No. 22-1482

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JENNIFER J. MILLER, DARIN E. MILLER, SECOND AMENDMENT FOUNDATION, INC., ILLINOIS STATE RIFLE ASSOCIATION, and ILLINOIS CARRY,

Plaintiffs-Appellants

v.

MARC D. SMITH, in his official capacity as Director of the Illinois Department of Children and Family Services, and KWAME RAOUL, in his official capacity as Attorney General of the State of Illinois

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS (No. 3:18-cv-3085)
HONORABLE SUE E. MYERSCOUGH

BRIEF AND REQUIRED SHORT APPENDIX OF PLAINTIFFS-APPELLANTS

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Jennifer J. Miller, Darin E. Miller, Second Amendment Foundation, Inc., Illinois State Rifle Association, Illinois Carry

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Statutes

Other Authorities

INTRODUCTION

In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment guarantees an "individual right to possess and carry weapons in case of confrontation," and it struck down two D.C. rules as categorically inconsistent with that right: a flat ban on "handgun possession in the home" and a requirement that any other "firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable." 554 U.S. 570, 592, 628 (2008). Defendants in this case impose *precisely* the same regime on homeowners who serve as licensed foster caregivers, or licensed providers of day care in their home. Under the laws and regulations challenged here, law-abiding citizens are completely prohibited from having a handgun in the home if they operate a day care there; and both home day care providers and foster caregivers must keep any other firearms kept in their home unloaded and locked away separately from any ammunition—an onerous requirement that amounts to a "prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Id.* at 635. The district court upheld these bans, but it was wrong to do so. Just like the same rules struck down in *Heller*, the limits here make it practically impossible for "responsible citizens to use arms in defense of hearth and home," *id.*, and they must meet the same fate.

Because the bans challenged here have precisely the same effect as the ones struck down in *Heller*, Defendants can defend the opposite result below only if they can distinguish that case based on the two features that define the class of people burdened by Defendants' restrictions: (1) that they have opened their homes as "designated spaces for the care of young children," App.32, and (2) that their decision to obtain a license for that purpose was a voluntary one, such that they "can preserve their Second Amendment rights by ceasing to operate" as day or foster care providers, App.35. The district court found both of these features significant enough to yield a different result than in *Heller*. That was error.

As to the first distinction, while *Heller*—and the Founding-Era history it is based upon—support the proposition that *actual schools* can be "sensitive places" where the government may bar students from carrying firearms, 554 U.S. at 626, that exception to the Second Amendment's scope does not justify the restrictions at issue here for at least two reasons. First, there is absolutely *no* historical support for extending the "sensitive places" exception off of school grounds and into *any* space "designated . . . for the care of young children," App.32—including *private homes*, "where the need for defense of self, family, and property is most acute," *Heller*, 554 U.S. at 628. And second, while historical limits on firearms in actual schools may support *disarming students*, there is no support for *disarming the adults that work there*. Accordingly, the fact that home day cares are "designated spaces for the care

of young children," App.32, cannot suffice to distinguish *Heller*. After all, *Heller*'s square holding is that firearms may not be banned in the home, and the home is *the paradigmatic* space designated for the care of young children.

Nor is the "element of voluntariness" involved in applying for a foster care or day care license sufficient to justify the challenged regime. App.25. It has long been settled that "constitutional guaranties, so carefully safeguarded against direct assault" cannot be "open to destruction by the indirect, but no less effective, process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion." *Frost v. Railroad Comm'n of Cal.*, 271 U.S. 583, 593 (1926). The many cases rejecting government attempts to extract a "voluntary" surrender of rights "reflect an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). Under that doctrine, the fact that the Plaintiffs voluntarily chose to apply for government licensure to operate a day care or foster care—"a privilege which may be vital to [their] livelihood" and which only the State can grant, *Frost*, 271 U.S. at 593—cannot affect the constitutional analysis either. After all, "what a government cannot compel, it should not be able to coerce." *Planned Parenthood of Ind., Inc. v. Commissioner of Ind. State Dep't Health*, 699 F.3d 962, 986 (7th Cir. 2012).

Accordingly, the bans at issue in this case are materially indistinguishable from the ones struck down in *Heller*. They are thus flatly contrary to "the right of law-abiding, responsible citizens to use arms in defense of hearth and home," 554 U.S. at 635, and hence "categorically unconstitutional," *Ezell v. City of Chicago ("Ezell I")*, 651 F.3d 684, 703 (7th Cir. 2011). But even if this Court declines to invalidate the challenged restrictions categorically, and instead applies one of the "heightened standards of scrutiny," *id.*, those restrictions still cannot stand.

Defendants have failed to provide any real evidence that the challenged bans *actually cause* any benefit to their claimed interest in preventing child suicide and accidental gun death. And even if they could show that, under any level of heightened scrutiny they must *also* establish that their restrictions are narrowly tailored—through proof "that alternative measures that burden substantially less [constitutionally protected conduct] would fail to achieve the government's interests." *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). Defendants have not, and cannot, show that. For there are myriad less-burdensome alternatives to Defendants' draconian regime that have gone untested by Illinois—including, most obviously, a rule allowing firearm owners to possess those firearms in the home, loaded and unlocked, so long as they are at all times kept on the owner's immediate person. *All* other States that impose general firearm storage requirements include such an allowance, and Defendants' expert witness expressly testified that he has

"no empirical data . . . and so no scientific opinion" regarding whether such a regime would be less safe than the challenged one. Dep. of Dr. Matthew Miller at 200:20–21, Doc. 64-1. That critical concession is alone fatal to Defendants' restrictions on day care and foster care homes.

JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343 because this case involves a constitutional challenge, under U.S. CONST. amends. II and XIV, § 1, to the Illinois statutory and regulatory provisions at issue. The District Court entered final judgment against Appellants on all claims on March 15, 2022, App.1, and Appellants filed a timely notice of appeal on March 24. Notice of Appeal, Doc. 67. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether Defendants may ban law-abiding citizens licensed to operate a day care in their home from possessing handguns, and from possessing any firearm operable for the purpose of immediate self-defense, in their home.

2. Whether Defendants may ban law-abiding citizens licensed to serve as foster parents from possessing any firearm operable for the purpose of immediate self-defense in their home.

STATEMENT OF THE CASE

The statutes and regulations at issue in this appeal severely restrict the fundamental right of homeowners who serve as foster parents or operate a day care in their homes to keep "any lawful firearm in the home operable for the purpose of immediate self-defense." *Heller*, 554 U.S. at 635. The undisputed facts are as follows.

I. Illinois's restrictions on keeping operable firearms in the home.

A. The Foster Home Ban.

Defendant Department of Children and Family Services' ("DCFS") regulations flatly ban law-abiding citizens who serve as foster caregivers from having firearms immediately operable for self-defense in their own homes at any time. 89 ILL. ADMIN. CODE § 402.8(o) provides:

> Any and all firearms and ammunition shall be stored and locked up separately at all times and kept in places inaccessible to children. . . . Loaded guns shall not be kept in a foster home unless required by law enforcement officers and in accordance with their law enforcement agency's safety procedures.

Apart from the carve-out for law-enforcement officers, there are no exceptions to this ban—not for licensed foster caregivers who do not currently have a foster child placed with them, not for homeowners who possess an Illinois Concealed Carry License, not for homeowners who employ storage mechanisms inaccessible to

children (such as biometric gun safes), and not even for loaded firearms kept in the homeowner's immediate possession.

B. The Day Care Home Ban.

The State imposes similar restrictions on citizens who provide day care services from their home. The statute governing the state licensing of home day cares requires DCFS to promulgate numerous, overlapping restrictions on the possession of firearms in home day cares:

- "Provisions prohibiting firearms on day care center premises except in the possession of peace officers;"
- "Provisions prohibiting handguns on day care home premises except in the possession of peace officers or other adults who must possess a handgun as a condition of employment and who reside on the premises of a day care home;"
- "Provisions requiring that any firearm permitted on day care home premises, except handguns in the possession of peace officers, shall be kept in a disassembled state, without ammunition, in locked storage, inaccessible to children and that ammunition permitted on day care home premises shall be kept in locked storage separate from that of disassembled firearms, inaccessible to children;" and
- "Provisions requiring notification of parents or guardians enrolling children at a day care home of the presence in the day care home of any firearms and ammunition and of the arrangements for the separate, locked storage of such firearms and ammunition."

225 ILL. COMP. STAT. § 10/7(a)(12)–(15).

Pursuant to this statutory command, Defendant DCFS has promulgated regulations (1) flatly banning the possession of handguns in any day care home

(except for law-enforcement officers or others required to possess a handgun as a condition of employment), (2) requiring all other firearms (i.e., long guns) to be "kept in a disassembled state, without ammunition, in locked storage in a closet, cabinet, or other locked storage facility inaccessible to children" (except, again, in the case of law-enforcement officers); (3) requiring that all "[a]mmunition for such firearms shall be kept in locked storage separate from that of the disassembled firearms, inaccessible to children"; and (4) requiring the homeowner operating the day care to "post a 'no firearms' sign" and "notify the parents or guardian of any child accepted for care that firearms and ammunition are stored on the premises," "locked in storage inaccessible to children." 89 ILL. ADMIN. CODE § 406.8(a)(17)–(18).

On their face, these restrictions admit of no exceptions. Defendants have asserted, and the district court held, that these restrictions on day care homes have effect only during business hours, when the day care is operating. App.13, *see* Mem. In Supp. of Mot. for Summ. J. at ¶ 32, Doc. 56. No such limitation appears in the text of the statutory or regulatory provisions at issue, however—and on their face, those provisions apply absolutely, at all times. Like the foster care ban, the day care home ban likewise includes no other exceptions, apart from the carve-out for law-enforcement officers—no matter how carefully the homeowners have been vetted or how securely they store their firearms.

II. The effect on Plaintiffs.

Plaintiffs Jennifer and Darin Miller are licensed foster parents who have cared for two foster children. Mem. In Supp. of Mot. for Summ. J. at ¶¶ 35, 45, Doc. 56. Ms. Miller is also licensed to operate a day care in the Miller's home. *Id.* ¶ 54. Accordingly, they are subject to Illinois's restrictions on the possession of firearms in both day care and foster homes—restrictions that, as described above, bar them from possessing a handgun in their home and from possessing any sort of firearm "operable for the purpose of immediate self-defense," *Heller*, 554 U.S. at 635, at any time. Were it not for the challenged restrictions, Mr. Miller would carry a concealed, loaded handgun, secured on his person and in his immediate control, while in his own home, and Ms. Miller would store a loaded handgun in their home, locked securely in a safe. Mem. In Supp. of Mot. for Summ. J. at ¶¶ 82–87, Doc. 56.[1]

III. The proceedings below.

Plaintiffs brought suit challenging the day care home restrictions on April 16, 2018. In May 2019, they amended their complaint to also include a challenge to the foster care restrictions. Following discovery, Defendants moved for summary judgment. On March 14, 2022, the district court granted Defendants' motion. App.2.

[1] Plaintiffs Second Amendment Foundation, Illinois State Rifle Association, and Illinois Carry each have at least one member who is a licensed day care home operator and/or foster parent who would possess in the home a firearm operable for the purpose of immediate self defense were it not for the challenged restrictions. Am. Compl. ¶¶ 17–22, Doc. 19; App.3.

The district court rejected Defendants' threshold arguments that Defendant Attorney General Raoul has sovereign immunity to Plaintiffs' claims and that Plaintiffs purportedly waived their constitutional challenges by signing various documents, as part of the licensing process, acknowledging the challenged firearm restrictions and representing that they were in compliance with them. Moving to the merits, the court applied the "two step inquiry" adopted by this Court for Second Amendment challenges, asking first whether the conduct restricted by the day-care and foster-care rules was "categorically unprotected" by the Second Amendment as a matter of text and history, and then, if not, whether the restrictions survive "some level of 'means-ends' scrutiny." App.27–28.

At the first step, the Court concluded that day care homes "are 'sensitive places' in which unusually restrictive firearms prohibitions may be permissible," based on "[t]he fact that day cares are designated spaces for the care of young children" and are thus "closely analogous to . . . schools," which *Heller* listed as a location where "laws forbidding the carrying of firearms" might be "presumptively lawful." App. 28–29, 32 (quoting *Heller*, 554 U.S. at 626–27 & n.26). Rather than exempting the challenged restrictions from all constitutional scrutiny, however, the district court instead reasoned that the "sensitive" nature of day care homes "inform[s] the Court's means-ends analysis under step two." App.30. The court declined to address Defendants' other arguments that the restrictions at issue fall

outside the protective ambit of the right to keep and bear arms, opting instead to proceed directly to step two. App.32.

At the second step, while the court acknowledged that the day care restrictions inflict "a relatively severe burden on the core Second Amendment right," it nonetheless applied intermediate scrutiny, rather than strict scrutiny, based on the "sensitive" nature of day care homes and its reasoning that "relatively few people are affected by the Day Care Home Rule" and those that are "can preserve their undiminished Second Amendment rights simply by ceasing to operate a day care." App.34, 35. The court likewise applied intermediate scrutiny to the foster home ban, despite the fact that the ban is "significantly broader in its application than the Day Care Home Rule," reasoning that the foster home ban constituted a "relatively light burden" because it does not "prohibit[ ] handguns entirely." App.40, 41.

Applying intermediate scrutiny, the court held that "the State has carried its burden" of justifying both sets of restrictions. App.36, *see also* App.45. While "Defendants have not produced direct evidence specifically addressing the issue of whether children in day care homes benefit from the removal of handguns or the storage of other firearms disassembled in locked containers separate from ammunition," the court upheld the challenged restrictions based on data generally showing "that there exists a strong link between children's exposure to firearms and the risk of injury and mortality from firearms." App.37, 38 (quotation marks

omitted). And while the court did not address the availability of less-burdensome alternatives for preventing child injuries and deaths, it concluded that the day care restrictions were "narrowly tailored" because they "appl[y] only during the daytime hours when the[ ] home most closely resembles a school or other 'sensitive place.' " App.37. The court did not directly address whether the foster care rule is appropriately tailored or less restrictive than other available protective measures.

SUMMARY OF THE ARGUMENT

I. The challenged restrictions on firearms in day care and foster homes burden conduct protected by the Second Amendment. The right at issue in this case is the same right that was at issue in *Heller* itself: "the right of law-abiding, responsible citizens to use arms in defense of hearth and home," which constitutes "the *central component*" of the Second Amendment. 554 U.S. at 599, 635. And contrary to what the district court thought, the fact that Plaintiffs' homes serve as "designated spaces for the care of young children" does not lead to a different conclusion. App.32. For as a matter of history, precedent, and legal reasoning, any Second Amendment exception that applies to "sensitive places such as schools and government buildings," *Heller*, 554 U.S. at 626, cannot extend off of school grounds and into *private homes*, nor can it authorize the government to disarm not only *students or children* but also *adult caregivers*. The other historical restrictions cited by Defendants to justify their bans also fall far short of the mark.

II. Because the day care and foster care bans at issue have the same effect as the laws challenged in *Heller*, they must receive the same treatment: categorical invalidation as flatly inconsistent with the Second Amendment "right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635. The only remaining, material distinction between this regime and the one in *Heller*—that Defendants impose their restrictions as a condition of the "voluntary" choice to serve as a day or foster caregiver—does not change the analysis. For under the longstanding "unconstitutional conditions" doctrine, what the government cannot *coerce directly*, it also cannot *coerce indirectly*, by imposing conditions on valuable government benefits that only it can confer. The government can no more buy away Plaintiffs' Second Amendment right to keep in the home firearms operable for the purpose of immediate self-defense than it can infringe it outright.

III. Even if the Court foregoes categorical invalidation of the challenged bans, and instead analyzes them under some form of heightened means-ends scrutiny, the bans must fall. Given the Second Amendment's status as a fundamental, enumerated right, and the severity of the burden at issue, strict scrutiny should apply. But even under intermediate scrutiny, the government has failed to provide sufficient evidence that the challenged limits will *actually cause* the public benefits claimed: a decreased risk of child suicide and accidental gun death. And even if it had provided such evidence, it *certainly* has not shown that the challenged regime

satisfies the second, "narrow tailoring" prong of intermediate scrutiny. For numerous less-burdensome alternatives to Defendants' draconian rules exist—including, most obviously, a regime that allows homeowners to possess loaded and operable firearms in the home so long as they keep them directly on their person. Every State that imposes a general firearm "safe storage" requirement includes such an allowance, and Defendants have no evidence—and *admitted that they have no evidence*—showing that such a regime is any less safe than the challenged one. Yet they have not even tried this (or any other) less burdensome alternative. That alone is fatal to the challenged limits.

ARGUMENT

The Second Amendment protects "the individual right to possess and carry weapons in case of confrontation." *Heller*, 554 U.S. at 592. While that fundamental right "is not unlimited," it "necessarily takes certain policy choices off the table," including a "prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Id.* at 626, 635–36. This Court generally applies "a two-step approach to evaluate Second Amendment challenges," *United States v. Williams*, 616 F.3d 685, 691 (7th Cir. 2010), asking first whether "the restricted activity [is] protected by the Second Amendment in the first place," based on "a textual and historical inquiry into original meaning," and second whether the challenged restriction passes muster under the relevant constitutional standard, *Ezell*

I, 651 F.3d at 701, 703. In many cases the second step will be comprised of some "standard of means-end scrutiny," but "broadly prohibitory laws restricting the core Second Amendment right—like the handgun bans at issue in [*Heller* and *McDonald*], which prohibited handgun possession even in the home—are categorically unconstitutional." *Id.* at 703. As shown below, that is the case here.

The Court reviews the district court's grant of summary judgment de novo, drawing all reasonable factual inferences in Plaintiffs' favor. *Gaddis v. DeMattei*, 30 F.4th 625, 630 (7th Cir. 2022).

I. Illinois's bans on keeping operable firearms in the home burden rights protected by the Second Amendment.

A. The Second Amendment protects the right to keep firearms operable for the purpose of immediate self-defense in the home.

As the district court recognized, the right at issue in this case is the right that was at issue in *Heller*: "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635. "[W]hatever else it leaves to future evaluation," *Heller* concluded, *that* right is one that the Constitution "surely elevates above all other interests." *Id.* For "the inherent right of self-defense has been central to the Second Amendment right," and that is particularly true in "the home, where the need for defense of self, family, and property is most acute." *Id.* at 628. There can thus be no serious dispute that the conduct restricted by the challenged limits on homes where day and foster care are provided falls within the Second Amendment's

protective sweep. Indeed, the limits on day care homes include a ban generally "prohibiting handguns on day care home premises," 225 ILL. COMP. STAT. § 10/7(a)(13); *accord* 89 ILL. ADMIN. CODE § 406.8(a)(17)—the very type of restriction struck down in *Heller*.

