.5)(a)(3)(i) (2021)(outlining the requirements for what the court's finding must be to issue the prohibition of firearm possession remedy: "finding that such person represents a credible threat to the physical safety of an intimate partner or child or the order explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.").

231. 750 ILL. COMP. STAT. 60/102 (1) (2013) (recognizing that domestic violence is a serious crime which "promotes a pattern of escalating violence which frequently culminates in intra-family homicide"); 750 ILL. COMP. STAT. 60/214 (a) (2021) (requiring a showing that petitioner has been abused by a family or household member to obtain an order of protection"); 750 ILL. COMP. STAT. 60/103 (1) (2013) (defining abuse as "physical abuse, harassment, intimidation of a dependent, interference with personal liberty, or willful deprivation"); 750 ILL. COMP. STAT. 60/103 (7) (2013) (defining harassment as "knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances; would cause a reasonable person emotional distress; and does cause emotional distress to the petitioner"); 750 ILL. COMP. STAT. 60/103 (9) (2013) (defining interference with personal liberty as "committing or threatening physical abuse, harassment, intimidation or willful deprivation so as to compel another to engage in conduct from which she or he has a right to abstain or to refrain from conduct in which she or he has right to engage"); 750 ILL. COMP. STAT. 60/103 (10) (2013) (defining intimidation of a dependent as "subjecting a person who dependent because of age, health or disability to participation in or the witnessing of: physical force against another or physical confinement or restraint of another which constitutes physical abuse"); 750 ILL. COMP. STAT. 60/103 (14) (2013) (defining physical abuse as "knowing or reckless use of physical force, confinement or restraint; knowing, repeated and unnecessary sleep deprivation; or knowing or reckless conduct which creates an immediate risk of physical harm"); 750 ILL. COMP. STAT. 60/103 (15) (2013) (defining "willful deprivation" as "willfully denying a person

order, that speech must pose a credible threat of harm to the intimate partner or child prior to the issuance of a prohibition of possession of firearms, which renders the speech unprotected under the true threat doctrine.<sup>232</sup>

Therefore, where Illinois firearm regulations lead to government seizure of guns based solely on speech, the statutes are tailored to ensure that the regulated speech fits within the unprotected category of true threat. Any speech that is chilled because of the government's action is unprotected speech that can be regulated.<sup>233</sup>

### 3. *Due Process Analysis*

Critics of red flag laws, such as Illinois', argue that *ex parte* hearings that deprive people of property and liberty violate due process even though, if granted, the *ex parte* order must be followed up by a post-deprivation hearing with notice.<sup>234</sup> The Supreme Court has upheld the adequacy of post-deprivation hearings involving only property interests.<sup>235</sup> Furthermore, the Court has declined to categorically rule out post-deprivation hearings regarding liberty interests.<sup>236</sup> Following these guidelines, the Court of Appeals for the Seventh Circuit has upheld *ex parte* deprivations of property and liberty in emergency situations, as long as notice and a post-deprivation hearing are provided.<sup>237</sup>

To analyze any procedural due process challenges, courts apply the *Mathews v. Eldridge* balancing test.<sup>238</sup> This test weights three factors: first, the government's interest in the deprivation of property and liberty, second, the private interest of the individual deprived, and third, "the risk of an erroneous deprivation" from the process provided.<sup>239</sup> Applying this test, both sides would likely agree that the government's interest in the prevention of violent acts and preservation of life is high.<sup>240</sup> The private interest at stake

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who because of age, health or disability requires medication, medical care, shelter, accessible shelter or services, food, therapeutic device, or other physical assistance, and thereby exposing that person to risk of physical, mental or emotional harm").

232. *See Black*, 538 U.S. at 360, 359-60 (adopting the "true threat" doctrine that renders speech falling within that exception as unprotected).

233. *See id.* (holding that true threat is unprotected speech).

234. Richardson, *supra* note 173, at 753.

235. *Parratt v. Taylor*, 451 U.S. 527, 540 (1981) (citing *Phillips v. Commissioner*, 283 U.S. 589, 596-97 (1931)).

236. Richardson, *supra* note 173, at 754 (citing *Zinermon v. Burch*, 494 U.S. 113, 132 (1990) (finding no precedential support for "a categorial distinction between a deprivation of liberty and one of property")).

237. *Donald v. Polk County*, 836 F.2d 376, 380 (7th Cir. 1988).

238. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

239. *Id.*

240. *See Richardson*, *supra* note 173, at 755 (citing *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 282 (1990) (holding the government has "an unqualified

is also indisputably high: the deprivation of liberty (the Second Amendment right to bear arms) and property (the seizure of firearms).<sup>241</sup> The two sides would likely dispute which interest is outweighed by the other. Supporters of FROs would likely argue that life always outweighs liberty. However, critics might argue that the protection of life by these regulations is merely speculative and hardly outweighs the guaranteed deprivation of Second Amendment rights.

Regardless of which side is seen to outweigh the other, the third factor, the risk of erroneous deprivation, remains.<sup>242</sup> Supporters of ILFRO could argue that the Illinois statute has protections built in to prevent an erroneous deprivation and, even if there is an erroneous deprivation, it is minimal.<sup>243</sup> First, it is the petitioner who has the burden of establishing that there is probable cause of immediate and present danger.<sup>244</sup> Second, the post-deprivation hearing must be held within fourteen days of the issuance of the *ex parte* order, and the burden on the petitioner is the highest established in civil court, clear and convincing evidence.<sup>245</sup> Under this view, the risk of an erroneous deprivation is minimal and outweighed by the government's interest in protecting life.

Critics could argue that the risk of an erroneous deprivation is heavy, even if it only lasts fourteen days, because the person being deprived of liberty receives no notice to appear in court for the initial hearing.<sup>246</sup> Additionally, the *ex parte* order only requires petitioner to show probable cause, and the gap between mere probable cause and the clear and convincing standard is wide.<sup>247</sup>

Given the government's high interest in protecting life in an emergency and the risk of an erroneous deprivation being slight in comparison (at most an erroneous deprivation of seized firearms would be fourteen days long), ILFRO will likely withstand due process challenges.

### *B. Comparison with other State Enforcement Efforts and Regulations*

Illinois' laws to ban possession of firearms are not unique. This

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interest in the preservation of human life”).

241. *Mackey v. Montrym*, 443 U.S. 1, 11 (1979) (holding that the private interest in retaining one's driving privileges is “substantial”). Comparatively, then, a deprivation implicating Second Amendment liberty and property is even weightier.

242. *Mathews*, 424 U.S. at 335 (holding the third factor is to weigh the risk of an erroneous deprivation using the current process).

243. 430 ILL. COMP. STAT. 67 et seq (2019).

244. 430 ILL. COMP. STAT. 67/35 (f) (2022).

245. 430 ILL. COMP. STAT. 67/40 (i) (2023).

246. 430 ILL. COMP. STAT. 67/35 (2022).

247. *Richardson*, *supra* note 173, at 761.

section compares Illinois' regulations with other states that have substantively similar regulations and the effectiveness of their enforcement efforts. Additionally, this section analyzes a regulation seen in other states but not in place in Illinois.

1. *“Red Flag” Laws, Including the Illinois FRO Act (ILFRO)*

“Red flag” laws are substantively similar in all nineteen states and the District of Columbia.<sup>248</sup> However, the level of enforcement effort for these laws varies widely. Connecticut, the first state to pass a red flag law in 1999, hardly utilized the law until the Virginia Tech shooting in 2007.<sup>249</sup> Florida passed its red flag law in the wake of the Parkland shooting, and law enforcement utilized it over 1,700 times in the law's first nine months.<sup>250</sup> New York passed its red flag law in 2019, and in 2022 alone doubled its use in the wake of a mass shooting in Buffalo, issuing 1,908 orders.<sup>251</sup>

ILFRO, which was passed in 2019, was used only fifty-three times in Illinois through the end of 2020.<sup>252</sup> Illinois responded in 2021 by updating ILFRO to increase funding, training, and awareness of the use of FROs.<sup>253</sup> Early reports indicate ILFRO usage appears to have increased to about 100 filed annually, still far short of other states' usage.<sup>254</sup>

The updated ILFRO calls for public dissemination on the appropriate use of firearm restraining orders via the Internet, pamphlets, and health care workers.<sup>255</sup> Additionally, the Act requires the creation of a Commission on Implementing the FRO Act composed of various representatives from law enforcement agencies, the Director of Public Health, prosecutors' and public defenders' offices, as well as a trial court judge to develop strategies

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248. *Id.* at 745 (finding that the differences in various states “red flag laws” include “the scope of who may petition for an order, the standard of proof required for such an order to be issued, and the duration of the order”).

249. Gay, *supra* note 129, at 1499.

250. Foley, *supra* note 77.

251. *NYS to Strengthen “Red Flag Law” to Protect New Yorkers from Gun Violence*, WGRZ (Oct. 24, 2022), [www.wgrz.com/article/news/local/new-york/nys-to-strengthen-red-flag-law-to-protect-nyers-from-gun-violence-new-york-hochul-james-police/71-9ff41c7f-dfdc-4bbf-9ef8-846cd31e5437](http://www.wgrz.com/article/news/local/new-york/nys-to-strengthen-red-flag-law-to-protect-nyers-from-gun-violence-new-york-hochul-james-police/71-9ff41c7f-dfdc-4bbf-9ef8-846cd31e5437) [perma.cc/2KS7-PCRH] (reporting an increase in use and more State financial support to increase implementation and staffing).

252. Gatens, *supra* note 63.

253. An Act Concerning Criminal Law, Pub. Act 102-0345, 2021 Bill Text IL H.B. 1092.

254. Courtney Sisk, *Cook County Sheriff's Office Launches Billboards Raising Awareness of Gun Law it Says Is Underutilized*, NBC 5 CHI. (Feb. 27, 2024, 5:10 PM) [www.nbcchicago.com/news/local/cook-county-sheriffs-office-launches-billboards-raising-awareness-of-gun-law-it-says-is-underutilized/3367443/](http://www.nbcchicago.com/news/local/cook-county-sheriffs-office-launches-billboards-raising-awareness-of-gun-law-it-says-is-underutilized/3367443/) [perma.cc/3QFR-V6ZT].

255. 20 ILL. COMP. STAT. 2310/2310-705 (2022).

and model policies on implementation of ILFRO.<sup>256</sup> Finally, ILFRO calls for mandatory training for police academy recruits as well as yearly training for all police officers on the appropriate usage of firearm restraining orders and the process for filing them.<sup>257</sup> Time will tell whether these efforts will increase the use on par with other states like Florida, New York, and Connecticut.