The remaining restrictions at issue do not escape Second Amendment scrutiny because they require that firearms be rendered *functionally inoperable*, rather than banning them altogether. The Second Amendment protects the right to be "armed and ready for . . . defensive action in a case of conflict with another person," *Heller*, 554 U.S. at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (Ginsberg, J., dissenting)—not the right to possess disassembled firearm parts. Once again, that follows directly from *Heller* itself. That case invalidated not only the District of Columbia's ban on possessing handguns outright, but also its law "requir[ing] residents to keep their lawfully owned firearms, such as registered long guns, 'unloaded and dissembled or bound by a trigger lock or similar device' " at all times. *Id.* at 575. As *Heller* explained, "[t]his makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional." *Id.* at 630. The very same reasoning applies to Illinois's day-care and foster-care rules, which likewise prohibit "rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Id.* at 635.

Nor do Defendants succeed in showing that the day care home ban at issue is different from the one in *Heller* because it purportedly "only applies during operating hours of the day care home." Mem. In Supp. of Mot. for Summ. J. at ¶ 32, Doc. 56. That interpretation of the day care rule was asserted by DCFS's Rule 30(b)(6) representative, but it *appears nowhere* in the statutory or regulatory text, and in fact it is flatly inconsistent with those provisions. Both the statutes and regulations at issue repeatedly frame their firearm prohibitions in blanket terms. *See* 225 ILL. COMP. STAT. § 10/7(a)(13) (requiring rules "prohibiting handguns on day care home premises"); 89 ILL. ADMIN. CODE § 406.8(a)(18) ("Any firearm . . . shall be kept in a disassembled state, without ammunition, in locked storage . . . ."). And they include exceptions that would make no sense if Defendants' atextual temporal limit really existed. (Why would the rules allow individuals "who must possess a handgun as a condition of employment" to keep one "on day care home premises," 225 ILL. COMP. STAT. § 10/7(a)(13), if they only barred such individuals from having handguns in the home during business hours?)

Moreover, with respect to the handgun ban, such a temporally limited restriction is nonsensical. Is public safety really advanced by requiring home day care operators to move their handguns from the gun safe in the closet into the glove compartment of the car, each weekday morning? Such a requirement—which would in effect force *more* guns *onto the street*—makes no sense.

In any event, even if the day care rules *could* be read in Defendants' atextual, temporally limited way, that would still not change the analysis. For "the right of law-abiding, responsible citizens to use arms in defense of hearth and home," *Heller*, 554 U.S. at 635, surely applies just as strongly during the waking hours. Nothing in *Heller* suggests that a handgun ban should receive lesser constitutional scrutiny if the Government limits its application from 9 to 5.

B. The presence of other children does not transform a day care home into a "sensitive place."

To be sure, *Heller* also made clear that the Second Amendment does not protect "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. As this Court has held, determining which "longstanding" regulatory measures are outside the Amendment's historical scope and thus "presumptively lawful," *id.* at 626–27 & n.26, "requires a textual and historical inquiry into original meaning," *Ezell I*, 651 F.3d at 701. After all, as *Heller* explains, "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." 554 U.S. at 634–35. Here, the text and Founding-Era history of the Second Amendment provide no support for Defendants' limits.

Defendants' principal historical justification of the challenged bans—and the one partially accepted by the district court—is built on an analogy to *Heller*'s dictum tentatively placing "laws forbidding the carrying of firearms in sensitive places such

as schools and government buildings" in the category of "longstanding" "presumptively lawful regulatory measures." 554 U.S. at 626–27 & n.26. While the challenged limits do not pertain to actual schools or government buildings, Defendants, and the court below, attempt to *abstract* from the school example a more general rule that any spaces "where children gather," Mem. In Supp. of Mot. for Summ. J. at ¶ 112, Doc. 56, or that are "designated spaces for the care of young children," App.32, qualify as "sensitive places" that the government may apparently decree to be gun-free zones. And once abstracted in this way, Defendants assert—and the district court held—this "sensitive places" limitation encompasses day cares.[2] That proposition is contrary to history, precedent, and all sense.

Defendants' invocation of the historical "sensitive places" limitation adverted to by *Heller* would strain the limitation beyond the breaking point. As *Heller* recognized, Founding-Era history does support the proposition that the Government may, consistent with the Second Amendment, place certain restrictions on the possession of firearms in a few discrete categories of public spaces. First, some Founding-Era jurisdictions limited the possession of firearms in public places where government officials (or voters) were exercising deliberative, governmental

[2] Even understood this broadly, neither Defendants nor the district court suggested that the limitation encompasses the homes of foster-care parents.

functions—such as courts, legislative chambers, or polling places.[3] And second, there is also some historical support for limiting the carrying of firearms *by students* on *actual school grounds*. For example, in 1824 the Board of Visitors of the University of Virginia—which included both Thomas Jefferson and James Madison—adopted a rule providing that "No Student shall, *within the precincts of the University* . . . keep or use weapons or arms of any kind, or gun-powder." Meeting Minutes of the University of Virginia Board of Visitors at 4–5 (Oct. 1824), https://bit.ly/3JEu26e (emphasis added). Several other colleges, including the publicly run University of North Carolina, adopted similar rules shortly thereafter. *See* Acts of the General Assembly and Ordinances of the Trustees, for the Organization and Government of the University of North Carolina 15 (1838), https://unc.live/37J4iZ1; *see also, e.g.*, Statutes of Dickenson College 22–23 (1830), https://bit.ly/3rjauxO.

Neither type of historical limitation comes close to supporting the bans challenged here. Day care homes plainly do not fall within the first category of historical restrictions, limiting the carrying of firearms in places where government

[3] *See, e.g.*, 1786 Va. Acts 33, ch. 21 (barring most people from "com[ing] before the Justices of any Court, or other of their Ministers of Justice, doing their office, with force and arms"); 1647 Md. Laws 216 (prohibiting bringing weapons "into the howse of Assembly (whilst the howse is sett)"); Act of Jan. 26, 1787 N.Y. Laws 345 (prohibiting bringing "force of arms . . . to disturb or hinder any citizen of this State to make free election").

officials engage in lawmaking or other governmental functions. Nor do they fall within the second. For while the historical evidence supports placing additional limits on keeping and carrying firearms *in actual schools*, there is *no* Founding-Era support for extending such limits to non-school locations "where children gather," Mem. In Supp. of Mot. for Summ. J. at 3, Doc. 56, and there is *certainly* no historical support for extending those limits outside of school grounds and *into a law-abiding citizen's private home*, "where the need for defense of self, family, and property is most acute." *Heller*, 554 U.S. at 628.

Moreover, even if the Founding-Era history *did* support the extension of a "sensitive places" limitation on the Second Amendment's scope to non-school locations—even including private homes—that are "designated . . . for the care of young children," App.32, that would still fail to justify Defendants' bans. For while the historical evidence referenced above supports additional limits, on school grounds, on the carrying of firearms *by students*, Defendants have cited *no* evidence—and Plaintiffs are aware of none—that would justify extending those limits to disarm *teachers or other adult school employees*. Accordingly, even if Defendants could, by analogy to the historical limitations on firearms in schools, enforce rules preventing the children who attend day care (or even their parents) from bringing firearms there, the analogy surely cannot be twisted still further to disarm the parents who operate, and live in, the day care home.

None of the precedents cited by the district court for employing the "sensitive places" limitation in this context provide any support. Two of those authorities—both of which are non-binding—do not involve the "sensitive places" limitation at all. The Fourth Circuit's decision in *United States v. Masciandaro* expressly *declined* to determine whether a national park is a "sensitive place," and the passage quoted by the district court merely discusses the government's interest, under intermediate scrutiny, in "providing for the safety of individuals who visit and make use of the national parks," "including children." 638 F.3d 458, 473 (4th Cir. 2011). Similarly, Judge Rovner's separate opinion in *Ezell v. City of Chicago ("Ezell II")* is simply a general discussion of the government's authority, in many contexts, to "restrict the rights of minors for purposes of protecting their health and welfare." 846 F.3d 888, 905 (7th Cir. 2017) (Rovner, J., concurring in part).

The remaining cases cited by the court below—two district court opinions—do not advance the ball. *Solomon v. Cook County Board of Commissioners* in fact *invalidated* state restrictions on carrying firearms within a forest preserve, concluding that the location in question *was not* a "sensitive place." 2021 WL 4147167, at *17 (N.D. Ill. Sept. 13, 2021). The court below suggested that a later passage of the *Solomon* opinion indicated that a narrower rule limited to "those sites at which children were frequently present" might have withstood scrutiny, App.31, but the portion of the opinion in question expressly *declined* to imply that such

narrower restrictions "are or are not constitutional," and in any event, the passage occurred (like the portion of the *Masciandaro* opinion cited by the district court) as part of *Solomon*'s discussion of whether the challenged restrictions *passed intermediate scrutiny*, not whether they fell within the "sensitive places" exception. 2021 WL 4147167, at *21. Finally, *United States v. Redwood* concerned the possession of firearms *in actual school zones*—and, in all events, that case again found that the restriction at issue passed scrutiny not because it was limited to a location "outside of the historical ambit of the Second Amendment," but because it "passes constitutional muster under the appropriate standard of review." 2016 WL 4398082, at *3 (N.D. Ill. Aug. 18, 2016).

Finally, extending *Heller*'s "sensitive places" dictum in the way done by the district court would threaten to expand the rule beyond all sensible limit, causing *Heller*'s exception to swallow *Heller* itself. For if, as the district court held, the metes and bounds of the "sensitive places" exception are marked by whether a space is "designated . . . for the care of young children," App.32, it is wholly unclear why the exception would not reach the *paradigmatic* space designated for the care of children: the home itself. The *number* of children on-site cannot make the difference—for it is not difficult to identify many large families that include more small children than many small day cares. Nor can the distinction be based on the fact that children from outside the family are present in day care homes—since such

a rule would apparently, and absurdly, authorize the government to ban the possession of operable firearms in the home during every birthday party, sleepover, or any other time when friends or neighbors are visiting. The district court's suggestion that any place "designated . . . for the care of young children" may qualify as a "sensitive place" thus simply cannot be right. *Heller* identified firearms limitations on "sensitive places" as a potential "exception[ ]" to the Second Amendment's scope. 554 U.S. at 626. That exception cannot sensibly be interpreted in a way that swallows the Court's core holding that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635.

C. The challenged bans do not come within any other longstanding, Founding-Era restriction on the Second Amendment's scope.

In addition to the potential "sensitive places" limitation on the Second Amendment's protective scope, Defendants below advanced a handful of additional historical restrictions in support of the challenged rules. The court below did not address those remaining historical arguments, and the arguments are not persuasive.

Defendants begin by invoking a broad "conception of the police power." Mem. In Supp. of Mot. for Summ. J. at ¶ 108, Doc. 56. That power "to enact and enforce laws to protect public health, safety, and welfare" was, they say, "foundational to virtually every feature of Anglo-American law" at the Founding. *Id.* And according to their expert below, Professor Saul Cornell, it "sanctioned a

variety" of gun control measures, vesting the States with a "far reaching" and "broad" power the "full contours" of which cannot be demarcated. Saul Cornell Decl. at 9–11, Doc. 57. No matter how broad, however, a State's general "police power" cannot justify the challenged restrictions for the simple reason that the Second Amendment must of course be understood *as a limit* on the exercise of the police power. *See Panhandle E. Pipe Line Co. v. State Highway Comm'n of Kan.*, 294 U.S. 613, 619 (1935) ("A claim that action is being taken under the police power of the state cannot justify disregard of constitutional inhibitions."). Asserting that restrictions on firearms in day cares fall within a State's police power "to adapt to changing circumstances and craft appropriate legislation to deal with . . . shifting challenges," Saul Cornell Decl. at 11–12, Doc. 57, thus simply does not answer the question relevant here, which is whether such a rule is consistent with the Second Amendment's *limits* on the proper exercise of the police power.

Professor Cornell resists that conclusion, asserting that while in "modern law" constitutional rights might "function as trumps" on the use of police power, "in the Founding era" they were not "antagonistic concepts," and police power regulation was instead seen as "the essential means of preserving rights." *Id.* at 7. Whatever the merits of this view as an academic matter, the difficulty in the present case is that it is plainly contrary to *Heller*. For if the general police power really did authorize the States to enact any law necessary "to protect public health, safety, and welfare," *id.*

at 8—unbridled by any limits imposed by the Second Amendment itself—then the District of Columbia's ban on handguns *was constitutional*, and *Heller* was wrongly decided. That result might be unobjectionable to Professor Cornell—he was cited extensively by the dissent in *Heller*, *see* 554 U.S. at 666 n.32, 671, 685 (Stevens, J., dissenting), has criticized the opinion as "just another example of activist judges manipulating the past to further their own ideological agenda,"[4] and testified in this case that he "quite clearly" believes that "from a historical standpoint Justice Scalia got *Heller* wrong." Dep. of Saul Cornell at 56:7–11, Doc. 64-2. But this Court has no authority to adopt a view of the relationship between the police power and constitutional rights that would gut *Heller*'s central holding (and, really, much of the rest of modern constitutional law).

Accordingly, Defendants cannot justify the challenged bans by pointing to Illinois's general police power to protect the public health and safety. Rather, they must point to historical laws widespread enough to establish a *specific* "historical tradition," dating back to the Founding, of accepting limits on the right to keep and bear arms that are directly analogous to the ones at issue. *Heller*, 554 U.S. at 627. Their attempt to do so falls woefully short. Defendants invoke an assortment of historical laws regulating "the storage and possession of gunpowder and firearms,"

[4] Saul Cornell, Heller*, New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss,"* 56 UCLA L. REV. 1095, 1098 (2009).

Mem. In Supp. of Mot. for Summ. J. at 19, Doc. 56, but the great bulk of these are merely laws regulating the quantity of gunpowder that could be privately held or the manner of its storage, for the purpose of preventing fire hazards. These laws were raised by D.C. in *Heller*, too, and that case provides the answer: "Nothing about those fire-safety laws undermines our analysis; they do not remotely burden the right of self-defense as much as an absolute ban on handguns." 554 U.S. at 632.

Heller also disposes of the only historical law cited by Defendants that even remotely relates to the storage of *firearms*, as opposed to quantities of gunpowder: a 1783 Massachusetts law they describe as "prohibiting storing a loaded firearm in a home." Mem. In Supp. of Mot. for Summ. J. at 19, Doc. 56. As *Heller* explained, this statute's

> text and its prologue, which makes clear that the purpose of the prohibition was to eliminate the danger to firefighters posed by the "depositing of loaded Arms" in buildings, give reason to doubt that colonial Boston authorities would have enforced that general prohibition against someone who temporarily loaded a firearm to confront an intruder (despite the law's application in that case). In any case, we would not stake our interpretation of the Second Amendment upon a single law, in effect in a single city, that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense of the home.

554 U.S. at 631–32; *see also Ezell I*, 651 F.3d at 706 (two historical fire-safety laws "fall[ ] far short of establishing that target practice is wholly outside the Second Amendment"). If these gunpowder storage regulations did not justify the D.C. laws in *Heller*—including its requirement that "the lawful owner of a firearm keep his

weapon 'unloaded and disassembled or bound by a trigger lock or similar device,' " 554 U.S. at 692—they plainly cannot justify the identical bans imposed by Illinois.

Defendants do not improve their situation by shifting their gaze forward to gun control laws enacted "[t]hroughout the nineteenth century and into the twentieth." Mem. In Supp. of Mot. for Summ. J. at 19, Doc. 56. As an initial matter, many of these restrictions were enacted far too late in the day to shed light on the Second Amendment's original meaning, and their relevance is thus far from clear. While *Ezell I* stated that 1868, the year of the Fourteenth Amendment's ratification, is "the relevant historical moment" for determining the scope of the right to keep and bear arms as incorporated against the States, 651 F.3d at 702, subsequent case law has fatally undermined that approach and confirmed that the relevant time period is the Founding.

In *Ramos v. Louisiana*, the Supreme Court reaffirmed "that incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government," 140 S. Ct. 1390, 1397 (2020), a principle that simply cannot be squared with the notion that the historical scope of the Second Amendment varies depending on whether a state or federal law is at issue. Moreover, in *Gamble v. United States*, the Court confirmed that the relevant inquiry in Second Amendment cases is "the public understanding in 1791 of the right codified by the Second Amendment," and that the 19th-century sources

cited by *Heller* "were treated as mere confirmation of what the Court thought had already been established." 139 S. Ct. 1960, 1875–76 (2019). Finally, this Court's precedent has also departed from *Ezell*'s instructions to look at 1868, rather than 1791, in cases challenging State restrictions. In *Moore v. Madigan*—a case involving Illinois' ban on carrying firearms in public—the Court reasoned that "1791" was "the critical year for determining the amendment's historical meaning, according to *McDonald*." 702 F.3d 933, 935 (7th Cir. 2012); *see Illinois Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 935 (N.D. Ill. 2014) (concluding, based on *Moore* and *McDonald*, that "the relevant time period for the first-step historical analysis is 1791"). That is the better approach, and the only one consistent with *Heller*, the Supreme Court's precedent on incorporation, and *McDonald*'s own holding "that incorporated Bill of Rights protections are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010) (quotation marks omitted).

In any event, none of the nineteenth or twentieth century laws cited by Defendants has anything to do with the challenged restrictions on possessing, in the home, firearms operable for the purpose of immediate self-defense. Those laws, by Defendants' own telling, merely regulated "the public carry of handguns, the discharge of firearms, . . . licensing requirements for the purchase or possession of

firearms, [and] the possession, sale, and manufacture of machine guns." Mem. In Supp. of Mot. for Summ. J. at 19, Doc. 56. This case does not involve carrying or discharging firearms in public; and Plaintiffs do not seek to purchase, possess, or manufacture machine guns.

Finally, Defendants invoke historical "[l]aws restricting children's access to firearms," including "mid-1800s restrictions on the purchase of firearms by minors" and "post-Civil War age-based restrictions on transfer of firearms to, or use of firearms by, minors." *Id.* at 20. Yet again, these historical laws are entirely beside the point. This challenge does not involve the purchase or possession of firearms by minors, it involves the possession of operable firearms, in the home, *by adults*. So long as *Heller* is good law, the fact that these adults care for children cannot suffice to place the challenged bans outside of the protective scope of the Second Amendment altogether.