Meanwhile, sixty-four Illinois counties have declared themselves as “sanctuary counties” for gun control regulations, holding that local law enforcement will not enforce gun control regulations they believe to be unconstitutional.<sup>258</sup> Some police departments have additionally suggested enforcing these orders is too time-consuming and resource draining.<sup>259</sup>

However, red flag laws are effective at reducing firearm related suicides by 6.4 percent.<sup>260</sup> Suicide is the most prevalent form of firearm-related-death, at fifty-four percent.<sup>261</sup> While the data from this study did not find a statistically significant reduction in firearm related homicides, this study was limited to pre-2018 data and other studies have been inconclusive.<sup>262</sup> Since many states’ red flag laws are relatively new, more data and research is needed.<sup>263</sup>

## 2. Firearm Identification Cards (FOID)

States with firearm identification regulations like FOID are rare. There are only two other states that have similar license-to-own requirements, New York and Massachusetts.<sup>264</sup> A license is required in New York to purchase and possess a handgun.<sup>265</sup> Hawaii has a permit requirement that allows the holder to obtain a firearm within a thirty-day window of acquiring the permit.<sup>266</sup> Massachusetts has a firearm identification requirement similar to Illinois, but also requires gun safety training to obtain the

256. 20 ILL. COMP. STAT. 2605/2605-51 (2024).

257. 50 ILL. COMP. STAT. 705/7(a) (2023); 50 ILL. COMP. STAT. 705/7.1 (2023).

258. Gatens, *supra* note 63, at 8 (citing Douglas K. Rosenberger, *Second Amendment “Sanctuary County” Movement Expands as Organizers Take Aim at New Gun Laws*, CHI. TRIBUNE (Apr. 17, 2019, 5:00 AM), [www.chicagotribune.com/news/breaking/ct-met-second-amendment-sanctuary-county-movement-illinois-20190416-story.html](http://www.chicagotribune.com/news/breaking/ct-met-second-amendment-sanctuary-county-movement-illinois-20190416-story.html)) [perma.cc/4UA9-RM7X].

259. Gatens, *supra* note 63, at 8.

260. Rachel Delafave, *Empirical Assessment of Homicide and Suicide Outcomes with Red Flag Laws*, 52 LOY. U. CHI. L.J. 867, 897 (2021).

261. Gramlich, *supra* note 18 (reporting that suicides accounted for fifty-four percent of all U.S. gun deaths in 2021).

262. Gatens, *supra* note 63, at 8.

263. *Id.*

264. *Owner Responsibilities: Licensing*, GIFFORDS L. CTR., [giffords.org/lawcenter/gun-laws/policy-areas/owner-responsibilities/licensing/](http://giffords.org/lawcenter/gun-laws/policy-areas/owner-responsibilities/licensing/) [perma.cc/R3R2-SQNZ] (last visited Nov. 13, 2022).

265. N.Y. PENAL LAW § 400.00 (2023).

266. HAW. REV. STAT. § 134-2 (2023).

identification card.<sup>267</sup>

Hawaii's permitting requirement is a per-purchase permit, temporary in nature and thus not analogous to Illinois' identification card regime.<sup>268</sup> Massachusetts and New York are the only states that have a similar identification card requirement, allowing the possession and acquisition of firearms as long as the identification card is valid.<sup>269</sup> In Massachusetts, upon suspension or revocation of the firearm license, licensees are required to turn over their firearms to the local law enforcement agency, but unlike Illinois, no statutory alternative for non-compliance exists.<sup>270</sup>

New York issues gun permits by county and independently for New York City.<sup>271</sup> After clearing a background check, screening for felony, domestic violence convictions, and mental health treatment, the application is approved.<sup>272</sup> The license is issued with a listing of the firearms owned by the licensee and whether the person is authorized to carry on the person or is restricted to possessing on the premises.<sup>273</sup> A listing of the licensee's firearms is useful to law enforcement, should the license be revoked to ensure all guns are turned over and accounted for.<sup>274</sup> If a license is revoked, the licensee is required to surrender the license and all firearms to local law enforcement.<sup>275</sup> Otherwise, a police officer "acting pursuant to his or her special duties is authorized to remove any and all such weapons."<sup>276</sup> The statute does not explain what legal process the officer should seek to remove such weapons within constitutional bounds.<sup>277</sup>

Illinois' legislation is the most comprehensive as to addressing the non-compliant revoked FOID cardholder.<sup>278</sup> The statute gives ISP and local law enforcement the discretion to seek a warrant for non-compliance with surrender of the FOID card and firearms.<sup>279</sup> However, many law enforcement agencies in Illinois apparently

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267. MASS. GEN. LAWS Ch. 140 § 129B (2023).

268. HAW. REV. STAT. § 134-2 (2023).

269. MASS. GEN. LAWS Ch. 140 § 129B; N.Y. PENAL LAW § 400.00 (2023).

270. MASS. GEN. LAWS Ch. 140 § 129 D (2023).

271. N.Y. PENAL LAW § 400.00 3 (2023).

272. N.Y. PENAL LAW § 400.00 4 (2023).

273. N.Y. PENAL LAW § 400.00 7 (2023).

274. *See Which States Require Handgun Sales Records Be Sent to Law Enforcement?*, EVERYTOWN RSCH. & POL'Y (Jan. 2022), [everytownresearch.org/rankings/law/sales-records-sent-to-law-enforcement/](https://everytownresearch.org/rankings/law/sales-records-sent-to-law-enforcement/) [perma.cc/48VL-E39V] (noting the importance of a registry of guns owned by an individual to aid law enforcement in seizing guns should the individual become prohibited from gun possession).

275. N.Y. PENAL LAW § 400.00 11(c) (2023).

276. *Id.*

277. *Id.*

278. 430 ILL. COMP. STAT. 65/9.5(c) (2023) (empowering police to seek a warrant for the statutory violation of noncompliance with FOID surrender or firearm disposition; however, the police are not mandated to act).

279. *Id.*

lack the resources or willpower to follow up on thousands of non-compliant revoked cardholders, and the statute does not compel them to act.<sup>280</sup>

### 3. *Constitutionality of Assault Weapons Bans*

Assault weapons and high-capacity magazine bans have been upheld as constitutional by several federal courts of appeals post-*Heller* and one post-*Bruen*.<sup>281</sup>

The basis of upholding these bans pre-*Bruen* is found in the *Heller* Court's recognition that states can ban "dangerous and unusual weapons" as there is a historical basis to do so.<sup>282</sup> *Heller* struck down handgun bans as unconstitutional because handguns are "the quintessential self-defense weapon", and thus protected under the Second Amendment right to bear arms for self-defense.<sup>283</sup> By contrast, *Heller* recognized that military weapons, similar to the M-16, are outside the scope of Second Amendment protection.<sup>284</sup>

The Court of Appeals for the Fourth Circuit, applying the *Heller* principle, found numerous similarities between the M16 and assault weapons/high-capacity magazines, thus placing them outside the scope of the Second Amendment.<sup>285</sup> The court found assault weapons and high-capacity magazines are weapons "most useful in military service."<sup>286</sup> Additionally, the court of appeals noted that assault weapons share the same qualities and characteristics as the M-16, making them weapons of war with the only difference being that assault weapons cannot fire in fully automatic mode.<sup>287</sup> However, the court noted the firing rate between fully- and semi-automatic mode was negligible, given the time difference to empty a thirty round magazine was only three seconds.<sup>288</sup> It also recognized that assault weapons are far more accurate and deadly in semi-automatic mode than the M-16 is in fully automatic mode.<sup>289</sup> Furthermore, the court discussed that high-capacity magazines contribute to the function of assault weapons to deliver the unique military feature of extraordinary firepower upon multiple human targets.<sup>290</sup>

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280. St. Clair et al., *supra* note 55.

281. *Kolbe v. Hogan*, 849 F.3d 114, 121 (4th Cir. 2017); *Wilson v. Cook Cty.*, 937 F.3d 1028, 1029 (7th Cir. 2019); *New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 247 (2d Cir. 2015); *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1247-48 (D.C. Cir. 2011); *Bevis*, 85 F.4th at 1182.

282. *Heller*, 554 U.S. at 627.

283. *Id.* at 629.

284. *Id.* at 627.

285. *Kolbe*, 849 F.3d at 136-37.

286. *Id.* at 136 (quoting *Heller*, 554 U.S. at 627).

287. *Kolbe*, 849 F.3d at 136.

288. *Id.*

289. *Id.*

290. *Id.* at 137.

Post-*Bruen*, the Seventh Circuit considered the constitutionality of PICA, Illinois' assault weapons and high-capacity magazine ban.<sup>291</sup> The court upheld the constitutionality of the ban under *Bruen*, finding that assault weapons and high-capacity magazines do not fall under the plain text of the Second Amendment because they are not "arms."<sup>292</sup> The court distinguished that "arms" as envisioned by the Founders and protected by the Second Amendment were those designed for personal use, rather than military use.<sup>293</sup> Since the court found assault weapons and high-capacity magazines to be weaponry designed for military or law-enforcement use, they were not a personal use "arm" covered by the Amendment.<sup>294</sup>

#### 4. *Constitutionality of Gun Registries*

There does not appear to be a viable Second Amendment claim against statewide gun registries, because they do not interfere or frustrate the right to bear arms, they merely require sales of firearms to be submitted to the state. If putting a gun sale on a list is found to be an interference, it appears to be *de minimis* at most. Moreover, there is a historical basis for gun registration: The Militia Act of 1792, requiring men between the ages of eighteen to forty-five to register for militia service and to have a "good rifle."<sup>295</sup> Subsequent militia records, such as in Philadelphia, showed a registry of rifles in private hands.<sup>296</sup> Registration of weapons was common at the time of framing and during ratification of the Bill of Rights to track what extent the militia was armed.<sup>297</sup> While the purpose of the registration may have changed, the fact that there is a historical basis for gun registration should survive *Bruen's* test.

## IV. PROPOSAL

Having reviewed the background of Illinois' firearm restrictions, analyzed their constitutionality, and compared other States' enforcement efforts and regulations, this comment makes the following proposals:

- (1) Amend the FOID Act to require that all owned firearms be logged to the individual's FOID number and require that all sales of firearms

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291. *Bevis*, 85 F.4th. at 1175.

292. *Id.* at 1203.

293. *Id.* at 1202.

294. *Id.*

295. Declan McCullagh, *Sorry, Mandatory Gun Registration is Constitutional*, CBS News (Aug. 21, 2009, 3:14 PM), [www.cbsnews.com/news/sorry-mandatory-gun-registration-is-constitutional/](http://www.cbsnews.com/news/sorry-mandatory-gun-registration-is-constitutional/) [perma.cc/6N4T-GKUP].

296. *Id.*

297. *Id.*



within the State be submitted to ISP to log the transfer of ownership to a new FOID.