II. Because Illinois's restrictions bar law-abiding citizens from possessing operable firearms in the home, they are categorically unconstitutional.

Given that the challenged restrictions on day- and foster-care homes severely burden conduct protected by the Second Amendment—and do not fall within any historical exception to the Amendment's scope—*Heller* makes the next analytical steps clear. Because "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon," broad bans upon

rights safeguarded by the Amendment must be held unconstitutional categorically, not "subjected to a freestanding 'interest-balancing' approach." 554 U.S. at 634–35. Illinois's rules barring law-abiding citizens from keeping firearms in the home operable for the purpose of immediate self-defense constitute just such an infringement of Second Amendment conduct. Accordingly, they are flatly unconstitutional.

A. Binding precedent requires categorical invalidation of broad restrictions on Second Amendment rights.

Heller requires *per se* invalidation of broad bans that strike at the heart of the Second Amendment. In *Heller*, the Supreme Court declined the invitation to analyze the ban on possessing handguns at issue under "an interest-balancing inquiry" based on the "approach . . . the Court has applied . . . in various constitutional contexts, including election-law cases, speech cases, and due process cases," *id.* at 689–90 (Breyer, J., dissenting), ruling instead that the right to keep and bear arms was "elevate[d] above all other interests" the moment that the People chose to enshrine it in the Constitution's text, *id.* at 635 (majority opinion). And *McDonald* reaffirmed that *Heller* had "expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing." 561 U.S. at 785 (plurality opinion).

This Court's precedent is in accord. In *Ezell I*, the Court held that "[b]oth *Heller* and *McDonald* suggest that broadly prohibitory laws restricting the

core Second Amendment right—like the handgun bans at issue in those cases, which prohibited handgun possession even in the home—are categorically unconstitutional." 651 F.3d at 703. And in *Moore*, the Court categorically struck down Illinois's flat ban on carrying firearms in public, explaining that "our analysis is not based on degrees of scrutiny, but on Illinois's failure to justify the most restrictive gun law of any of the 50 states." *Moore*, 702 F.3d at 941.

B. Plaintiffs' status as licensed day- and foster-care providers does not exempt the challenged restrictions from categorical invalidation.

As already noted, the firearm restrictions at issue in this case, considered in regard to their effect on the law-abiding citizens they bind, are indistinguishable from those in *Heller*: they have the effect of banning those citizens from having handguns in the home and from having *any* firearm that is "operable for the purpose of immediate self-defense." *Heller*, 554 U.S. at 635. And apart from the fact that the day care home restrictions are limited to "designated spaces for the care of young children," App.32—a feature that, as explained in Part I.B, does not exempt them from Second Amendment scrutiny—the only remaining material difference between the restrictions here and those in *Heller* is that the bans in this case apply only to individuals who in a sense "are government contractors," who "have chosen to apply for a Day Care Home [or Foster Care] License" and who, thus, "can regain their undiminished Second Amendment rights by ceasing to provide the child care services for which licensure is required." App.34, 41, 42. The district court held that

this distinction critically affected the Second Amendment analysis, but that was error.

Under the "unconstitutional conditions" doctrine, it has long been settled that the State "may not impose conditions which require the relinquishment of constitutional rights." *Frost v. Railroad Comm'n of Cal.*, 271 U.S. 583, 594 (1926). That rule "is premised on the notion that what a government cannot compel, it should not be able to coerce." *Planned Parenthood of Ind., Inc. v. Commissioner of Ind. State Dep't Health*, 699 F.3d 962, 986 (7th Cir. 2012) (quotation marks omitted). After all, "[i]f the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." *Frost*, 271 U.S. at 594. Accordingly, just as the Second Amendment bars Illinois from directly prohibiting Plaintiffs from possessing operable firearms in their home, it in equal measure bars them from trying to buy that right away from Plaintiffs—in exchange for a license that only the State can grant and that "may be vital to [their] livelihood." *Id.* at 593.

The Supreme Court's recent decision in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), confirms the point. There, too, the government sought to excuse an alleged infringement of foster caregivers' constitutional rights on the basis that "governments should enjoy greater leeway . . . when setting rules for contractors"

because "when individuals enter into government employment or contracts, they accept certain restrictions on their freedom as part of the deal." *Id.* at 1878. The Supreme Court took a different view, noting that constitutional principles "still constrain the government in its capacity as manager," and it struck the challenged government actions down. *Id.* The district court cited *Fulton*—and noted that it "nevertheless . . . [held the challenged] licensing requirement for foster care . . . unconstitutional," App.42—but it then proceeded to reach *precisely the opposite* conclusion, with *no explanation* of how that conclusion could be squared with *Fulton*. It cannot.

The few precedents that the district court did rely on do not support its conclusion. It cited *Garcetti v. Ceballos* for the proposition that "statements made by government employees pursuant to their professional duties are categorically unprotected by the First Amendment," App.44, but as *Garcetti* itself explains, that proposition has nothing to do with the doctrine of unconstitutional conditions; rather, it is based on the principle—plainly inapplicable here—that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." 547 U.S. 410, 421 (2006).

The court below also relied on the district-court opinion in *Van Dyke v. Fultz*, 2018 WL 1535141 (N.D. Ill. Mar. 29, 2018), which concerned a foster caregiver's Section 1983 challenge to a warrantless search of her foster home. The court

dismissed the challenge, but its decision is inapplicable here for multiple independent reasons: (1) it upheld the search under qualified immunity, not on the merits; (2) rather than applying the "unconstitutional conditions" doctrine, or relying on the foster parent's status as a government contractor, it applied *precisely the same Fourth Amendment analysis* that would govern any other search; and (3) it ultimately upheld the search under longstanding Fourth Amendment jurisprudence regarding the scope of consent to warrantless searches—jurisprudence that is entirely irrelevant in this case. *Id.* at *3–*4.

For their part, Defendants below sought to avoid the "unconstitutional conditions" doctrine by suggesting that a condition is not unconstitutional so long as it is "rationally related to the benefit received." Defs.' Reply in Supp. of Mot. for Summ. J. at 7, Doc. 64. That proposition, which would allow the Government to help itself to *mere rational basis review* for *any constitutional infringement*, is flatly contrary to the rationale of the unconstitutional conditions doctrine. As explained, that doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). The Constitution would *not be vindicated in the slightest* if the only result of the doctrine were to require, in the face of a government rule "awarding or withholding a public benefit for the purpose of coercing the beneficiary to give up a constitutional right or to penalize his exercise

of a constitutional right," *Planned Parenthood of Ind.*, 699 F.3d at 986, the application of *rational basis* review—the very analysis that would apply anyway, under "the separate constitutional prohibitions on irrational laws," *Heller*, 554 U.S. at 628 n.27.

Defendants sought to support their "rational basis" theory by citing an aside in this Court's decision in *Burgess v. Lowery* to the effect that "conditions can lawfully be imposed on the receipt of a benefit—conditions that may include the surrender of a constitutional right, such as the right to be free from unreasonable searches and seizures—provided the conditions are reasonable." 201 F.3d 942, 947 (7th Cir. 2000) (Posner, J.). That passage was the purest of dicta. And in any event, it did not clearly impose a "rational basis" test in the unconstitutional-conditions context—instead, it suggested that any conditions must be "reasonable," a suggestion best read as limited to the Fourth Amendment context specifically at issue in *Burgess*, where the underlying constitutional standard *is itself* "reasonableness." Again, that is the only reading of this opaque and gratuitous passage from *Burgess* that is consistent with the nature and purpose of the unconstitutional conditions doctrine.

The district court also thought the burden on Second Amendment rights less severe because "relatively few people are affected" by the challenged rules, App.34, but that is plainly unsound. The question is the effect of the challenged rule on *those*

people who are affected, not the *number* of people affected. In other words, "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894 (1992). Else, an unconstitutional law imposed by Peoria would be subject to lesser constitutional scrutiny than the same law imposed by Chicago, simply because the population of the latter jurisdiction is larger. That is not how constitutional rights work.

The short of the matter is this: There is no material difference between the bans at issue in this case (which bar Plaintiffs from possessing, in their own home, firearms operable for the purpose of immediate self-defense) and the bans struck down in *Heller* (which did exactly the same thing). Accordingly, the same analysis used in *Heller* must apply, with the same result: the challenged restrictions are "off the table." 554 U.S. at 636.

III. The challenged bans also fail heightened constitutional scrutiny.

A. At a minimum, the challenged bans must be subjected to strict scrutiny.

Even if the day-care and foster-care restrictions at issue are not categorically unconstitutional (and they are), at the very least they must be subjected to strict scrutiny, not the watered-down intermediate scrutiny applied by the district court. As the Supreme Court has explained, "strict judicial scrutiny [is] required" whenever a law "impinges upon a fundamental right explicitly or implicitly protected by the

Constitution." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). And the right to bear arms not only is enumerated in the constitutional text but also was counted "among those fundamental rights necessary to our system of ordered liberty" by "those who drafted and ratified the Bill of Rights." *McDonald*, 561 U.S. at 768, 778. Moreover, even if strict scrutiny does not apply across the board—and depends instead on "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right," *Kanter v. Barr*, 919 F.3d 437, 441 (7th Cir. 2019)—strict scrutiny would apply here. For as shown above, the challenged bans severely burden the "*central component*" of the Second Amendment: "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 599, 635.

B. Illinois's bans fail any level of heightened constitutional scrutiny.

The debate over the correct level of scrutiny is ultimately inconsequential, however, because the challenged restrictions on home day-care and foster-care providers fail any level of heightened constitutional scrutiny, including the intermediate scrutiny applied below. To survive intermediate scrutiny, a restriction must be "substantially related to the achievement" of the government's objective. *United States v. Virginia*, 518 U.S. 515, 533 (1996). Specifically, a government defending a law challenged as a violation of the Second Amendment (i) "must supply actual, reliable evidence to justify" the restriction, (ii) "cannot get away with shoddy

data or reasoning," and (iii) will fail scrutiny if the government's "empirical support for an ordinance . . . [is] too weak." *Ezell I*, 651 F.3d at 709 (citations and quotation marks omitted). "The burden of justification is demanding and it rests entirely on the State." *Virginia*, 518 U.S. at 533.

Plaintiffs do not dispute that the Government has a compelling interest in protecting children—as well as a compelling interest, as the continuing "legal guardian of children placed into foster homes," to "act in the best interests of foster children." App.42." But the evidence offered by Defendants below fails to show that the challenged bans actually advance those interests—and it *certainly* fails to show that they are not a substantially more burdensome means than necessary of doing so.

1. Defendants have failed to meet their "demanding" burden, *Virginia*, 518 U.S. at 533, of presenting "evidence that the restrictions actually have public benefits" of the kind claimed, *Ezell I*, 651 F.3d at 707. Defendants do not claim that the challenged restrictions are necessary to protect children from violence at the hand *of their caregivers*—which makes sense, given that licensed day and foster caregivers go through extensive screening, training, and background checks before being granted a license. *See, e.g.*, 225 ILL. COMP. STAT. § 10/4.2; 89 ILL. ADMIN. CODE §§ 402.12, 402.13, 406.9. Rather, Defendants argue that the challenged measures are necessary to protect children in day care and foster homes from unintentional deaths and suicide. *See* Mem. In Supp. of Mot. for Summ. J. at 21–22,

Doc. 56. And even with respect to this narrower claim, Defendants come up short because all of their evidence for those benefits shows a mere *correlation* between restrictions on firearm storage and the risk of suicide or gun death, not that particular storage restrictions *actually cause* a decrease in the risk.

The district court, for example, concluded that Defendants' experts had shown a "strong *link* between children's exposure to firearms and the risk of injury and mortality from firearms," App.38 (emphasis added), and Defendants themselves describe their evidence as demonstrating a "strong *association* between the presence of firearms in the home and the risk of suicide," Mem. In Supp. of Mot. for Summ. J. at ¶ 126, Doc. 56 (emphasis added); *see also* Decl. of Dr. Matthew Miller at 5, Doc. 56-14 ("The strong *association* between the presence of firearms in a home and the risk of suicide has been established in a large literature." (emphasis added)). But *none* of the evidence presented by Illinois—and no evidence of which Plaintiffs are aware—shows that there is any *causal* link between storage laws and gun deaths.

That means, as the Rand Corporation (hardly a bastion of pro-Second Amendment policy) summarized in a recent, comprehensive study of the social science evidence bearing on several different gun-control measures:

> In the absence of strong causal models, however, alternative explanations remain plausible. If, for instance, those most determined to kill themselves leave a weapon unsecured so that it will be available for use when they are ready to die, it could be that suicide risk determines storage practices rather than that storage practices determine suicide risk. Further research is needed to better understand

> the relationship among mental health, suicide risk, firearm ownership, and firearm behaviors.

Rand Corporation, *The Effects of Child-Access Prevention Laws*, GUN POLICY IN AMERICA (April 22, 2020), https://bit.ly/37ktXr9; *see also* FIREARMS AND VIOLENCE: A CRITICAL REVIEW 118–19 (Charles F. Wellford *et al.* eds., 2005); *First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Early Childhood Home Visitation and Firearms Laws*, 52 MORBIDITY & MORTALITY WEEKLY REP. 15, 17–18 (Oct. 3, 2003), https://bit.ly/38yH34r; Robert Hahn *et al.*, *Firearms Laws and the Reduction of Violence: A Systematic Review*, 28 AM. J. PREV. MED. 40, 40, 49, 56 (2005). Because Defendants' evidence at most shows a mere *correlation* between storage restrictions and their interest in public safety, they cannot show that those restrictions will actually advance that interest. *Cf. Brown v. Entertainment Merchs. Ass'n*, 564 U.S. 786, 800 (2011) (concluding that strict scrutiny was not satisfied by empirical studies "based on correlation, not evidence of causation," and noting that studies showing only correlation had "been rejected by every court to consider them").

Defendants' experts try to gloss over this critical problem with their evidence by suggesting that the "best explanation for the association between access to household firearms and death by suicide is a causal link" because "no other well-established suicide risk factor" is "meaningfully more common" in the empirical studies than the presence of firearms. Decl. of Dr. Matthew Miller at 6, Doc. 56-14

(emphasis omitted). But they nonetheless admitted in deposition testimony that the data they rely upon all comes from "ecological evidence" that is "more corroborative" in nature and not "as definitive as . . . individual level studies." Dep. of Dr. Matthew Miller at 27:5–8, Doc. 64-1. Indeed, it is axiomatic in social science research that ecological studies alone can at most provide evidence of correlation, not causation. *See Ecological Fallacy*, ENCYCLOPEDIA BRITANNICA, https://bit.ly/3rrb1hp.

Finally, while Defendants argue—based on their evidence of correlation—that the challenged bans "reduce the risk of death and injury to minors," Mem. In Supp. of Mot. for Summ. J. at 2, Doc. 56, they completely discount the offsetting risk that depriving homeowners of firearms operable for the purpose of immediate self-defense will in fact *increase* the risk of gun death by preventing effective self-defense. And that risk is substantial. Although the number of defensive gun uses is difficult to measure, the leading study on the issue, the National Self-Defense Survey, "indicate[s] that each year in the U.S. there are about 2.2 to 2.5 million [defensive uses of guns] of all types by civilians against humans." Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 164 (1995). "At least 19 other surveys have resulted in [similar] estimated numbers of defensive gun uses." NATIONAL RESEARCH COUNCIL, FIREARMS AND VIOLENCE 103 (2005); *see also*

William English, *2021 National Firearms Survey* 10 (July 14, 2021), https://bit.ly/3xt40jS (estimating, based on survey of over 16,000 firearm owners, approximately 1.67 million defensive uses of firearms per year). What is more, "[a]lmost all national survey estimates indicate that defensive gun uses by victims are at least as common as offensive uses by criminals." INSTITUTE OF MEDICINE AND NATIONAL RESEARCH COUNCIL, PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE 15 (2013), http://goo.gl/oO6oRp (citation omitted).

Defensive gun uses are not only common, they are also effective. Numerous studies have found that robbery victims who resist with firearms are significantly less likely to have their property taken and are also less likely to be injured. GARY KLECK, TARGETING GUNS 170 (1997). "Robbery and assault victims who used a gun to resist were less likely to be attacked or to suffer an injury than those who used any other methods of self-protection or those who did not resist at all." *Id.* at 171. Similarly, "rape victims using armed resistance were less likely to have the rape attempt completed against them than victims using any other mode of resistance." *Id.* at 175. Indeed, Justice Department statistics reveal that the probability of serious injury from any kind of attack is 2.5 times greater for women offering no resistance than for women resisting with a gun. Lawrence Southwick, Jr., *Self-defense With Guns: The Consequences*, 28 J. CRIM. JUST. 351, 362 tbl.6 (2000). "[V]ictim

resistance with a gun almost never provokes the criminal into inflicting either fatal or nonfatal violence." KLECK, TARGETING GUNS, *supra*, at 174.

Accordingly, Illinois's limits, by impeding effective self-defense in the home, may well *cause an increase* in violent gun deaths. Defendants resist this conclusion, arguing that "no epidemiologic studies" show any "countervailing mortality benefit to children if they live in a household where firearms are present and/or accessible." Mem. In Supp. of Mot. for Summ. J. at ¶ 140, Doc. 56. But once again, this conclusion is based on the same type of ecological studies discussed above. Defendants thus cannot rule out the very real possibility that the availability of firearms in the home operable for the purpose of immediate self-defense *does cause* fewer gun deaths, but that this does not show up in the ecological data because, for instance, the very individuals who are more likely to have accessible self-defense firearms in the home suffer from a *greater baseline risk of gun death*—on account of living in a high-crime area, for example.

Accordingly, Defendants have failed to show that the challenged bans actually further public safety—and they may well *harm* it.

2. The challenged limits also fail the tailoring prong of heightened scrutiny. While laws subject to intermediate scrutiny "need not be the least restrictive or least intrusive means of serving the government's interests," they still must be narrowly tailored, possessing "a close fit between ends and means."

McCullen, 573 U.S. at 486 (quotation marks omitted). Defendants' bans fail this requirement in both ways that a law can fail it: they are both *under*inclusive and *over*inclusive with respect to the State's asserted public-safety ends.