(2) Amend the FOID Act to mandate local police follow up on non-compliant, suspended, and revoked FOID cardholders within the local jurisdiction and seek a search warrant to seize the FOID and/or firearms of persistent non-compliant individuals.

(3) Amend ILFRO to require police reports whenever a subject is known to have firearms and has threatened harm to self or another, and require an explanation be documented for why an FRO was not sought.

(4) Amend ILFRO to fund regional task forces specially trained to assist with executing firearm restraining orders and related search warrants.

(5) Strengthen the statewide ban on assault weapons and high-capacity magazines by eliminating the grandfathering exception and encouraging compliance with a buyback safe harbor period.

(6) Amend Clear and Present Danger provisions to require future FOID applicants who were the subject of a credible report to obtain psychological clearance certifications before obtaining a FOID.

By enacting these constitutionally defensible proposals, the Illinois General Assembly, and other States following this proposed model, can prevent a repeat of the types of massacres perpetrated by Crimo, Martin, Kaczmierczak, Dann, and the countless others that have occurred throughout the United States.

### *A. FOID Registry of Owned Firearms & Mandatory Reporting of All Firearm Sales*

New York has successfully enacted a registry of all owned firearms logged to the individual's state firearm permit.<sup>298</sup> Numerous states have successfully enacted requirements that all firearm sales records be reported to the State.<sup>299</sup> With these two requirements, should an individual's FOID be revoked due to imminent danger, the police will no longer be guessing as to which, if any, firearms need to be accounted. As it currently stands, the public is at the mercy of the compliance of the revoked FOID cardholders to willingly surrender their FOID, voluntarily provide police a listing of owned firearms, and the current disposition of the firearms.<sup>300</sup> With thousands of revoked cardholders not in compliance with current requirements, it is a guessing game

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298. N.Y. PENAL LAW 400.00 7 (2023).

299. *Which States Require Handgun Sales Records Be Sent to Law Enforcement?*, EVERYTOWN RSCH. & POL'Y (Jan. 2022), [everytownresearch.org/rankings/law/sales-records-sent-to-law-enforcement/](https://everytownresearch.org/rankings/law/sales-records-sent-to-law-enforcement/) [perma.cc/43KJ-8K8J].

300. See 430 ILL. COMP. STAT. 65/ et seq. (2013) (regulating FOID revocation procedures that largely depend on voluntary compliance by the subject of the revocation).

whether the revoked FOID holder has any firearms, and, if so, how many are owned and still in the person's possession.<sup>301</sup>

Amending the FOID Act in these two key manners could have prevented Gary Martin's armed rampage. Martin legally purchased a gun in Illinois while his FOID was valid, and, shortly thereafter, his FOID was revoked.<sup>302</sup> Yet no record of his gun ownership was known to law enforcement.<sup>303</sup> Had Gary Martin been required to log his legal firearm purchases to his FOID card, and had the transaction been reported to the State, police would have been aware that Martin not only had a revoked FOID, but owned firearms that he had not turned over to police or to another lawful party, as would be required by the FOID Act. However, mere law enforcement awareness of the violation is not enough. Law enforcement must be mandated to act.

### *B. Mandate Local Police Agencies to Act on Revoked FOIDs in Their Jurisdictions*

As outlined above, Illinois' laws are well provisioned to trigger a FOID revocation when an individual is rendered unqualified to possess firearms due to their criminal or threatening conduct or mental health status.<sup>304</sup> The flaw in the system is the lack of mandatory police follow up when a FOID revocation takes place.<sup>305</sup> Illinois regulations must be amended to: one, require ISP to notify the local jurisdiction when an individual's FOID is suspended or revoked, two, require the local law enforcement agency attempt contact with the individual within two weeks of notification if the subject has remained non-compliant with surrendering FOID and all registered firearms, and three, require the agency to seek a search warrant if the subject remains non-compliant after thirty days from notification.

Gary Martin's firearm would likely have been seized or turned over rather than remaining with him for five years after his FOID revocation if such requirements had been in place. While some might argue Martin could have acquired firearms illegally despite a revoked FOID, the argument is highly speculative and disregards the deterrent effect of regulations.<sup>306</sup> By this same logic, prohibitions on murder are pointless because some choose to do it

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301. St. Clair et al., *supra* note 55.

302. Bradley, *supra* note 56.

303. *Id.*

304. *See supra* Part II.

305. Bradley, *supra* note 56 (reporting that Gary Martin's FOID was revoked for five years after a lawful firearm purchase with no police follow up to confiscate his FOID and firearm).

306. Dennis A. Henigan, *The 3 Worst Arguments Against Gun Control*, DAILY BEAST (July 30, 2016, 12:01 AM), [www.thedailybeast.com/the-3-worst-arguments-against-gun-control](http://www.thedailybeast.com/the-3-worst-arguments-against-gun-control) [perma.cc/KP9D-JVF4].

anyway.<sup>307</sup> However, regulations deter the conduct that society wants to prohibit and provide consequences that make it more difficult for the individual to perpetrate the same unlawful conduct again.<sup>308</sup> Additionally, studies have shown that gun regulations do reduce gun violence and are not a futile exercise.<sup>309</sup>

### *C. Require Police Reports Documenting Those in Possession of Firearms Who Exhibit Threatening Conduct*

Illinois can increase its usage of FROs since Florida law enforcement has demonstrated it was capable of using their state's newly enacted red flag law over 1,700 times in the first nine months.<sup>310</sup> To its credit, the Illinois General Assembly identified low usage of FROs in the first two years after enactment and passed a trailer bill in June of 2022.<sup>311</sup> The trailer bill requires mandated training to all Illinois police officers and dissemination of information for the use of FROs by family members.<sup>312</sup> It is too soon to tell whether these measures will increase the use of FROs where appropriate. To encourage police to consider situations where FROs are appropriate and justify non-use, the legislature should enact a mandatory reporting requirement.