Begin with underinclusiveness. Defendants acknowledge, and the district court found, that they presented no "direct evidence specifically addressing the issue of whether children in day care homes benefit from the removal of handguns or the storage of other firearms disassembled in locked containers separate from ammunition." App.37; *see also* Mem. In Supp. of Mot. for Summ. J. at 21, Doc. 56. Instead, their argument proceeds by (1) suggesting that their handgun storage measures are associated with fewer gun deaths *in households generally*, and then (2) urging that this finding should "apply equally to households in which children live and households in which children spend time," *i.e.* day care homes. App.38. But this means that whatever public safety benefit the challenged firearm storage restrictions may yield in the foster and day-care homes where they apply (and again, no benefit has been proven), would redound *equally* if they applied in *every other household*. Yet neither the challenged statutes and rules nor any other Illinois law impose these or similar requirements on gun owners generally. *See Safe Storage*, Giffords Law Center, https://bit.ly/3rs84gC; 720 ILL. COMP. STAT. § 5/24-9.5 (merely requiring that handguns sold by licensed dealers be accompanied with a locking device).

To be sure, constitutional scrutiny does not generally impose a "freestanding 'underinclusiveness limitation.' " *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 449 (2015). But underinclusiveness *does* raise "a red flag," and can "reveal that a law does not actually advance a compelling interest." *Id.* Underinclusiveness, for example, "raise[s] serious doubts about whether the government is in fact pursuing the interest it invokes." *Brown*, 564 U.S.at 802. The dramatic underinclusiveness of the challenged restrictions must give rise to such doubts here.

3. Finally, the challenged bans independently fail intermediate scrutiny because they are also seriously *over*inclusive—burdening far more constitutionally protected conduct than has been shown necessary to advance the State's interests. Under intermediate scrutiny "the government must demonstrate that alternative measures that [would] burden substantially less [protected conduct] *would fail* to achieve the government's interests." *McCullen*, 573 U.S. at 495 (emphasis added). In *McCullen*, for example, the Supreme Court struck down a Massachusetts "buffer zone" law forbidding certain types of speech outside of abortion clinics, reasoning that the State had failed to show that measures substantially less restrictive than such an extreme prophylactic measure were not just as "capable of serving its interests." *Id.* at 494. Massachusetts's law, the Court noted, was "truly exceptional," and the State was able to "identify no other [ ] law" that was comparable, raising the "concern that the Commonwealth has too readily forgone options that could serve

its interests just as well." *Id.* at 490. And even in the context of intermediate scrutiny, the Court concluded, the State must "show[ ] that it seriously undertook to address the problem with less intrusive tools readily available to it," or at the least, "that it considered different methods that other jurisdictions have found effective." *Id.* at 494. This requirement, the Court explained, "prevents the government from too readily sacrificing speech for efficiency." *Id.* at 486 (cleaned up).

The challenged bans here flunk intermediate scrutiny under the very same reasoning. There are myriad alternatives Illinois could try that would protect foster children, and children in home day cares, from gun violence, and it has failed to show that that those less-burdensome restrictions would not serve its interests just as effectively.

Most glaringly, Defendants could impose their onerous storage requirements only for any firearms *that are not carried directly on the homeowner's person*. All States that impose general gun-storage requirements create an exception for firearms within the owner's direct control,[5] and while Plaintiffs take no position on the constitutionality of that type of regime, it obviously poses a quite dramatically lesser burden on the Second Amendment right to effective, armed self-defense than the

[5] CAL. PENAL CODE § 25135(a)(6); COLO. REV. STAT. § 18-12-114(1)(a); CONN. GEN. STAT. ANN. § 29-37i; MASS. GEN. LAWS ANN. ch. 140, § 131L(a); NEW YORK PENAL LAW § 265.45; OR. REV. STAT. § 166.395(1)(a); *see also See Safe Storage*, Giffords Law Center, https://bit.ly/3rs84gC.

blanket requirements imposed by Defendants. *See McCullen*, 573 U.S. at 491 n.8 (not taking any position on whether the less-burdensome alternatives themselves would "pass constitutional muster").

Yet as Defendants' expert admitted, they have offered *no data* showing that this less-restrictive regime would be *any less effective* in preventing child gun deaths than the current, challenged bans. When asked, during his deposition, whether there is any evidence that storing handguns locked, unloaded and separate from the ammunition, as Defendants' rules require, yields a greater safety benefit than the owner "carrying [the handgun] in a holster on their person," Defendant's expert responded that "there are no data that speak to [that] situation," and that "I have no empirical data to reference and so no scientific opinion about that." Dep. of Dr. Matthew Miller at 200:7–21, Doc. 64-1. That concession is fatal to the constitutionality of the challenged bans.

The foster care ban is obviously overinclusive in another way, as well: it applies during a foster parent's *entire period of licensure*, even during times when *no foster children have been placed with them*. *See* 89 ILL. ADMIN. CODE §§ 402.4(c); 402.8(o). Whatever interest the State may have in restricting the presence of firearms in the home while foster children are actually living there, this interest quite obviously has no application whatsoever during periods when there are no foster children residing in the home. The State's failure to limit its bans to those

periods when a foster child is actually in residence is also fatal to the challenged restrictions.

It does not take a rich imagination to think of other less-restrictive alternatives that defendants could, but have not, tried. Illinois could require that any loaded firearms be stored in a biometric safe accessible only to the owner. Or it could require that they be stored in an ordinary safe but that the owner keep the key (or the combination) inaccessible from any children in the house. Again, Plaintiffs do not endorse the constitutionality of such requirements; but defendants have no evidence that these alternatives would be less effective in ensuring child safety, and the more-burdensome restrictions they have imposed thus cannot stand.

Indeed, the State has not come forward with evidence that it *even considered* these less-restrictive alternatives—and that alone is fatal under intermediate scrutiny. The Supreme Court squarely held in *McCullen* that where a restriction burdens constitutional rights and is subject to intermediate scrutiny, the Government must show "that it seriously undertook to address the problem with less intrusive tools readily available to it," or that it at least "considered different methods that other jurisdictions have found effective." 573 U.S. at 494. "In other words, the government is obliged to demonstrate that it actually tried or considered less-[arms-bearing]-restrictive alternatives and that such alternatives were inadequate to serve the government's interest." *Billups v. City of Charleston* 961 F.3d 673, 688 (4th Cir.

2020); *see also Bruni v. City of Pittsburgh*, 824 F.3d 353, 371 (3d Cir. 2016) (government "may not forego a range of alternatives—which would burden substantially less [constitutionally protected conduct]—without a meaningful record demonstrating that those options would fail to alleviate the problems meant to be addressed"). Defendants have made no such showing, and that independently requires reversal of the judgment below and entry of an injunction against the challenged bans.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the district court and remand with instructions to enter judgment in favor of Appellants.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Circuit Rule 32(c) because it contains 12,234 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

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May 4, 2022

/s/ David H. Thompson
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STATUTORY ADDENDUM – PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

TABLE OF CONTENTS

Page

U.S. CONST. amend. II.

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.

U.S. CONST. amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

225 ILL. COMP. STAT. § 10/4. License requirement; application; notice.

(a) Any person, group of persons or corporation who or which receives children or arranges for care or placement of one or more children unrelated to the operator must apply for a license to operate one of the types of facilities defined in Sections 2.05 through 2.19 and in Section 2.22 of this Act. Any relative, as defined in Section 2.17 of this Act, who receives a child or children for placement by the Department on a full-time basis may apply for a license to operate a foster family home as defined in Section 2.17 of this Act.

. . .

(b) Application for a license to operate a child care facility must be made to the Department in the manner and on forms prescribed by it. An application to operate a foster family home shall include, at a minimum: a completed written form; written authorization by the applicant and all adult members of the applicant's household to conduct a criminal background investigation; medical evidence in the form of a medical report, on forms prescribed by the Department, that the applicant and all members of the household are free from communicable diseases or physical and mental conditions that affect their ability to provide care for the child or children; the names and addresses of at least 3 persons not related to the applicant who can attest to the applicant's moral character; the name and address of at least one relative who can attest to the applicant's capability to care for the child or children; and fingerprints submitted by the applicant and all adult members of the applicant's household.

. . .

(d) If, upon examination of the facility and investigation of persons responsible for care of children and, in the case of a foster home, taking into account information obtained for purposes of evaluating a preliminary application, if applicable, the Department is satisfied that the facility and responsible persons reasonably meet standards prescribed for the type of facility for which application is made, it shall issue a license in proper form, designating on that license the type of child care facility and, except for a child welfare agency, the number of children to be served at any one time.

225 ILL. COMP. STAT. § 10/4.2. License; employment at facility; residence in facility; eligibility.

(a) No applicant may receive a license from the Department and no person may be employed by a licensed child care facility who refuses to authorize an investigation as required by Section 4.1.

(b) In addition to the other provisions of this Section, no applicant may receive a license from the Department and no person may be employed by a child care facility licensed by the Department who has been declared a sexually dangerous person under "An Act in relation to sexually dangerous persons, and providing for their commitment, detention and supervision", approved July 6, 1938, as amended,[1] or convicted of committing or attempting to commit any of the following offenses stipulated under the Criminal Code of 1961 or the Criminal Code of 2012:[2]

(1) murder;

(1.1) solicitation of murder;

(1.2) solicitation of murder for hire;

(1.3) intentional homicide of an unborn child;

(1.4) voluntary manslaughter of an unborn child;

(1.5) involuntary manslaughter;

[1] Former Ill.Rev.Stat. ch. 38, ¶ 105-1 et seq.
[2] 720 ILCS 5/1-1 et seq.

(1.6) reckless homicide;

(1.7) concealment of a homicidal death;

(1.8) involuntary manslaughter of an unborn child;

(1.9) reckless homicide of an unborn child;

(1.10) drug-induced homicide;

(2) a sex offense under Article 11,[3] except offenses described in Sections 11-7, 11-8, 11-12, 11-13, 11-35, 11-40, and 11-45;[4]

(3) kidnapping;

(3.1) aggravated unlawful restraint;

(3.2) forcible detention;

(3.3) harboring a runaway;

(3.4) aiding and abetting child abduction;

(4) aggravated kidnapping;

(5) child abduction;

(6) aggravated battery of a child as described in Section 12-4.3 or subdivision (b)(1) of Section 12-3.05;

(7) criminal sexual assault;

(8) aggravated criminal sexual assault;

(8.1) predatory criminal sexual assault of a child;

(9) criminal sexual abuse;

(10) aggravated sexual abuse;

(11) heinous battery as described in Section 12-4.1 or subdivision (a)(2)

[3] 720 ILCS 5/11-1.10 et seq.

[4] 720 ILCS 5/11-7, 5/11-8, 5/11-12, 5/11-13 (repealed), 5/11-35, 5/11-40, and 5/11-45.

of Section 12-3.05;

(12) aggravated battery with a firearm as described in Section 12-4.2 or subdivision (e)(1), (e)(2), (e)(3), or (e)(4) of Section 12-3.05;

(13) tampering with food, drugs, or cosmetics;

(14) drug induced infliction of great bodily harm as described in Section 12-4.7 or subdivision (g)(1) of Section 12-3.05;

(15) hate crime;

(16) stalking;

(17) aggravated stalking;

(18) threatening public officials;

(19) home invasion;

(20) vehicular invasion;

(21) criminal transmission of HIV;

(22) criminal abuse or neglect of an elderly person or person with a disability as described in Section 12-21 or subsection (e) of Section 12-4.4a;

(23) child abandonment;

(24) endangering the life or health of a child;

(25) ritual mutilation;

(26) ritualized abuse of a child;

(27) an offense in any other jurisdiction the elements of which are similar and bear a substantial relationship to any of the foregoing offenses.

(b-1) In addition to the other provisions of this Section, beginning January 1, 2004, no new applicant and, on the date of licensure renewal, no current licensee may operate or receive a license from the Department to operate, no person may be employed by, and no adult person may reside in a child care facility licensed by the Department who has been convicted of committing

or attempting to commit any of the following offenses or an offense in any other jurisdiction the elements of which are similar and bear a substantial relationship to any of the following offenses:

(I) BODILY HARM

(1) Felony aggravated assault.

(2) Vehicular endangerment.

(3) Felony domestic battery.

(4) Aggravated battery.

(5) Heinous battery.

(6) Aggravated battery with a firearm.

(7) Aggravated battery of an unborn child.

(8) Aggravated battery of a senior citizen.

(9) Intimidation.

(10) Compelling organization membership of persons.

(11) Abuse and criminal neglect of a long term care facility resident.

(12) Felony violation of an order of protection.

(II) OFFENSES AFFECTING PUBLIC HEALTH, SAFETY, AND DECENCY

(1) Felony unlawful use of weapons.

(2) Aggravated discharge of a firearm.

(3) Reckless discharge of a firearm.

(4) Unlawful use of metal piercing bullets.

(5) Unlawful sale or delivery of firearms on the premises of any school.

(6) Disarming a police officer.

(7) Obstructing justice.

(8) Concealing or aiding a fugitive.

(9) Armed violence.

(10) Felony contributing to the criminal delinquency of a juvenile.

(III) DRUG OFFENSES

(1) Possession of more than 30 grams of cannabis.

(2) Manufacture of more than 10 grams of cannabis.

(3) Cannabis trafficking.

(4) Delivery of cannabis on school grounds.

(5) Unauthorized production of more than 5 cannabis sativa plants.

(6) Calculated criminal cannabis conspiracy.

(7) Unauthorized manufacture or delivery of controlled substances.

(8) Controlled substance trafficking.

(9) Manufacture, distribution, or advertisement of look-alike substances.

(10) Calculated criminal drug conspiracy.

(11) Street gang criminal drug conspiracy.

(12) Permitting unlawful use of a building.

(13) Delivery of controlled, counterfeit, or look-alike substances to persons under age 18, or at truck stops, rest stops, or safety rest areas, or on school property.

(14) Using, engaging, or employing persons under 18 to deliver controlled, counterfeit, or look-alike substances.

(15) Delivery of controlled substances.

(16) Sale or delivery of drug paraphernalia.

(17) Felony possession, sale, or exchange of instruments adapted for use of a controlled substance, methamphetamine, or cannabis by subcutaneous injection.

(18) Felony possession of a controlled substance.

(19) Any violation of the Methamphetamine Control and Community Protection Act.[5]

(b-1.5) In addition to any other provision of this Section, for applicants with access to confidential financial information or who submit documentation to support billing, the Department may, in its discretion, deny or refuse to renew a license to an applicant who has been convicted of committing or attempting to commit any of the following felony offenses:

(1) financial institution fraud under Section 17-10.6 of the Criminal Code of 1961 or the Criminal Code of 2012;

(2) identity theft under Section 16-30 of the Criminal Code of 1961 or the Criminal Code of 2012;

(3) financial exploitation of an elderly person or a person with a disability under Section 17-56 of the Criminal Code of 1961 or the Criminal Code of 2012;

(4) computer tampering under Section 17-51 of the Criminal Code of 1961 or the Criminal Code of 2012;

(5) aggravated computer tampering under Section 17-52 of the Criminal Code of 1961 or the Criminal Code of 2012;

(6) computer fraud under Section 17-50 of the Criminal Code of 1961 or the Criminal Code of 2012;

(7) deceptive practices under Section 17-1 of the Criminal Code of 1961 or the Criminal Code of 2012;

(8) forgery under Section 17-3 of the Criminal Code of 1961 or the Criminal Code of 2012;

(9) State benefits fraud under Section 17-6 of the Criminal Code of 1961

[5] 720 ILCS 646/1 et seq.

or the Criminal Code of 2012;

(10) mail fraud and wire fraud under Section 17-24 of the Criminal Code of 1961 or the Criminal Code of 2012;

(11) theft under paragraphs (1.1) through (11) of subsection (b) of Section 16-1 of the Criminal Code of 1961 or the Criminal Code of 2012.

(b-2) Notwithstanding subsection (b-1), the Department may make an exception and, for child care facilities other than foster family homes, issue a new child care facility license to or renew the existing child care facility license of an applicant, a person employed by a child care facility, or an applicant who has an adult residing in a home child care facility who was convicted of an offense described in subsection (b-1), provided that all of the following requirements are met:

(1) The relevant criminal offense occurred more than 5 years prior to the date of application or renewal, except for drug offenses. The relevant drug offense must have occurred more than 10 years prior to the date of application or renewal, unless the applicant passed a drug test, arranged and paid for by the child care facility, no less than 5 years after the offense.

(2) The Department must conduct a background check and assess all convictions and recommendations of the child care facility to determine if hiring or licensing the applicant is in accordance with Department administrative rules and procedures.

(3) The applicant meets all other requirements and qualifications to be licensed as the pertinent type of child care facility under this Act and the Department's administrative rules.

(c) In addition to the other provisions of this Section, no applicant may receive a license from the Department to operate a foster family home, and no adult person may reside in a foster family home licensed by the Department, who has been convicted of committing or attempting to commit any of the following offenses stipulated under the Criminal Code of 1961, the Criminal Code of 2012, the Cannabis Control Act,[6] the Methamphetamine Control and Community Protection Act, and the Illinois

[6] 720 ILCS 550/1 et seq.

Controlled Substances Act:[7]

(I) OFFENSES DIRECTED AGAINST THE PERSON

(A) KIDNAPPING AND RELATED OFFENSES

(1) Unlawful restraint.

(B) BODILY HARM

(2) Felony aggravated assault.

(3) Vehicular endangerment.

(4) Felony domestic battery.

(5) Aggravated battery.

(6) Heinous battery.

(7) Aggravated battery with a firearm.

(8) Aggravated battery of an unborn child.

(9) Aggravated battery of a senior citizen.

(10) Intimidation.

(11) Compelling organization membership of persons.

(12) Abuse and criminal neglect of a long term care facility resident.

(13) Felony violation of an order of protection.

(II) OFFENSES DIRECTED AGAINST PROPERTY

(14) Felony theft.

(15) Robbery.

(16) Armed robbery.

[7] 720 ILCS 570/100 et seq.

(17) Aggravated robbery.

(18) Vehicular hijacking.

(19) Aggravated vehicular hijacking.

(20) Burglary.

(21) Possession of burglary tools.

(22) Residential burglary.

(23) Criminal fortification of a residence or building.

(24) Arson.

(25) Aggravated arson.

(26) Possession of explosive or explosive incendiary devices.

(III) OFFENSES AFFECTING PUBLIC HEALTH, SAFETY, AND DECENCY

(27) Felony unlawful use of weapons.

(28) Aggravated discharge of a firearm.

(29) Reckless discharge of a firearm.

(30) Unlawful use of metal piercing bullets.

(31) Unlawful sale or delivery of firearms on the premises of any school.

(32) Disarming a police officer.

(33) Obstructing justice.

(34) Concealing or aiding a fugitive.

(35) Armed violence.

(36) Felony contributing to the criminal delinquency of a juvenile.

(IV) DRUG OFFENSES

(37) Possession of more than 30 grams of cannabis.

(38) Manufacture of more than 10 grams of cannabis.

(39) Cannabis trafficking.

(40) Delivery of cannabis on school grounds.

(41) Unauthorized production of more than 5 cannabis sativa plants.

(42) Calculated criminal cannabis conspiracy.

(43) Unauthorized manufacture or delivery of controlled substances.

(44) Controlled substance trafficking.

(45) Manufacture, distribution, or advertisement of look-alike substances.

(46) Calculated criminal drug conspiracy.

(46.5) Streetgang criminal drug conspiracy.

(47) Permitting unlawful use of a building.

(48) Delivery of controlled, counterfeit, or look-alike substances to persons under age 18, or at truck stops, rest stops, or safety rest areas, or on school property.

(49) Using, engaging, or employing persons under 18 to deliver controlled, counterfeit, or look-alike substances.

(50) Delivery of controlled substances.

(51) Sale or delivery of drug paraphernalia.

(52) Felony possession, sale, or exchange of instruments adapted for use of a controlled substance, methamphetamine, or cannabis by subcutaneous injection.

(53) Any violation of the Methamphetamine Control and Community Protection Act.

(d) Notwithstanding subsection (c), the Department may make an exception

and issue a new foster family home license or may renew an existing foster family home license of an applicant who was convicted of an offense described in subsection (c), provided all of the following requirements are met:

(1) The relevant criminal offense or offenses occurred more than 10 years prior to the date of application or renewal.

(2) The applicant had previously disclosed the conviction or convictions to the Department for purposes of a background check.

(3) After the disclosure, the Department either placed a child in the home or the foster family home license was issued.

(4) During the background check, the Department had assessed and waived the conviction in compliance with the existing statutes and rules in effect at the time of the hire or licensure.

(5) The applicant meets all other requirements and qualifications to be licensed as a foster family home under this Act and the Department's administrative rules.

(6) The applicant has a history of providing a safe, stable home environment and appears able to continue to provide a safe, stable home environment.

(e) In evaluating the exception pursuant to subsections (b-2) and (d), the Department must carefully review any relevant documents to determine whether the applicant, despite the disqualifying convictions, poses a substantial risk to State resources or clients. In making such a determination, the following guidelines shall be used:

(1) the age of the applicant when the offense was committed;

(2) the circumstances surrounding the offense;

(3) the length of time since the conviction;

(4) the specific duties and responsibilities necessarily related to the license being applied for and the bearing, if any, that the applicant's conviction history may have on his or her fitness to perform these duties and responsibilities;

(5) the applicant's employment references;

(6) the applicant's character references and any certificates of achievement;

(7) an academic transcript showing educational attainment since the disqualifying conviction;

(8) a Certificate of Relief from Disabilities or Certificate of Good Conduct; and

(9) anything else that speaks to the applicant's character.

225 ILL. COMP. STAT. § 10/7. Minimum standards for licensing of facilities.

(a) The Department must prescribe and publish minimum standards for licensing that apply to the various types of facilities for child care defined in this Act and that are equally applicable to like institutions under the control of the Department and to foster family homes used by and under the direct supervision of the Department. The Department shall seek the advice and assistance of persons representative of the various types of child care facilities in establishing such standards. The standards prescribed and published under this Act take effect as provided in the Illinois Administrative Procedure Act,[1] and are restricted to regulations pertaining to the following matters and to any rules and regulations required or permitted by any other Section of this Act:

(1) The operation and conduct of the facility and responsibility it assumes for child care;

(2) The character, suitability and qualifications of the applicant and other persons directly responsible for the care and welfare of children served. All child day care center licensees and employees who are required to report child abuse or neglect under the Abused and Neglected Child Reporting Act[2] shall be required to attend training on recognizing child abuse and neglect, as prescribed by Department rules;

(3) The general financial ability and competence of the applicant to provide necessary care for children and to maintain prescribed standards;

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[1] 5 ILCS 100/1-1 et seq.

[2] 325 ILCS 5/1 et seq.

(4) The number of individuals or staff required to insure adequate supervision and care of the children received. The standards shall provide that each child care institution, maternity center, day care center, group home, day care home, and group day care home shall have on its premises during its hours of operation at least one staff member certified in first aid, in the Heimlich maneuver and in cardiopulmonary resuscitation by the American Red Cross or other organization approved by rule of the Department. Child welfare agencies shall not be subject to such a staffing requirement. The Department may offer, or arrange for the offering, on a periodic basis in each community in this State in cooperation with the American Red Cross, the American Heart Association or other appropriate organization, voluntary programs to train operators of foster family homes and day care homes in first aid and cardiopulmonary resuscitation;

(5) The appropriateness, safety, cleanliness, and general adequacy of the premises, including maintenance of adequate fire prevention and health standards conforming to State laws and municipal codes to provide for the physical comfort, care, and well-being of children received;

(6) Provisions for food, clothing, educational opportunities, program, equipment and individual supplies to assure the healthy physical, mental, and spiritual development of children served;

(7) Provisions to safeguard the legal rights of children served;

(8) Maintenance of records pertaining to the admission, progress, health, and discharge of children, including, for day care centers and day care homes, records indicating each child has been immunized as required by State regulations. The Department shall require proof that children enrolled in a facility have been immunized against Haemophilus Influenzae B (HIB);

(9) Filing of reports with the Department;

(10) Discipline of children;

(11) Protection and fostering of the particular religious faith of the children served;

(12) Provisions prohibiting firearms on day care center premises except in the possession of peace officers;

(13) Provisions prohibiting handguns on day care home premises except in the possession of peace officers or other adults who must possess a handgun as a condition of employment and who reside on the premises of a day care home;

(14) Provisions requiring that any firearm permitted on day care home premises, except handguns in the possession of peace officers, shall be kept in a disassembled state, without ammunition, in locked storage, inaccessible to children and that ammunition permitted on day care home premises shall be kept in locked storage separate from that of disassembled firearms, inaccessible to children;

(15) Provisions requiring notification of parents or guardians enrolling children at a day care home of the presence in the day care home of any firearms and ammunition and of the arrangements for the separate, locked storage of such firearms and ammunition;

(16) Provisions requiring all licensed child care facility employees who care for newborns and infants to complete training every 3 years on the nature of sudden unexpected infant death (SUID), sudden infant death syndrome (SIDS), and the safe sleep recommendations of the American Academy of Pediatrics; and

(17) With respect to foster family homes, provisions requiring the Department to review quality of care concerns and to consider those concerns in determining whether a foster family home is qualified to care for children.

By July 1, 2022, all licensed day care home providers, licensed group day care home providers, and licensed day care center directors and classroom staff shall participate in at least one training that includes the topics of early childhood social emotional learning, infant and early childhood mental health, early childhood trauma, or adverse childhood experiences. Current licensed providers, directors, and classroom staff shall complete training by July 1, 2022 and shall participate in training that includes the above topics at least once every 3 years.

(b) If, in a facility for general child care, there are children diagnosed as mentally ill or children diagnosed as having an intellectual or physical disability, who are determined to be in need of special mental treatment or of nursing care, or both mental treatment and nursing care, the Department shall

seek the advice and recommendation of the Department of Human Services, the Department of Public Health, or both Departments regarding the residential treatment and nursing care provided by the institution.

(c) The Department shall investigate any person applying to be licensed as a foster parent to determine whether there is any evidence of current drug or alcohol abuse in the prospective foster family. The Department shall not license a person as a foster parent if drug or alcohol abuse has been identified in the foster family or if a reasonable suspicion of such abuse exists, except that the Department may grant a foster parent license to an applicant identified with an alcohol or drug problem if the applicant has successfully participated in an alcohol or drug treatment program, self-help group, or other suitable activities and if the Department determines that the foster family home can provide a safe, appropriate environment and meet the physical and emotional needs of children.

(d) The Department, in applying standards prescribed and published, as herein provided, shall offer consultation through employed staff or other qualified persons to assist applicants and licensees in meeting and maintaining minimum requirements for a license and to help them otherwise to achieve programs of excellence related to the care of children served. Such consultation shall include providing information concerning education and training in early childhood development to providers of day care home services. The Department may provide or arrange for such education and training for those providers who request such assistance.

(e) The Department shall distribute copies of licensing standards to all licensees and applicants for a license. Each licensee or holder of a permit shall distribute copies of the appropriate licensing standards and any other information required by the Department to child care facilities under its supervision. Each licensee or holder of a permit shall maintain appropriate documentation of the distribution of the standards. Such documentation shall be part of the records of the facility and subject to inspection by authorized representatives of the Department.

(f) The Department shall prepare summaries of day care licensing standards. Each licensee or holder of a permit for a day care facility shall distribute a copy of the appropriate summary and any other information required by the Department, to the legal guardian of each child cared for in that facility at the time when the child is enrolled or initially placed in the facility. The licensee or holder of a permit for a day care facility shall secure appropriate

documentation of the distribution of the summary and brochure. Such documentation shall be a part of the records of the facility and subject to inspection by an authorized representative of the Department.

(g) The Department shall distribute to each licensee and holder of a permit copies of the licensing or permit standards applicable to such person's facility. Each licensee or holder of a permit shall make available by posting at all times in a common or otherwise accessible area a complete and current set of licensing standards in order that all employees of the facility may have unrestricted access to such standards. All employees of the facility shall have reviewed the standards and any subsequent changes. Each licensee or holder of a permit shall maintain appropriate documentation of the current review of licensing standards by all employees. Such records shall be part of the records of the facility and subject to inspection by authorized representatives of the Department.

(h) Any standards involving physical examinations, immunization, or medical treatment shall include appropriate exemptions for children whose parents object thereto on the grounds that they conflict with the tenets and practices of a recognized church or religious organization, of which the parent is an adherent or member, and for children who should not be subjected to immunization for clinical reasons.

(i) The Department, in cooperation with the Department of Public Health, shall work to increase immunization awareness and participation among parents of children enrolled in day care centers and day care homes by publishing on the Department's website information about the benefits of immunization against vaccine preventable diseases, including influenza and pertussis. The information for vaccine preventable diseases shall include the incidence and severity of the diseases, the availability of vaccines, and the importance of immunizing children and persons who frequently have close contact with children. The website content shall be reviewed annually in collaboration with the Department of Public Health to reflect the most current recommendations of the Advisory Committee on Immunization Practices (ACIP). The Department shall work with day care centers and day care homes licensed under this Act to ensure that the information is annually distributed to parents in August or September.

(j) Any standard adopted by the Department that requires an applicant for a license to operate a day care home to include a copy of a high school diploma or equivalent certificate with his or her application shall be deemed to be

satisfied if the applicant includes a copy of a high school diploma or equivalent certificate or a copy of a degree from an accredited institution of higher education or vocational institution or equivalent certificate.

89 ILL. ADMIN. CODE § 402.4. Application for License.

a) Application for license as a foster family home shall be completed, signed by the foster parent applicants, and filed with the Department of Children and Family Services by the supervising agency on forms prescribed by the Department. Applications submitted to the Department after July 1, 1995 shall be a complete application for a foster family home license, as defined in Section 402.2. Any relative who receives a child or children for placement on a full-time basis may apply for a license to operate a foster family home as defined in Section 2.17 of the Child Care Act of 1969 [225 ILCS 10/2.17].

b) When a contractor with the Department or an employee of the State of Illinois seeks to become licensed as a foster family home, the study to determine compliance with licensing standards shall be provided by a licensed child welfare agency other than the Department and by persons who have no significant working relationship or personal relationship with the contractor or State employee. If the license is granted, the contractor or State employee may continue his or her contract or employment while operating the foster family home. The contractor's or employee's foster family home shall be supervised, monitored, licensed and evaluated by a licensed child welfare agency other than the Department and by individuals who have no significant working relationship or personal relationship with the employee. The contractor or employee shall consult with appropriate contract monitors and/or supervisors to make sure his or her official duties do not involve any interaction with the licensed child welfare agency responsible for supervising, monitoring, licensing, or evaluating the foster family home of the contractor or employee. When a foster parent contracted by the Department to provide support services to other foster parents chooses not to be supervised and monitored by a private agency, the foster parent may be licensed by the Department only when licensing and supervision is provided from Department staff in a region outside the contracted foster parent's region of residence and service provision.

c) As part of the application, each foster family home applicant and adult member of the household shall authorize background checks in accordance with 89 Ill. Adm. Code 385 (Background Checks) and shall submit to fingerprinting to determine if the individual has ever been charged with a

crime, and if so, the disposition of the charges. In addition, members of the household ages 13 through 17 must authorize a check of CANTS and the Child Sex Offender Registry.

d) The child welfare agency shall conduct a home study for each initial application for foster home licensure under its supervision. The home study shall be conducted by a qualified licensing representative and shall be reviewed and approved by a qualified licensing supervisor. (Supervisor requirements can be found in 89 Ill. Adm. Code 401, Licensing Standards for Child Welfare Agencies.) The home study shall require the licensing representative to have one scheduled initial on-site visit to determine if the home meets licensing standards. The licensing representative shall provide in writing how the applicants can meet standards, or why they cannot meet standards, for foster home licensure at that time.

1) When more than 30 days have passed since the licensing representative has been to the home, prior to the recommendation to issue a foster home license, the licensing representative shall go to the home a second time to ensure the home continues to meet the requirements of this Part.

2) The licensing representative shall make a scheduled visit to the home when all household members are present to observe and assess family dynamics. The licensing representative, with supervisory approval, shall have discretion on whether to interview or observe each household member based on his or her age and development.

3) The licensing representative shall assess the applicant and the applicant's ability to communicate and effectively work with youth in care in conjunction with the youth's health care providers and other service providers.

4) Before a final recommendation for licensure is made, applicants shall provide specific and signed assurances they understand and shall adhere to provisions of this Part that include, but are not limited to, corporal punishment, smoking, alcohol and/or drug use, and reasonable and prudent parenting standards.

e) A new application shall be filed when any of the following occurs:

1) when an application for license has been withdrawn, and the licensee or agency seeks to reapply; or

2) when there is a change in the name of the licensee, the address of the foster home or the supervising agency; or

3) when there is a change in the status of joint licensees, such as marriage, entering into a civil union, separation, divorce, dissolving a civil union, or death; or

4) not sooner than 12 months after the Department has revoked or refused to renew a license, and a new license is sought.

f) A new application may be submitted at any time, including following the denial of an application for license, except that when a license has been revoked or the Department has refused to renew a license, the licensee may not reapply for licensure as a foster family home for a period of one year after revocation or refusal to renew.

89 ILL. ADMIN. CODE § 402.8. General Requirements for the Foster Home.

a) The foster home shall be clean, well ventilated, free from observable hazards, properly lighted, heated and cooled, and free of fire hazards.

b) The foster home may not use or have on the premises any unsafe children's product as described in the Children's Product Safety Act [430 ILCS 125] and 89 Ill. Adm. Code 386 (Children's Product Safety).

c) A foster home shall have a kitchen, including, but not limited to, properly operating appliances (at a minimum, stove, oven, refrigerator and sink).

d) A foster home shall have a bathroom with properly operating toilet, sink and shower or tub.

e) The operation of a commercial rooming or boarding house on the premises is not permitted.

f) The water supply of the foster family home shall comply with the requirements of the local and State health departments. If the foster family home accepts children under age ten or who are developmentally disabled, the maximum hot water temperature from all showers and bathtubs shall be no more than 115° Fahrenheit. If well water is used, a copy of the Inspection Report and Compliance with Regulations shall be on file with the supervising agency.

g) The applicant or licensee shall maintain the home, premises, and all

structures on the premises in a safe and sanitary condition, including proper trash disposal and recycling when available.

h) Water Hazards Protection

Swimming pools, hot tubs and spas shall meet all State, tribal and/or local safety requirements.

1) All in-ground swimming pools located in areas accessible to children shall be fenced. The fence shall be at least 5 feet in height and secured by a locked gate.

2) All above-ground pools shall have non-climbable sidewalls that are at least 4 feet high or shall be enclosed with a 5-foot fence that is at least 36 inches away from the pool's side wall and secured with a locked gate. When the pool is not in use, pool's steps shall be removed or the pool shall be otherwise protected to insure the pool cannot be accessed.

3) Any swimming pool shall be equipped with devices that are manufactured and labeled as life saving devices and approved by the U.S. Coast Guard for sale as life saving devices.

4) A swimming pool shall have a working pump and filtering system when the pool cannot be emptied after each use.

5) Any hot tub not enclosed with a 5-foot fence shall have a securely locked cover.

6) Any portable wading pool not enclosed with a 5-foot fence shall be emptied daily.

7) Licensees in foster family homes with pools, hot tubs, ponds, outdoor fountains, decorative water ponds, fishponds, or the like must have current CPR certification.