The Illinois General Assembly took similar action when enacting the Illinois Domestic Violence Act by mandating police reports whenever a bona fide allegation of domestic violence was reported.<sup>313</sup> Similarly, the General Assembly should mandate a police report whenever police have actual or constructive knowledge of firearm possession by an individual who has posed a credible threat to self or another. Moreover, the report mandate should require an explanation of why the firearm restraining order was not sought and what, if any, alternate means of firearm restraint was

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307. *Id.*

308. See Ben Johnson, *Do Criminal Laws Deter Crime? Deterrence Theory in Criminal Justice Policy: A Primer*, MN HOUSE RSCH., (Jan. 2019), [www.house.mn.gov/hrd/pubs/deterrence.pdf](http://www.house.mn.gov/hrd/pubs/deterrence.pdf) [perma.cc/U9BC-RRZ8] (citing research that shows (1) crimes involving conscious planning are deterred by criminal laws and (2) laws that “increase the likelihood of being caught” are more effective at deterring crime than increasing punishment).

309. Kalesan et al., *supra* note 30 (finding “the three state laws most strongly associated with reduced overall firearm mortality were universal background checks for firearm purchase, ammunition background checks, and identification requirement for firearms”).

310. Foley, *supra* note 77.

311. See Gatens, *supra* note 63 (noting that Illinois House Bill 1092 expanded training and awareness of the use of firearm restraining orders to multiple groups); 20 ILL. COMP. STAT. 2310/2310-705 (2022) (regulating expanded training and awareness of firearm restraining orders in Illinois).

312. 20 ILL. COMP. STAT. 2310/2310-705 (2022).

313. 750 ILL. COMP. STAT. 60/303 (2013).

used (e.g., facilitating the turnover of firearms to another individual able to legally possess firearms, or consensual surrender of firearms to law enforcement). It took legislative mandates such as reporting requirements to hold police accountable to their duties to protect domestic violence survivors.<sup>314</sup> As a result of civil liability attached to police breaching their statutory duties, police were motivated to comply with the ILDVA's requirements.<sup>315</sup> Similarly, a legislative mandate for reporting of dangerous individuals known to be in possession of firearms will encourage increased enforcement by police officers in order to avoid potential liability.

As discussed earlier, FROs are constitutionally valid, reduce suicides, and likely prevent homicides. An increase in FRO usage from the paltry number logged in Illinois so far will undoubtedly save lives.

#### *D. Funding for Specially Trained Task Forces to Serve and Execute Firearm Restraining Orders*

Police resources and safety are always a paramount concern when instituting more demands and requirements on law enforcement.<sup>316</sup> State funding must assist agencies with the additional work hours, personnel, and resources required to follow up on FOID revocations and to obtain FROs. An additional concern is how to safely execute FROs for the dangerous and non-compliant armed individual.

The Cook County Sheriff's Office has created a specialized unit, comprised of six officers and a supervisor, focused on tracking down revoked FOIDs and weapons possessed by those individuals.<sup>317</sup> However, this sole unit is hardly enough to cover one of the most populous counties in the country.<sup>318</sup> Building upon Cook County's

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314. See Kathryn E. Lichman, *Punishing the Protectors: The Illinois Domestic Violence Act Remedy for Victims of Domestic Violence Against Police Misconduct*, 38 LOYOLA U. CHI. L.J. 765, 766 (citing *Moore v. Green*, 848 N.E.2d 1015, 1023 (Ill. 2006) (affirming *Calloway v. Kinkelaar*, 659 N.E.2d 1322 (Ill. 1995)) (recognizing a cause of action against police is created for "willful and wanton breach of duties under the Illinois Domestic Violence Act"))).

315. See John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1596 (2017) (finding that police liability insurance providers are reasonably effective at inducing departments to reduce misconduct).

316. See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 454 (1990) (recognizing that police have responsibilities to carry out their duties using limited public resources).

317. *Editorial: Thousands in Cook County Haven't Turned in Revoked FOID Cards. That's Dangerous*, CHI. TRIBUNE (Aug. 8, 2022, 5:00 AM), [www.chicagotribune.com/opinion/editorials/ct-editorial-foid-card-revocation-backlog-cook-county-20220808-2qeoh24icvc27ds4ms5gt2cx4i-story.html](http://www.chicagotribune.com/opinion/editorials/ct-editorial-foid-card-revocation-backlog-cook-county-20220808-2qeoh24icvc27ds4ms5gt2cx4i-story.html) [perma.cc/WX2F-ZL69].

318. See *id.* (reporting that even with a dedicated unit, six officers, and a supervisor is hardly enough for thousands of non-compliant revoked FOID card

start, Illinois should add funding for similar specialized firearm seizure units, either per county or multiple counties, depending on population density. These units can be employed to assist agencies, particularly smaller agencies with limited resources, in executing search warrants and firearm restraining orders when the target of the order does not cooperate with authorities in surrendering the FOID and all firearms. By funding such task forces and additional personnel to handle firearm seizures generally, agencies will have the support necessary to be able to fulfill these additional statutory requirements.