8) Foster homes shall come into compliance with the above water hazard requirements by January 1, 2010. Foster homes that have a license or a permit on January 1, 2009 and have had a fence with a minimum height of 3 ½ foot shall be considered in compliance with the fence requirement.

i) No person shall smoke tobacco or other substances in a foster family home, in any *vehicle* used to transport youth in care, in the presence of youth in care, or *within 15 feet of entrances, exits, windows that open, and ventilation*

intakes that serve the foster family home. [410 ILCS 82/10 and 70] Smoking and vaping materials of any kind, and the use of any substances by smoking or vaping, are prohibited. However, this subsection does not prohibit smoking in a licensed foster home that does not have foster children in placement.

j) Applicants and licensees shall not use any illegal substance, abuse prescription or non-prescription drugs, or abuse alcohol. Licensees shall not drink alcohol in excess while caring for youth in care.

k) Alcoholic beverages and toxic/hazardous materials shall be stored where youth in care cannot access them.

l) Portable space heaters may be used as a supplementary source of heat if they have an Underwriters Laboratories sticker attached and are used in accordance with local and State building and fire codes. Portable space heaters may not be used in rooms where children are sleeping. Portable and fixed space heaters in areas occupied by children shall be separated by fire resistant partitions or barriers to prevent contact with the heater.

m) Dangerous household supplies and dangerous tools shall be kept in a safe place inaccessible to children under 12 years of age. These items shall remain inaccessible to children during disposal.

n) When not being dispensed or immediately accessible due to medical necessity, prescription and nonprescription drugs shall be kept in places that are not readily accessible to children under 12 years of age. Expired or unused medications, syringes, medical waste, or medication shall remain inaccessible to children during disposal.

o) Any and all firearms and ammunition shall be stored and locked up separately at all times and kept in places inaccessible to children. No firearms possessed in violation of a State or federal law or a local government ordinance shall be present in the home at any time. Loaded guns shall not be kept in a foster home unless required by law enforcement officers and in accordance with their law enforcement agency's safety procedures.

p) Foster parents shall adequately supervise children in their care to assure compliance with laws, including, but not limited to, criminal laws.

q) The foster home shall comply with all requirements of the State, tribal and local laws and/or municipal codes for household pets. Certificates of inoculation for rabies shall be available for inspection.

r) The foster home shall be free from rodent and/or insect infestation.

s) The foster home shall maintain a first aid kit and supplies, including, but not limited to, adhesive bandages, scissors, thermometer, nonpermeable gloves, sterile gauze pads, adhesive tape, tweezers and mild soap.

t) The foster home shall have an operating telephone on the premises unless the supervising agency has approved a written plan detailing the immediate and unrestricted access to a telephone.

u) The foster home shall maintain a comprehensive list of emergency telephone numbers, including poison control, and shall post those numbers in a prominent place in the home.

v) The foster home shall have fire and emergency evacuation plans that are to be discussed and rehearsed quarterly with the children.

w) The foster home shall be equipped with a minimum of one approved smoke detector in operating condition on every floor level and within 15 feet of every room used for sleeping purposes, including basements and occupied attics, in accordance with Section 3 of the Smoke Detector Act [425 ILCS 60].

x) The foster home shall have at least one operable fire extinguisher that is readily accessible.

y) Basements and Attics

1) Basements and attics may be used for sleeping for children who are mobile, capable of self-preservation, and able to understand and follow directions with minimal assistance in an emergency.

2) Children for whom basement or attic sleeping arrangements may be provided shall be individually evaluated and approved by the supervising agency in accordance with the requirements of subsection (y)(1).

3) To be used for sleeping, basements and attics shall have two exits with one exit that provides access to the outside with means to safely reach the ground level. The second exit may be an easily accessible outside window that provides an unobstructed opening, operable from the inside without the use of tools, and large enough to accommodate an adult. The sleeping area shall be separated from the furnace and utility areas.

4) No basement or attic shall be used for sleeping without the approval of

the supervising agency after consultation with the appropriate safety authorities.

z) A foster home that is not exempted by Section 20 of the Carbon Monoxide Alarm Detector Act [430 ILCS 135] shall be equipped with a minimum of one approved carbon monoxide detector within 15 feet of every sleeping room, in accordance with Section 10 of that Act.

aa) Adequate closet and dresser space comparable to that provided to the other children of the household shall be provided for each foster child to accommodate personal belongings.

ab) Foster parents shall respect children's rights to privacy while sleeping, bathing, toileting, and dressing.

ac) The room shall be exposed to an outside window or shall have auxiliary means of ventilation.

ad) If children placed in foster care exhibit sexually abusive behavior, sleeping arrangements for the sexually abusive child shall comply with the requirements of a safety plan approved by the Department.

89 ILL. ADMIN. CODE § 402.12. Qualifications of Foster Family.

a) The licensees shall be either a single person or two persons in a marriage or civil union with each other. Each foster parent shall be willing and able to assume appropriate responsibilities for the child or children received for care.

b) An individual may be allowed to share the living arrangements only at the discretion of the supervising agency. The licensee is responsible for reporting to the supervising agency that an individual may be sharing the living arrangements prior to the individual moving into the home or prior to licensure. The individual will be subject to the same requirements as other members of the household, such as health certification and background checks as required in 89 Ill. Adm. Code 385 (Background Checks). The license capacity will be redetermined based on the new family composition. This is non-waivable.

c) Foster parents shall be stable, law abiding, responsible, mature individuals, at least 21 years of age. This is non-waivable.

d) The capability of the foster parents to provide care shall be considered prior

to licensure of the foster family home. A decision to establish the age and number of children permitted in the home shall be based on an assessment of the foster family and shall consider at least the following criteria, which are non-waivable:

1) the foster parents' capability to provide care including an evaluation of the caregivers' health, strength, and mobility;

2) whether at least one applicant for foster home licensure can read and write at the level necessary to meet the needs of youth in care and whether the applicants participate effectively in the community in which they reside;

3) the number, chronological and functional age, and characteristics and needs of the children currently under the care of the foster parents. This shall include an assessment of the foster parent's own children under age 18, all other children under age 18 receiving full-time care, and children receiving day care services in the foster family home;

4) the characteristics, limitations, and responsibilities of the caregivers. All members of the foster family shall be free from active alcohol or substance dependency;

5) the caregivers' ability to appropriately care for and adequately supervise the children currently in the home, as well as their ability to care for and supervise the ages, needs, and behaviors of the children who may be placed in the foster family home; and

6) the number of foster parents in the home and the availability and experience of child care assistants.

e) All members of the household age 13 and older (except for foster children) shall have passed the background check required by 89 Ill. Adm. Code 385 (Background Checks). This is non-waivable.

f) Foster parents shall accept agency supervision. This is non-waivable.

g) Foster home applicants shall provide the names and addresses of at least three persons who are not related to them who can attest that the applicants are of reputable and responsible moral character, as well as the name and address of at least one relative who can attest to the applicant's capability to care for the child or children. This is non-waivable.

h) Foster parents shall respect a child's ties to his or her family and support the child in maintaining connections with his or her family. Foster parents shall cooperate with the supervising agency and the service plan for the child and his/her family. In an effort to become better acquainted with the child's siblings and other family members, a foster parent shall transport children to and supervise family visitation whenever possible.

i) The licensee shall have sufficient and stable financial resources to provide for all needs of current household members and for any youth placed in the foster home.

j) As a condition of initial licensure, each foster parent shall complete Pre-licensure Foster PRIDE/Adopt PRIDE Training or an equivalent pre-licensure foster parent training that has been approved by the Department.

k) As a condition of fostering unrelated children in a licensed foster home, each foster parent shall complete Pre-placement Foster PRIDE/Adopt PRIDE Training or an equivalent pre-placement foster parent training that has been approved by the Department.

l) Promoting Joint Placement of Sibling Groups and Sibling Contact

1) As part of pre-licensure training, each foster parent shall receive training regarding the importance of maintaining sibling relationships and the child's sense of attachment to his/her siblings, the importance of maintaining sibling relationships over the child's lifespan, and the impact on the child if those relationships are severed. Foster home applicants shall be asked to explore their willingness to help children maintain contact with their siblings and other significant relationships in the children's past, as well as significant relationships they develop in the future. Foster home applicants shall be told that they may be contacted in the future regarding placement of siblings of a child subsequently requiring placement, or visitation and contact with siblings in other living arrangements or living independently.

2) The Department shall assess the prospective foster family's understanding of a foster child's family connections, their willingness to help and support children in maintaining or developing a relationship with their siblings, including siblings with whom the children do not yet have a relationship, and recognize the value of preserving family ties between siblings, including their need for stability and continuity of relationships,

and the importance of sibling contact in the development of the each child's identity.

3) When it is not possible to place all of the children together, the Department shall encourage the prospective foster families to encourage and facilitate visitation and contact among the siblings.

m) In addition, each foster parent shall complete, as a condition of license renewal, 16 clock hours of approved in-service training. The foster home license shall not be renewed until each single foster parent and at least one foster parent in a married couple, or couple in a civil union, has completed educational advocacy training by the Department or approved agency that, if completed in the most recent licensing cycle, may count toward the 16 clock hours of in-service training. Child welfare agencies may require foster families under their supervision to complete additional training as a condition of continued supervision by the agency.

n) An expanded capacity license to allow foster homes to serve more than six children (including the foster parent's own children under age 18 and all other children under age 18 receiving full-time care) may be granted if the foster family home meets the requirements of Section 402.15(c). As a provision of retaining the expanded capacity license, foster parents shall complete a total of 9.0 clock hours of approved training each calendar year, beginning the calendar year the expanded capacity license is issued.

o) A statement that describes how the foster family and the foster family's home comply with the requirements of this Part shall be placed in the permanent foster home record. If the foster family home is not in compliance with any of the licensing standards, these standards shall be specifically recorded and the plan for achieving compliance shall be outlined. The plan for achieving compliance shall indicate whether foster children can remain in the foster home and whether new placements may be made in the foster home while the foster home is achieving compliance with the licensing standards. The statement shall be updated to reflect any changes in the status of the foster family or the foster home. All such updates shall be entered within five working days after the change in status. This is non-waivable.

89 ILL. ADM. CODE § 402.13. Background Inquiry.

a) As a condition of issuance or renewal of a license by the Department, foster parents shall furnish information of:

1) any offenses (other than minor traffic violations) for which they have been convicted; and

2) the disposition of the convictions.

The Department shall make a determination concerning the suitability of the foster parents in working with the child in accordance with this Part and 89 Ill. Adm. Code 385 (Background Checks).

b) Licensed foster parents shall have access to reliable, legal and safe transportation, which may include public transportation.

1) All members of the foster family who transport foster children shall submit to annual verification of their driver's license, automobile liability insurance, and driving records.

2) Any vehicle used to transport foster children shall be equipped with safety restraints in accordance with Section 4b of the Child Passenger Protection Act [625 ILCS 25/4b].

3) Any foster family member transporting foster children shall comply with the child passenger restraint requirements of the Child Passenger Protection Act and any other state and local vehicle safety laws or ordinances and shall ensure that all foster children wear required safety restraints at all times while being transported.

c) Persons who have been convicted of an offense shall not be automatically rejected as foster parents unless the offense is one of those listed in Part 402.Appendix A. Otherwise, the Department shall consider the following:

1) the type of crime for which the individual was convicted;

2) the number of crimes for which the individual was convicted;

3) the nature of the offenses;

4) the age of the individual at the time of conviction;

5) the length of time that has elapsed since the last conviction;

6) the relationship of the crime and the capacity to care for children;

7) evidence of rehabilitation; and

8) opinions of community members concerning the individual in question.

89 ILL. ADM. CODE § 406.8. General Requirements for Day Care Homes.

a) The physical facilities of the home, both indoors and outdoors, shall meet the following requirements for safety to children.

1) The home shall have a first aid kit consisting of adhesive bandages, scissors, thermometer, non-permeable gloves, Poison Control Center telephone number (1-800-222-1222 or 1-800-942-5969), sterile gauze pads, adhesive tape, tweezers and mild soap.

2) The kitchen shall be equipped with a readily accessible and operable fire extinguisher rated for Class A, B, and C fires and a flashlight in working order.

3) All electrical outlets that are in areas used by the day care children shall have protective coverings. There shall be no exposed or uninsulated wiring.

4) The home shall be equipped with a minimum of one approved smoke detector in operating condition on every floor level, including basements and occupied attics.

A) A smoke detector in operating condition shall be within each room where children nap or sleep. *The detector shall be installed on the ceiling and at least 6 inches from any wall, or on a wall located between 4 and 6 inches from the ceiling.* In addition, there shall be at least one detector at the beginning and end of each separate corridor or hallway 200 feet or more in length in any occupied story.

B) *In any facility constructed after December 31, 1987, or which undergoes substantial remodeling of its structure or wiring system after that date, the smoke detectors shall be permanently wired into the structure's AC power line, and, if more than one detector is required to be installed, the detectors shall be wired so that the activation of one detector will activate all the detectors in the facility unit.* For purposes of this subsection (a)(4), "substantial remodeling" represents more than 15% of the replacement cost of the day care home. For homes that did not have wired installation of smoke detectors in each room prior to December 15, 2011, the Department may allow the installation of a battery-operated smoke detector in each room where children nap or

sleep and deem the home to be in compliance.

C) *Compliance with any applicable federal, State or local law, rule or building code which requires the installation and maintenance of smoke detectors in a manner different from this Section, but providing a level of safety for occupants which is equal to or greater than that provided by this Section, shall be deemed to be compliance with this Section.* (Section 2 of the Facilities Requiring Smoke Detectors Act [425 ILCS 10/2])

D) For homes constructed after December 15, 2011, or that underwent substantial remodeling of structure or wiring systems after December 15, 2011, the smoke detectors shall be permanently wired into the structure's AC power line and, if more than one detector is required to be installed, the detectors shall be wired so that the activation of one detector will activate all the detectors in the facility unit.

5) Carbon Monoxide Detector

A) A home that has an attached garage and/or relies *on combustion of fossil fuel for heating, ventilation, or hot water shall be equipped with* a minimum of *one approved carbon monoxide detector in operating condition within 15 feet of rooms* where children nap or sleep.

B) *The carbon monoxide detector may be combined with smoke detector devices, provided that the combined unit complies with* subsection (a)(4) and this subsection (a)(5). [430 ILCS 135/10]

6) The home and indoor space shall be maintained in good repair and shall provide a safe, comfortable environment for the children.

7) A draft-free temperature of 65°F to 75°F shall be maintained during the winter months or heating season. For infants and toddlers, a temperature of 68°F to 82°F shall be maintained during the summer or air-conditioning months. When the temperature in the home exceeds 78°F, measures shall be taken to cool the children. Temperatures shall be measured at least 3 feet above the floor.

8) Fixed space heaters, fireplaces, radiators, and other heating sources in areas occupied by children shall be separated by partitions or a sturdy barrier to prevent contact. Portable space heaters may not be used in a day care home during the hours that child care is provided.

9) Facilities in which a wood-burning stove or fireplace has been installed and which is used during the hours that child care is provided shall provide a written plan of how the stove or fireplace will be used and what actions will be taken to ensure the children's safety when in use.

10) When the basement area may be used for child care, 2 exits shall be provided.

A) At least one exit shall be a basement exit via a door directly to the outside (without traversing any other level of the home) or a protected exit from a basement via a door or stairway that allows unobstructed travel directly to the outside of the building at street or ground level. The stairway may not be more than 8 feet high.

B) A second exit may be a window.

i) The window shall be operable from the inside without the use of tools and provide a clear opening not less than 20 inches in width, 24 inches in height, and 5.7 square feet in area.

ii) If the window is used as a second exit, the bottom of the window opening shall be no more than 44 inches above the floor.

iii) When the bottom of the window opening used as a second exit is greater than 24 inches above the floor, there shall be a permanently affixed, sturdy ramp or stairs located below the window to allow speedy access in the event of an emergency.

C) If the basement area does not meet the requirements in subsections (a)(10)(A) and (B), the basement may be used for child care only with the prior written approval of OSFM.

11) All walls and surfaces shall be maintained free from lead paint and from chipped or peeling paint.

12) Walls of rooms that children use shall be free of carpeting, fabric or plastic products. Inflammable or combustible artwork attached to the walls shall not exceed 20% of any wall area.

13) Furniture and equipment shall be kept in safe repair.

14) First aid supplies, medication, cleaning materials, poisons, sharp scissors, plastic bags, sharp knives, cigarettes, matches, lighters,

flammable liquids, and other hazardous materials shall be stored in places inaccessible to children. Hazardous items for infants and toddlers also include items that can cause choking, including but not limited to: coins, balloons, safety pins, marbles, Styrofoam™ and similar products, and sponge, soft rubber or soft plastic toys that can be bitten or broken into small pieces.

15) Tools and gardening equipment shall be stored in locked cabinets, if possible, or in places inaccessible to all children.

16) An operable telephone shall be available on the premises of the licensee. The number of the Poison Control Center (1-800-222-1222 or 1-800-942-5969) and other emergency numbers shall be posted in an area that is readily available in an emergency.

17) *Handguns are prohibited on the premises of the day care home except in the possession of peace officers or other adults who must possess a handgun as a condition of employment and who reside in the day care home.* The licensee shall post a "no firearms" sign, as described in Section 65(d) of the Firearm Concealed Carry Act [430 ILCS 66/65(d)], in a visible location where parents pick up children.

18) *Any firearm, other than a handgun in the possession of a peace officer or other person as provided* in subsection (a)(17)*, shall be kept in a disassembled state, without ammunition, in locked storage in a closet, cabinet, or other locked storage facility inaccessible to children.*

A) *Ammunition for such firearms shall be kept in locked storage separate from that of the disassembled firearms*, *inaccessible to children.*

B) *The operator of the home shall notify the parents or guardian of any child accepted for care that firearms and ammunition are stored on the premises. The operator shall also notify the parents or guardian that such firearms and ammunition are locked in storage inaccessible to children.* (Section 7 of the Child Care Act of 1969 [225 ILCS 10/7]) The notification need not disclose the location where the firearms and ammunition are stored.

19) Written emergency preparedness plans shall be developed and shall specify the actions to be taken in the event of a fire, tornado or other emergency. Caregivers and assistants in the home shall be familiar with

these plans. The emergency preparedness plans shall include, but are not limited to:

A) A fire evacuation plan identifying exits from each area used for child care and specifying the evacuation route;

B) A fire evacuation plan identifying a safe assembly area outside of the home. It shall also identify a nearby indoor location for post-evacuation holding if needed;

C) A fire evacuation plan requiring that the home be evacuated immediately and the children's safety insured before calling the local emergency number 911 or attempting to combat the fire;

D) A tornado plan specifying actions that will be taken in the event of tornado or other severe weather warning, including designation of those areas of the home to be used as safe spots;

E) Specific procedures for notifying parents if evacuation is necessary and how they will be reunited with their children;

F) Specific procedures for evacuating children who are less than 30 months of age and/or for evacuating special needs children when applicable;

G) Monthly fire drills to be conducted for the purpose of removing children from the home as quickly as possible; and

H) Monthly tornado drills to be conducted for the purpose of getting children accustomed to moving to a position of safety in the event of a tornado.

20) The licensee shall hold monthly fire safety inspections of the day care home and maintain documentation on file for a period of 1 year.

21) Fire and tornado drills shall be documented and that documentation shall be maintained on file for a period of 3 years.

22) Escape routes from the home shall be designed and maintained for swift and safe exiting in the event of an emergency.

A) All corridors and escape routes from the home shall be kept clear of obstructions.

B) Dead-end paths or corridors within the home shall be a maximum of 20 feet in length.

C) All escape routes from the home shall have operable lighting. The lighting shall be activated during any hours of operation when natural lighting is reduced to a level that prohibits visibility within the escape route.

D) Bathroom doors in areas accessible to day care children shall allow a caregiver to open the door from outside of the bathroom if necessary.

E) All closet doors accessible to children shall be able to be opened from inside of the closet without the use of a key.

F) There shall be no more than 2 releasing devices (door knobs, hand-operated deadbolts, thumb-turn locks, etc.) on any exit door or exit window.

G) Exit doors and exit windows shall be operable without the use of a key, a tool or special knowledge to open for exit to the outside.

H) Exit doors and exit windows shall be kept clear of equipment and debris at all times.

23) The licensee shall inspect the home daily, prior to arrival of children, ensuring that escape routes are clear and that exit doors and exit windows are operable. A log of these daily inspections shall be maintained for at least one year, and shall be available for review. The log shall reflect, at minimum, the date and time of each inspection and the full name of the person who conducted it.

24) All in-ground swimming pools located in areas accessible to children shall be fenced. The fence shall be at least 5 feet in height and secured by a locked gate. Day care homes that have a license or a permit on April 1, 2001 and are in compliance with the requirement for a 3 ½ foot fence shall be considered in compliance with the fence requirement.

25) All above-ground pools shall have non-climbable sidewalls that are at least 4 feet high or shall be enclosed with a 5 foot fence that is at least 36 inches away from the pool's side wall and secured with a locked gate. When the pool is not in use, steps shall be removed from the pool or otherwise protected to insure the pool cannot be accessed. Day care homes

that have a license or a permit on April 1, 2001 and are in compliance with the requirement for a 3 ½ foot fence shall be considered in compliance with the fence requirement.

26) Portable wading pools shall be emptied daily and disinfected before being air-dried.

27) All hot tubs shall have securely locked covers or otherwise be inaccessible to children.

28) Free hanging cords on blinds, shades and drapes shall be tied or otherwise kept out of reach of children.

29) Effective January 1, 2013, the home shall be tested for radon at least once every 3 years. The most current radon measurements shall be posted next to the license in the home, on a form provided by the Department, containing the required informative statement from Section 5.8(d) of the Child Care Act of 1969 [225 ILCS 10].

b) The kitchen shall be clean, equipped for the preservation, storage, preparation and serving of food, and reasonably safe from hazards.

c) Garbage and refuse containers used to discard diapering supplies, food products or disposable meal service supplies in areas for child care shall be disinfected daily unless plastic liners are used and disposed of daily.

d) A safe and sanitary water supply shall be maintained. If a private water supply is used instead of an approved public water supply, the applicant shall supply written records of current test results indicating the water supply is safe for drinking. New test results must be provided prior to renewal of license. If nitrate content exceeds 10 ppm, bottled water must be used for children under 15 months of age.

e) Any day care home currently licensed as of January 1, 2019 shall submit a survey provided by its day care licensing office that includes the construction date of the home. The construction date for new day care home applicants is captured on the CFS 597-DCI form.

f) Any day care home serving children under 6 years of age and housed in a building constructed on or before January 1, 2000 shall be subject to lead in water testing by an IEPA laboratory or an IEPA-certified laboratory. A current list of certified laboratories can be obtained by contacting the Day Care

Information Line at 1-877-746-0829, or can be accessed online through https://sunshine.dcfs.illinois.gov/Content/Licensing/LeadTesting.aspx. Water sampling guidelines followed by certified laboratories may also be accessed through this link. Test results and mitigation plans, when required, shall be submitted to the local licensing office within 120 days after notification of test results of 2.01 ppb or above.

1) All lead in water test results (at, above or below 2.01 ppb) shall be posted in the home in a visible location and submitted by the applicant or licensee directly to his or her local licensing office.

2) A mitigation plan shall be made available to parents and submitted to the local licensing office if test results indicate the presence of lead for each drinking water source with a result of 2.01 ppb or above and shall specify:

A) Interim measures the applicant/licensee will take to ensure a safe drinking water supply during mitigation;

B) Mitigation plan start and planned completion dates;

C) Retesting dates, to include one test to occur no later than six months following the completion of a mitigation plan and a second test no later than one year after the completion of a mitigation plan;

D) Each drinking water source that tested at 2.01 ppb or higher and the planned mitigation activity for each source. Examples of acceptable mitigation strategies include, but are not limited to, installation of mechanical flushing devices, replacement of lead-based lines or fixtures, or reverse osmosis filters installed at affected drinking water fixtures; and

E) In extenuating circumstances in which mitigation cannot be readily undertaken (e.g., lead in the municipal water source), alternative external sources of water that tests below 2.01 ppb, such as bottled water with that test result, may be used subject to Department approval.

3) Following successful mitigation that results in two consecutive tests of lower than 2.01 ppb, further testing is only required if there has been any change to the water profile of the building, including, but not limited to, replacement of the hot water heater, change in the water source, or change to, or replacement of, the water service lines.

4) The Department reserves the right to require testing upon suspicion of the day care home misrepresenting the construction date of the building, submitting false or altered testing results, failing to follow mitigation remedies, or committing other actions that may compromise the health and welfare of children. Any day care home that fails to insure testing and reasonable mitigation actions when necessary may be subject to enforcement action, up to and including revocation of, or refusal to renew, the license.

g) Hot and cold running water shall be provided. When children under age 10 or who are developmentally disabled are cared for, the maximum hot water temperature from all faucets of sinks designated for children washing hands shall be no more than 115° Fahrenheit. Caregivers shall always test the hot water before allowing children less than 5 years of age to use the water.

h) Insect and rodent control shall be maintained.

1) All outside doors except those with operable self-closing devices, operable windows, and other openings used for ventilation shall be screened.

2) Chemicals for insect and rodent control shall be applied in minimum amounts and shall not be used when children are present. Over-the-counter products may be used only according to package instructions. Commercial chemicals, if used, shall be applied by a licensed pest control operator and shall meet all standards of the Department of Public Health (Structural Pest Control Code, 77 Ill. Adm. Code 830). A record of any pesticides used shall be maintained.

i) Healthy household pets that present no danger to children are permitted.

1) A licensed veterinarian shall certify that the animals are free of diseases that could endanger the children's health and that dogs and cats have been inoculated for rabies.

2) If certification is not available, animals shall be confined at all times in an area inaccessible to children.

3) There shall be careful supervision of children who are permitted to handle and care for the animals.

4) Immediate treatment shall be available to any child who is bitten or

scratched by an animal.

5) The presence of monkeys, ferrets, turtles, iguanas, psittacine birds (birds of the parrot family) or any wild or dangerous animal is prohibited in areas accessible to children during the hours the day care home is in operation. Wild and dangerous animals include, but are not limited to, venomous and constricting snakes, undomesticated cats and dogs, raccoons, and other animals determined to be dangerous by local public health authorities.

j) Indoor space shall consist of a clean, comfortable environment for children.

1) The day care home shall be well-ventilated, free from observable hazards, properly lighted and heated, and free of fire hazards.

2) The dwelling shall be kept clean, sanitary, and in good repair.

3) There shall be provision for isolating a child who becomes ill or who is suspected of having a contagious disease.

4) When used for child care, floors shall have protective covering such as, but not limited to, tile, carpet or linoleum. Paint or sealer alone is not acceptable as a protective covering.

5) When children under 30 months of age are in care, stairs leading to second levels, attics or basements shall be fitted with a sturdy gate, door or other barrier to prevent the children's access to stairs without adult supervision. Such a barrier shall be moveable enough so as not to impede evacuation, if necessary.

k) The licensee shall identify those areas in the home used for child care. The identified areas minus any special use areas shall be measured to calculate the square footage available for child care. When the licensed capacity of the home exceeds 8 children, there shall be:

1) A minimum of 35 square feet of floor space per each child in care; and

2) An additional 20 square feet of floor space for each child under 30 months of age when the play area is the same as the sleep area. However, if portable bedding is used for napping, then removed, the licensing representative shall approve the use of only 35 square feet of space for each child if the applicant/licensee has adequate storage for the bedding materials and the bedding materials are removed before and after naptime.

l) *No person may smoke tobacco in any area of the day care home in which day care services are being provided to children, while those children are present* on the premises. In addition, no person may smoke tobacco while providing transportation, in either an open or enclosed motor vehicle, to children who are receiving child care services. *Nothing in this subsection prohibits smoking in the home in the presence of a person's own children or in the presence of children to whom day care services are not then being provided.* [225 ILCS 10/5.5]

m) There shall be safe outdoor space for active play.

1) Space shall be provided for play in yards, nearby parks or playgrounds under adult supervision.

2) Space shall be protected by physical means (e.g., fence, tree line, chairs, ropes, etc.) against all water hazards, including, but not limited to, pools, ponds, standing water, ornamental bodies of water, and retention ponds, regardless of the depth of the water, and by adult caregiver supervision at times when children in care are present. Other hazards, such as, but not limited to, heavy traffic and construction, shall be inaccessible to children in care through a physical barrier and adult supervision.

3) Play areas shall be well drained and safely maintained.

4) All pieces of outdoor equipment used by children 5 years of age and younger on the day care home premises that is purchased or installed on or after April 1, 2001 shall meet the following standards to guard against entrapment or situations that may cause strangulation.

A) Openings in exercise rings shall be smaller than 4 ½ inches or larger than 9 inches in diameter.

B) There shall be no openings in a play structure with a dimension between 3 ½ inches and 9 inches (except for exercise rings). Side railings, stairs and other locations that a child might slip or climb through shall be checked for appropriate dimensions.

C) Distances between vertical slats or poles, where used, must be 3 ½ inches or less (to prevent head entrapment).

D) No opening shall form an angle of less than 55 degrees unless one leg of the angle is horizontal or slopes downward.

E) No openings shall be between ⅜ inch and one inch in size (to prevent finger entrapment).

5) The use of a trampoline by children in care is prohibited.

6) Children shall be closely supervised by the caregiver when public parks or playgrounds are used for play, during play and while traveling to and from the area.

7) Supervision shall be provided during outdoor play by caregivers who meet the requirements of Section 406.9.

n) Operation of other business on the premises must not interfere with the care of children.

o) A day care home may not house bedridden or chronically ill persons except by permission of the supervising agency. The supervising agency shall grant such permission unless the person has a contagious or a reportable communicable disease or requires care that adversely affects the ability of the caregiver to supervise children.

p) A day care home shall have certification that all cribs used by the home meet or exceed the federal safety standards in 16 CFR 1219 or 1220 (2011). This certification from the manufacturer shall be available for inspection by the licensing representative. In the absence of a manufacturer's certificate, proof that the crib was manufactured on or after June 28, 2011 will meet the required standard.

89 ILL. ADM. CODE § 406.9. Characteristics and Qualifications of the Day Care Family.

a) No individual may receive a license from the Department when the applicant, a member of the household age 13 and over, or any individual who has access to the children cared for in a day care home, or any employee of the day care home, has not authorized the background check required by 89 Ill. Adm. Code 385 (Background Checks) and been cleared in accordance with the requirements of Part 385.

b) Employees subject to background checks may begin employment on a conditional basis while awaiting the results of the background check. The employees may not be alone with children until the results of the initial background check have been received.

c) Persons who have been the perpetrator of certain types of child abuse or neglect or who have committed or attempted to commit certain crimes may not be licensed to operate a day care home, be a member of the household of a family home in which a day care home operates, or be an employee or volunteer in a day care home. These allegations/criminal convictions are listed in Appendix C of this Part.

d) Day care homes shall be responsible for ensuring that persons subject to criminal background checks make themselves available for fingerprinting when scheduled by the Department or its authorized representatives. Failure of a person subject to criminal background checks to appear for scheduled fingerprinting may result in the denial of a license application or refusal to renew or revocation of an existing license unless the child care facility can demonstrate that it took reasonable measures to insure cooperation with the fingerprinting process. Adequate cause for failure to appear for fingerprinting includes, but is not limited to:

1) death in the family of the person;

2) serious illness of the person or illness in the person's immediate family; or

3) weather or transportation emergencies.

e) As a condition of licensure, each licensee or license applicant must *certify under penalty of perjury that he or she is current or not more than 30 days delinquent in complying with a child support order. Failure to so certify may result in a denial of the license application, refusal to renew the license, or revocation of the license.* (Section 10-65(c) of the Illinois Administrative Procedure Act [5 ILCS 100/10-65(c)])

f) If the licensees or license applicants acknowledge that they are more than 30 days delinquent in complying with an order for child support or, upon completion of the background check, the licensees or license applicants are found to be delinquent despite their certification, the Department shall deny the application for license, refuse to renew the license, or revoke the license unless the licensees or license applicants arrange for payment of past due and current child support and pay child support in accordance with that agreement.

g) Members of the household who have contact with the children in care shall treat them with respect, courtesy, and patience.

h) The caregiver is responsible for the day-to-day operation of the day care home in accordance with the standards prescribed in this Part.

i) The licensee shall be present in the home when day care children are in attendance unless a qualified substitute caregiver per Section 406.11 is present.

j) The licensee and other adult members of the household in contact with day care children shall be stable, law abiding, responsible, mature individuals.

k) The caregivers in a day care home shall be at least 18 years of age.

l) Caregivers licensed after January 1, 2011 shall have proof of a high school diploma, equivalent certificate, or degree from a regionally accredited institution of higher education or vocational institution.

m) The caregivers and all members of the household shall provide medical evidence as required by Section 406.24(i) that they are free of reportable communicable disease, and, in the case of caregivers, free of physical or mental conditions that could interfere with the child care responsibilities.

n) The licensee who is the primary caregiver shall be certified in first aid, the Heimlich maneuver and infant/child cardiopulmonary resuscitation (CPR) by the American Red Cross, the American Heart Association or other entity approved by the Illinois Department of Public Health.

o) During the hours of operation of the day care home, there shall be at least one person on the premises certified in first aid, the Heimlich maneuver and infant/child cardiopulmonary resuscitation (CPR) by the American Red Cross or the American Heart Association, or other entity approved by the Illinois Department of Public Health. The caregivers shall have on file current certificates attesting to the training.

p) The caregiver shall successfully complete a Department approved basic training course of 6 or more clock hours in providing care to children with disabilities. Refer to Appendix D for basic course requirements. The licensee shall have on file a certificate attesting to the successful completion of the training.

1) New licensee shall complete this training within 36 months from the issue date of the initial license.

2) A licensee who has completed training prior to November 15, 2003 may have that training approved as meeting the provisions of this Section. A certificate of training completion and a description of the course content must be submitted to the Department for approval.

q) Through interaction with the licensing representative, children, parents or guardian of children in care and operation of the day care home in accordance with standards prescribed by this Part, caregivers shall exhibit competence in the following specific areas:

1) Knowledge of basic hygiene, safety, and nutrition.

2) The ability to relate comfortably with parents and to communicate with them on differences in caregiving methods, values, and goals.

3) The ability to communicate with children.

4) The ability to set realistic controls for children and to enforce these without harshness or physical abuse.

5) Knowledge of the child's need to explore and manipulate and the willingness to provide and maintain a home where children can enjoy living and learning.

6) Using developmentally appropriate behavior management techniques that do not constitute corporal punishment of children.

r) The caregivers may not work or be employed outside the home during the hours the day care home is licensed. Outside employment during hours that child care is not being provided shall not interfere with child care.

s) The caregiver shall be awake, alert, and able to supervise the children when providing care, except as allowed by Section 406.23(h).

t) The caregivers shall complete 15 clock hours of in-service training per licensing year in accordance with the requirements in Appendix D.

1) The training may be derived from programs offered by any of the entities identified in Appendix D.

2) Courses or workshops to meet this requirement include, but are not limited to, those listed in Appendix D.

3) The records of the day care home shall document the training in which the caregiver has participated, and these records shall be available for review by the Department.

4) Caregivers obtaining clock hours in excess of the required 15 clock hours per year may apply up to 5 clock hours to the next year's training requirements.

5) Licensees shall submit to the local licensing office a certificate of completion of lead safety training consisting of instruction in the following topics:

A) Mitigation plan strategies for test results of 2.01 ppb or above; and

B) Impact of lead exposure.

u) Licensees or applicants shall not provide false or misleading information regarding their compliance with the applicable regulations.

REQUIRED SHORT APPENDIX

TABLE OF CONTENTS

Page

UNITED STATES DISTRICT COURT

for the
Central District of Illinois

JENNIFER J. MILLER, DARIN E. MILLER, SECOND AMENDMENT FOUNDATION, INC., ILLINOIS STATE RIFLE ASSOCIATION, and ILLINOIS CARRY,	)	
Plaintiffs,	)	
vs.	)	**Case Number: 18-cv-3085**
MARC D. SMITH and KWAME RAOUL,	)	
Defendants.	)	

JUDGMENT IN A CIVIL CASE

☐ **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **DECISION BY THE COURT.** This action came before the Court, and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that summary judgment shall be entered in favor of the Defendants and against the Plaintiffs on each of the Plaintiffs' claims.

Dated: March 15, 2022

s/ Shig Yasunaga
Shig Yasunaga
Clerk, U.S. District Court

Approved: s/ Sue E. Myerscough
Sue E. Myerscough
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

JENNIFER J. MILLER; DARIN E. MILLER; SECOND AMENDMENT FOUNDATION, INC.; ILLINOIS STATE RIFLE ASSOCIATION; and ILLINOIS CARRY,	)	
Plaintiffs,	)	
v.	)	**No. 18-cv-3085**
MARC D. SMITH, in his official capacity as Acting Director of the Illinois Department of Children and Family Services, and KWAME RAOUL, in his official capacity as Attorney General of the State of Illinois,	)	
Defendants.	)	

OPINION

SUE E. MYERSCOUGH, U.S. District Judge.

This cause is before the Court on the Motion for Summary Judgment (d/e 55) filed by Defendants Marc D. Smith and Kwame Raoul. For the reasons stated below, Defendants' Motion for Summary Judgment is GRANTED.

I. PROCEDURAL BACKGROUND

The five Plaintiffs in this case are Jennifer J. Miller, Darin E. Miller, the Second Amendment Foundation, the Illinois State Rifle Association, and Illinois Carry. The Millers are a married couple who are licensed foster caregivers. Jennifer Miller additionally holds a license to operate a for-profit day care out of the Millers' family home. The three organizational Plaintiffs are non-profit membership organizations devoted to Second Amendment advocacy. The Millers are members of each of the three organizational Plaintiffs.