### *E. Statewide Bans on Assault Weapons and High-Capacity Magazines*

Despite its progressive reputation, Illinois has only recently enacted bans on assault weapons and high-capacity magazines.<sup>319</sup> These bans are utilized in numerous states and are constitutionally defensible due to the military nature of the weapons.<sup>320</sup> Exceptions to the bans should be granted for law enforcement personnel since there is a legitimate law enforcement purpose, as demonstrated in the 1997 North Hollywood gun battle between two heavily armed felons and the outgunned police.<sup>321</sup>

However, assault rifles and high-capacity magazines are not legitimate self-defense weapons subject to Second Amendment scrutiny. While the Supreme Court has upheld the self-defense nature of handguns, it has not done so with assault weapons which research confirms are not effective self-defense weapons.<sup>322</sup> Additionally, self-defense gun use is rare, and when it is employed, it is more likely to cause victim injury than any other protective actions.<sup>323</sup> In 2017, FBI reporting data showed that nationwide, there were 298 justifiable homicides involving private citizens using firearms compared with 10,380 criminal gun homicides, a thirty-five to one disparity.<sup>324</sup> In a nation of nearly 400 million guns,

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holders).

319. *Gun Laws in Illinois*, EVERYTOWN RSCH. & POL'Y (2022), [everytownresearch.org/rankings/state/illinois/](http://everytownresearch.org/rankings/state/illinois/) [perma.cc/EP26-J836].

320. *See supra* Section III.B.3.

321. Doug Smith & Kate Mather, *20 Years Ago, A Dramatic North Hollywood Shootout Changed the Course of the LAPD and Policing at Large*, L.A. TIMES (Feb. 28, 2017, 4:00 AM), [www.latimes.com/local/lanow/la-me-ln-north-hollywood-shootout-revisited-20170223-htmllstory.html](http://www.latimes.com/local/lanow/la-me-ln-north-hollywood-shootout-revisited-20170223-htmllstory.html) [perma.cc/D25R-UGDS] (reporting that outgunned police engaged in a forty-four minute shootout with armed robbers led to equipping officers nationwide with upgraded high-powered rifles).

322. David Hemenway & Sara J. Solnick, *The Epidemiology of Self-Defense Gun Use: Evidence From the National Crime Victimization Surveys 2007-2011*, 79 PREVENTIVE MED. 22, 25-26 (2015).

323. *Id.*

324. *Self-Defense Gun Use*, VIOLENCE POL'Y CTR. [vpc.org/revealing-the-](http://vpc.org/revealing-the-)

firearms cause much more criminal mayhem compared to legitimate self-defense.<sup>325</sup>

Moreover, the harm caused by these weapons in the wrong hands is incalculable. Crimo legally purchased two assault rifles, killing and injuring dozens.<sup>326</sup> Paddock, the Las Vegas shooter, had dozens of rifles along with one hundred round magazines, killing and injuring hundreds.<sup>327</sup> Omar Mateen, the Orlando nightclub shooter, used his rifle to kill forty-nine.<sup>328</sup> Kaczmierczak, the Northern Illinois University shooter, used his rifle to kill five college students during class.<sup>329</sup>

Bans on assault weapons and high-capacity magazines will prevent all people, including the law abiding, from owning weapons of war. However, these restrictions are reasonable given the uncontested prohibitions on possessing other weapons of war, such as fully automatic weaponry, bazookas, grenades, incendiary bombs, and nuclear weapons. These are all fundamentally weapons of war not protected by the Second Amendment and, thus, subject to government prohibition. The benefit of these bans is preventing shooters like Crimo from having long-range weapons of war with massive shooting capability via high-capacity magazines. Assault weapons and high-capacity magazines serve little to no self-defense utility; they only make killers more efficient and deadly, and therefore should be banned.

Illinois can strengthen its already existing bans by eliminating the grandfathering provision which allowed those in possession of assault weapons to retain such possession by following the endorsement affidavit protocol. To accomplish this in a just manner, those who obtained the affidavit can be given a twelve-month period to sell their assault weapons to a lawful buyer. Those buyers can be either from states that permit assault weapons or to lawful exempted persons or organizations within Illinois.<sup>330</sup> If the seller is able to show reasonable, yet unsuccessful, efforts to sell, then the State will compensate the seller the fair market value of the assault

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impacts-of-gun-violence/self-defense-gun-use/ [perma.cc/CX9X-VXHL] (last visited Nov. 13, 2022) (citing FBI national crime reporting data).

325. *Id.*

326. *Id.*

327. *Criminal Investigative Report*, *supra* note 115, at 96-104.

328. Bart Jansen, *Weapons Gunman Used in Orlando Shooting are High-Capacity, Common*, USA TODAY (June 14, 2016), [www.usatoday.com/story/news/2016/06/14/guns-used-kill-49-orlando-high-capacity-common-weapons/85887260/](http://www.usatoday.com/story/news/2016/06/14/guns-used-kill-49-orlando-high-capacity-common-weapons/85887260/) [perma.cc/GP7L-Q94B].

329. *See Police Investigate NIU Shooter's Two Sides*, ASSOCIATED PRESS (Feb. 16, 2008, 5:08 PM), [www.nbcnews.com/id/wbna23200851](http://www.nbcnews.com/id/wbna23200851) [perma.cc/SLM6-7HPX].

330. *See* 720 ILL. COMP. STAT. 5/24-1.9 (e) (2023) (exempting the following from the prohibition on possession of assault weapons: peace officers, qualified retired law enforcement officers, federal, state, or local law enforcement agencies, wardens, members of armed services while performing their official duties, and certain private security contractors).

weapon. These measures will reduce the amount of assault weapons within the State, making it illegal for anyone to possess the weapon except limited, qualified individuals and organizations<sup>331</sup> that have a legitimate purpose for the weaponry. Fewer assault weapons in the State means the likelihood of carnage from assault weapons will reduce.

Australia serves as evidence of the effectiveness of this proposal. In April 1996, a man armed with an assault rifle went to Port Arthur and opened fire, killing 35 people and wounding another 28.<sup>332</sup> Australia responded by banning assault weapons and instituting a mandatory gun buyback program, collecting 650,000 firearms.<sup>333</sup> Seven years later, firearm suicides had dropped 57 percent and firearm homicides dropped 42 percent.<sup>334</sup>

#### *F. Clear & Present Danger Forms Should Flag Later FOID Applications*

The Highland Park Police did their duty to submit a Clear and Present Danger form to ISP.<sup>335</sup> However, ISP did not flag Crimo when he later applied for a FOID based on that form.<sup>336</sup> A policy change after the Highland Park shooting corrected this oversight.<sup>337</sup> However, in addition to this policy change, Illinois law must require ISP to flag individuals who are subject to Clear and Present Danger reporting. If the flagged individual subsequently applies for a FOID, the individual must be cleared for gun possession by a psychological professional, certifying the individual is no longer an imminent threat or exhibiting any disqualifying mental illness or developmental disabilities. If the individual is unable to afford such an examination, one will be provided at taxpayer expense. However, if a Clear and Present Danger form is submitted for an active FOID card holder, ISP must revoke the FOID if the allegation is sufficiently credible and should notify the local agency to take mandated next steps to seek a FRO and search warrant. With this statutory change in place, it would be unlikely that Crimo would have passed a psychological clearance after the Clear and Present Danger form was submitted given the later revelations of his recent mental instability.<sup>338</sup>

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331. Such as the military, law enforcement agencies, and active and retired military and law enforcement personnel.

332. Zack Beauchamp, *Australia Confiscated 650,000 Guns. Murders and Suicides Plummeted*, VOX (May 25, 2022), [www.vox.com/2015/8/27/9212725/australia-buyback](http://www.vox.com/2015/8/27/9212725/australia-buyback) [perma.cc/52F3-F8QL].

333. *Id.*

334. *Id.*

335. Kim et al., *supra* note 47.

336. *Id.*

337. Press Release, Illinois State Police, *supra* note 50.

338. See Frank Main & Elvia Malagon, *Highland Park Parade Mass Murder Suspect Robert E. Crimo III Through People Who Knew Him, Police Reports*,

## V. CONCLUSION

Hundreds of thousands of Americans have been needlessly killed by firearms. There is no reasonable basis to believe that arming more “good guys” without any further regulatory action will change this bloody reality moving forward. It is incumbent upon lawmakers and policy makers to attempt every legitimate and constitutionally defensible avenue to reduce the preventable harm. Attitudes of futility and inevitability are not acceptable, particularly when studies have shown more can be done that will prevent harm. The proposals put forward in this comment are a holistic approach to strengthen our current regulations, encourage better enforcement of the regulations already in place, and ban weapons of war that serve no purpose in civilized society, outside of legitimate military and law enforcement purposes.

There are estimated to be nearly 400 million firearms in the United States, more than the entire population of approximately 331 million people.<sup>339</sup> There are presumably millions of well-armed “good guys” that have been ineffective at stemming the wave of firearm violence by “bad guys.” It is time to turn to reasonable, constitutionally defensible regulations that are effective in keeping guns out of the hands of the “bad guy” in the first place. The families of lives cut short should not suffer in vain while a civilized society ignores its power to effect positive change. Proactive and effective enforcement and legislation prevents the likes of Crimo and his dangerous counterparts from acquiring guns prior to executing their murderous goals.

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CHI. SUN-TIMES (July 9, 2022, 6:00 AM), [chicago.suntimes.com/2022/7/9/23201114/highland-park-parade-mass-shooting-robert-crimo-ethan-absler-denise-pesina-jeremy-cahnmann](https://chicago.suntimes.com/2022/7/9/23201114/highland-park-parade-mass-shooting-robert-crimo-ethan-absler-denise-pesina-jeremy-cahnmann) [perma.cc/XLE8-NBLB] (reporting many warning signs that Crimo was troubled, including social media posts of violent, bloody images and reported by police to be struggling with suicidal and homicidal thoughts).

339. Mia Salenetri, *Yes, There Are More Guns Than People in the United States*, WUSA9 (June 9, 2022), [www.wusa9.com/article/news/verify/more-guns-than-people-in-the-united-states-firearms-per-person-america-fact-check/65-8c558fbc-2d02-465e-97e7-bbc7d4fb00cb](https://www.wusa9.com/article/news/verify/more-guns-than-people-in-the-united-states-firearms-per-person-america-fact-check/65-8c558fbc-2d02-465e-97e7-bbc7d4fb00cb) [perma.cc/BCG4-UB4X] (finding the Small Arms Survey found the United States has approximately 393 million guns for a total census population of approximately 331 million).