Section 7 of the Illinois Child Care Act of 1969 requires the Illinois Department of Children and Family Services (DCFS) to "prescribe and publish minimum standards for licensing" for child care facilities including home day cares and foster family homes. 225 ILCS 10/7. Under Subsection 7(a), DCFS is required to issue regulations including:

> (13) Provisions prohibiting handguns on day care home premises except in the possession of peace officers or other adults who must possess a handgun as a condition of employment and who reside

on the premises of a day care home;

(14) Provisions requiring that any firearm permitted on day care home premises, except handguns in the possession of peace officers, shall be kept in a disassembled state, without ammunition, in locked storage, inaccessible to children and that ammunition permitted on day care home premises shall be kept in locked storage separate from that of disassembled firearms, inaccessible to children;

(15) Provisions requiring notification of parents or guardians enrolling children at a day care home of the presence in the day care home of any firearms and ammunition and of the arrangements for the separate, locked storage of such firearms and ammunition

225 ILCS 10/7(a)(13)–(15).

In order to comply with §§ 7(a)(13)–(15) of the Act, DCFS has promulgated the following rules:

(17) Handguns are prohibited on the premises of the day care home except in the possession of peace officers or other adults who must possess a handgun as a condition of employment and who reside in the day care home. The licensee shall post a "no firearms" sign, as described in Section 65(d) of the Firearm Concealed Carry Act, in a visible location where

parents pick up children.

(18) Any firearm, other than a handgun in the possession of a peace officer or other person as provided in subsection (a)(17), shall be kept in a disassembled state, without ammunition, in locked storage in a closet, cabinet, or other locked storage facility inaccessible to children.

A) Ammunition for such firearms shall be kept in locked storage separate from that of the disassembled firearms, inaccessible to children.

B) The operator of the home shall notify the parents or guardian of any child accepted for care that firearms and ammunition are stored on the premises. The operator shall also notify the parents or guardian that such firearms and ammunition are locked in storage inaccessible to children. The notification need not disclose the location where the firearms and ammunition are stored.

89 Ill. Admin. Code §§ 406.8(a)(17)–(18). Hereinafter, the regulations codified at 89 Ill. Admin. Code §§ 406.8(a)(17)–(18) and the Illinois statute mandating said regulations are referred to collectively as the "Day Care Home Rule."

DCFS has also promulgated the following rule regarding firearms in foster family homes:

> (o) Any and all firearms and ammunition shall be stored and locked up separately at all times and kept in places inaccessible to children. No firearms possessed in violation of a State or federal law or a local government ordinance shall be present in the home at any time. Loaded guns shall not be kept in a foster home unless required by law enforcement officers and in accordance with their law enforcement agency's safety procedures.

89 Ill. Admin. Code § 402.8(o). Hereinafter, this regulation is referred to as the "Foster Home Rule." Together, the Day Care Home Rule and the Foster Home Rule are hereinafter referred to as the "DCFS Rules."

On April 16, 2018, Plaintiffs filed a Complaint (d/e 1) asserting that the Day Care Home Rule was an unconstitutional restriction on the Second Amendment right to keep and bear arms. On May 29, 2019, Plaintiffs filed their Amended Complaint (d/e 19). In the Amended Complaint, Plaintiffs assert that both the Day Care Home Rule and the Foster Home Rule are unconstitutional restrictions on the Second Amendment right to keep and bear arms. The Plaintiffs request a declaration that the DCFS Rules are unconstitutional, as

well as preliminary and permanent injunctions enjoining Illinois from enforcing the DCFS Rules.

Plaintiffs' Amended Complaint names two defendants: Marc D. Smith, Acting Director of DCFS, and Kwame Raoul, Attorney General of the State of Illinois. Both Defendants are sued in their official capacities. On November 12, 2021, Defendants jointly filed a Motion for Summary Judgment (d/e 55), as well as a supporting Memorandum of Law (d/e 56). Defendants' Motion argues that: (1) the Millers waived their Second Amendment rights when they applied for foster home and day care home licenses, and the organizational Plaintiffs lack standing to challenge the DCFS Rules if the Millers are dismissed; (2) the DCFS Rules are consistent with a historical tradition of regulating access to firearms by minors and regulating storage of gunpowder and are, therefore, categorically outside of the scope of the Second Amendment's protection; (3) the Day Care Home Rule is a presumptively valid regulation of a "sensitive place"; (4) the Foster Home Rule "is a regulation in a longstanding tradition permitting the government to exercise control over the work of those with whom it contracts"; and (5) the DCFS

Rules survive constitutional scrutiny because they are substantially related to the Government's important interest in ensuring the safety of children. D/e 55, ¶¶ 4–10. Defendants also argue that Defendant Kwame Raoul, the Attorney General of Illinois, is not a proper party because he does not play a role in the enforcement of the DCFS Rules and is therefore entitled to Eleventh Amendment immunity from Plaintiffs' claims. Id., ¶ 13.

Plaintiffs have filed a Response (d/e 63) to Defendants' summary judgment motion. Plaintiffs argue that the Millers have not waived their Second Amendment rights, that the rights infringed by the challenged prohibitions and restrictions are within the historical scope of the Second Amendment, that day care homes are not "sensitive places" where restrictions on firearms are presumptively lawful, and that Illinois has not carried its burden of demonstrating that the DCFS Rules are "narrowly tailored" or substantially related to the Government's compelling interest in protecting children. D/e 63, pp. 5–7, 10–13, 30. Plaintiffs also argue that Defendant Raoul is a proper party because he is authorized by statute to enforce the DCFS Rules and may therefore

be sued under Ex parte Young. Id., p. 33. On January 14, 2022, Defendants filed a Reply (d/e 64) to Plaintiffs' Response, arguing that Plaintiffs have not established a genuine factual dispute and that Defendants are entitled to summary judgment.

II. FACTS

DCFS is an Illinois state agency that provides social services to children and their families. D/e 56, ¶ 1. Children can be placed in DCFS's custody and care in a number of ways. Id., ¶ 2. For example, a child's parents may consent to DCFS's temporary custody. Id. Additionally, DCFS may assume the temporary custody of a child found within the state whose parent or guardian cannot be located. Id. Alternatively, a court may order a child placed in DCFS's custody and care if the child is adjudicated abused, neglected, or dependent. Id. When DCFS is awarded guardianship of a child, DCFS is given the rights and responsibilities of legal custody and is required to act in the child's best interests. Id., ¶ 3. DCFS sometimes places children in its care in a licensed child care facility such as a foster home. Id., ¶ 5. Foster homes and foster parents must be licensed by DCFS. Id.,

¶ 8. DCFS provides foster parents with subsidies for the expenses incurred in caring for a foster child. Id., ¶ 7.

DCFS is authorized to promulgate minimum licensing standards for foster homes under Section 7 of the Illinois Child Care Act of 1969. Id., ¶ 9. DCFS has promulgated licensing standards for foster homes in Section 402 of Title 89 of the Illinois Administrative Code. 89 Ill. Admin. Code § 402. Section 402 describes how an individual must apply for a foster care license and the minimum standards with which licensees must comply. D/e 56, ¶ 11. Among other requirements, foster care licensees must agree to store tools and other dangerous household supplies away from children, must agree to refrain from smoking, and must agree that their home will be subject to inspection by DCFS to ensure compliance with all of the licensing requirements. Id., ¶ 12.

The Foster Home Rule, 89 Ill. Admin. Code § 402.8(o), was promulgated by DCFS pursuant to DCFS's authority to create licensing standards for foster homes. The Foster Home Rule provides in relevant part that "[a]ny and all firearms and ammunition shall be stored and locked up separately at all times

and kept in places inaccessible to children" and that "[l]oaded guns shall not be kept in a foster home," subject to certain exceptions not at issue here. Id., ¶ 15.

Jennifer and Darin Miller are DCFS-licensed foster caregivers who have cared for two foster children in the past. Id., ¶¶ 35, 41. The Millers voluntarily chose to become foster caregivers. Id., ¶ 44. The Millers applied for and were granted a foster caregivers' license in 2016. Id., ¶ 36. When the Millers cared for foster children, DCFS provided them with funds to offset expenses incurred for the care of the foster children. Id., ¶ 51. This financial compensation was one reason why the Millers became licensed foster parents. Id., ¶ 52. While applying for their foster caregivers' license, the Millers signed a "Foster Family Firearms Agreement" form provided by DCFS, which contained a restatement of the rule regarding firearms and ammunition in foster homes that was in place at the time. Id., ¶ 43. In 2016, the DCFS Rule regarding firearms and ammunition in foster homes stated that "[a]ny and all firearms and ammunition shall be locked up at all times and kept in places inaccessible to children" and that "[l]oaded guns shall not be kept in a foster home

unless required by law enforcement officers and in accordance with their law enforcement agency's safety procedures." D/e 56, exh. 3, pp. 3–4. However, the 2016 foster home firearm rule, unlike the current Foster Home Rule, did not require that firearms and ammunition in foster homes be stored and locked up separately. Id., pp. 4–5. The Millers are currently in compliance with the Foster Home Rule. D/e 56, ¶ 53.

In Illinois, day care homes are also child care facilities licensed by DCFS. Id., ¶ 22. Day care homes are "businesses, run out of the licensee's home, where parents of other children pay the day care licensee for child care services." Id., ¶ 23. Section 7(a) of the Illinois Child Care Act of 1969 requires DCFS to create minimum licensing standards for day care homes and requires that the standards include certain restrictions on firearms. See 225 ILCS 10/7(a)(13)–(15). In order to comply with § 7(a), DCFS has promulgated the Day Care Home Rule, which provides in relevant part that: (1) "[h]andguns are prohibited on the premises of the day care home"; (2) licensees are required to "post a 'no firearms' sign . . . in a visible location where parents pick up children"; (3)

"[a]ny firearm" on day care home premises "shall be kept in a disassembled state, without ammunition, in locked storage in a closet, cabinet, or other locked storage facility inaccessible to children"; (4) "ammunition for such firearms shall be kept in locked storage separate from that of the disassembled firearms, inaccessible to children"; and (5) "[t]he operator of the home shall notify the parents or guardian of any child accepted for care that firearms and ammunition are stored on the premises" and "shall also notify the parents or guardian that such firearms and ammunition are locked in storage inaccessible to children." D/e 56, ¶ 31; see 89 Ill. Admin. Code § 406.8(a)(17)–(18). The Day Care Home Rule is subject to exceptions not at issue in this case. D/e 56, ¶ 31. The Day Care Home Rule applies only during the operating hours of the day care home. Id., ¶ 32.

Jennifer Miller applied for and received a DCFS Day Care Home License in 2017 and renewed her license in 2019. Id., ¶ 54. Darin Miller helps his wife with the day care, but he is not the licensee. Id., ¶ 55. Jennifer voluntarily chose to apply for a Day Care Home License. Id., ¶ 65. Jennifer's day care is a business,

and the parents of the children in Jennifer's day care pay Jennifer for child care services. Id., ¶ 66. While applying for her Day Care Home License, Jennifer signed a certification stating that she had read and was familiar with the "appellate licensing standards" and would "comply with all requirements for licensure." Id., ¶¶ 57–58. In 2019, when Jennifer applied to renew her license, she signed a form that restated the Day Care Home Rule in full and certified that she had read and was in compliance with the Day Care Home Rule. Id., ¶¶ 61–63.

Darin Miller testified that, in the absence of the DCFS Rules, he would carry a concealed, loaded handgun in his home during day care hours and would store multiple loaded firearms in a locked safe in the Miller house. Id., ¶¶ 83–84. Jennifer Miller testified that, in the absence of the DCFS Rules, she would store a loaded handgun locked in a safe in the Miller house. Id., ¶ 82.

III. LEGAL STANDARD

Summary judgment is proper if the movant shows that no genuine dispute exists as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

The movant bears the initial responsibility of informing the Court of the basis for the motion and identifying the evidence the movant believes demonstrates the absence of any genuine dispute of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A genuine dispute of material fact exists if a reasonable trier of fact could find in favor of the nonmoving party. Marnocha v. St. Vincent Hosp. & Health Care Ctr., Inc., 986 F.3d 711, 718 (7th Cir. 2021). When ruling on a motion for summary judgment, the Court must construe all facts in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. King v. Hendricks Cty. Commissioners, 954 F.3d 981, 984 (7th Cir. 2020).

IV. ANALYSIS

A. The Illinois Attorney General Is Not Entitled to Eleventh Amendment Immunity from Plaintiffs' Claims.

Defendants argue that Defendant Raoul is not a proper defendant because the Eleventh Amendment to the U.S. Constitution immunizes him against Plaintiffs' claims. The Court disagrees.

The Eleventh Amendment limits a federal court's jurisdiction over suits against a state by a foreign state, citizens of another state, and the state's own citizens. MCI Telecommunications Corp. v. Illinois Bell Tel. Co., 222 F.3d 323, 336 (7th Cir. 2000). As such, "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." Bd. Of Regents of Univ. of Wis. Sys. V. Phx. Int'l Software, Inc., 653 F.3d 448, 457 (7th Cir. 2011). The Eleventh Amendment "also bars federal jurisdiction over suits against state officials acting in their official capacities when the state is the real party in interest." MCI Telecommunications, 222 F.3d at 337. Under Ex parte Young, 209 U.S. 123 (1908), however, the Eleventh Amendment does not bar private parties from suing individual state officials who have "'some connection with the enforcement' of an allegedly unconstitutional state statute for the purpose of enjoining that enforcement." Doe v. Holcomb, 883 F.3d 971, 975 (7th Cir. 2018) (quoting Ex parte Young, 209 U.S. 123, 157 (1908)).

Defendant Raoul argues that he does not play a role in enforcing the DCFS Rules because he has never enforced the DCFS

Rules before. Mr. David Buysse, the Rule 30(b)(6) designee who testified in this matter on behalf of the Office of the Attorney General, indicated that he was not aware of any past instance in which the Attorney General had taken action to enforce the DCFS Rules. See d/e 56, exh. 18, p. 71.

Past enforcement, however, is not required under Ex parte Young. All that is required is that the defendant official have "some connection with the enforcement" of the challenged rule or statute. Ent. Software Ass'n v. Blagojevich, 469 F.3d 641, 645 (7th Cir. 2006). In Entertainment Software Association v. Blagojevich, 469 F.3d 641 (7th Cir. 2006), the Seventh Circuit found that the "some connection" requirement was satisfied where the Attorney General had the power to enforce the challenged statute, even though the Attorney General had never prosecuted anyone for violating the statute and shared the power to enforce the statute with the State's Attorney. Id. at 645. Here, enforcement of the DCFS Rules is governed by Section 11.1 of the Child Care Act of 1969, which states that violations of the Act or of any rule adopted under the authority of the Act can be referred to either the Attorney General or

the State's Attorney, who "may initiate the appropriate civil or criminal proceedings." 225 ILCS 10/11.1; see also d/e 56, exh. 18, pp. 23, 66–68 (Buysse stating that Section 11.1 "addresses enforcement of" the Child Care Act of 1969 and conceding that the Attorney General has the authority to enforce the DCFS Rules under Section 11.1). As in Entertainment Software Association, Defendant Raoul and the State's Attorney have concurrent power to enforce the DCFS Rules. As in Entertainment Software Association, this power satisfies the "some connection" requirement of Ex parte Young. Accordingly, Defendant Raoul is a proper party.

B. Defendants Have Not Shown that the Millers Knowingly Waived Their Second Amendment Rights.

Before reaching the merits of Plaintiffs' constitutional argument, the Court must determine whether the Millers contractually waived their right to challenge the constitutionality of the DCFS Rules. When applying to be foster caregivers, the Millers filled out and signed two forms that stated the then-current requirements for firearm storage in their home. When Jennifer Miller applied for a Day Care Home License in 2017, she signed a form that required her to declare that she had received a copy of the

DCFS Day Care Home Licensing Standards and that she had read them and was familiar with them. Defendants argue that, by signing these forms, the Millers waived their right to challenge the DCFS Rules.

Constitutional rights, including the Second Amendment right to keep and bear arms, may be contractually waived. See D. H. Overmyer Co. Inc., of Ohio v. Frick Co., 405 U.S. 174, 185 (1972). However, in both civil and criminal contexts, "courts indulge every reasonable presumption against waiver" of a fundamental constitutional right. Fuentes v. Shevin, 407 U.S. 67, 95 n.31 (1972). Overcoming the presumption against waiver requires a showing that the waiver was knowing and voluntary. See Bayo v. Napolitano, 593 F.3d 495, 505 (7th Cir. 2010). Whether or not a purported waiver was given knowingly and voluntarily is "an issue which must be resolved by examining the factual circumstances of each individual case." Scott v. Danaher, 343 F. Supp. 1272, 1278 (N.D. Ill. 1972). If the parties to a contract including a waiver of constitutional rights (1) have bargaining equality; (2) have negotiated the terms of the contract; and (3) are represented by

competent counsel, the waiver is deemed to be knowing and voluntary as a matter of law.[1] See Kole v. Vill. of Norridge, No. 11-CV-3871, 2017 WL 5128989, at *14 (N.D. Ill. Nov. 6, 2017). Courts need not reach the knowing-and-voluntary issue if "the contractual language relied upon does not, on its face, even amount to a waiver." Fuentes, 407 U.S. at 95.

With respect to the Day Care Home Rule, the contractual language relied upon by Defendants appears in the "Application for a Day Care/Group Day Care Home License" that Ms. Miller filled out and signed in 2017. The document states that Ms. Miller certifies that she is familiar with the relevant licensing standards and agrees to "comply with all requirements for licensure after the permit and/or license is issued." D/e 56, ¶ 58. However, the Application does not specifically mention any of the firearms restrictions imposed by the Day Care Home Rule. See id. "[A] waiver of constitutional rights in any context must, at the very

[1] Plaintiffs' Response (d/e 63) to Defendants' Motion for Summary Judgment incorrectly asserts that bargaining equality, negotiated terms, and representation by competent counsel are all necessary conditions for a knowing and voluntary waiver. In fact, the presence of all three together is sufficient, but not necessary, to demonstrate that a waiver was knowing and voluntary. See Allen v. Ohio Civ. Serv. Emps. Ass'n AFSCME, Loc. 11, No. 19-CV-3709, 2020 WL 1322051, at *11 (S.D. Ohio Mar. 20, 2020) (distinguishing Fuentes in part because the waiver language was simple and explicit rather than indirectly stated hidden in "fine print").

least, be clear." Fuentes, 407 U.S. at 95. Due to the absence of any clear and specific contractual waiver language, the Court finds that the Millers did not waive their Second Amendment Rights by applying for a Day Care Home License in 2017. In the alternative, the Court finds that a genuine factual dispute exists regarding whether any waiver of the Millers' Second Amendment rights with respect to the Day Care Home Rule was knowing. According to the Millers' uncontradicted deposition testimony, the Millers did not understand that the Day Care Home Rule did not allow them to store handguns in their home during day care hours until roughly a year after they received their Day Care Home License, when a DCFS employee informed them that they were in violation of the Rule. D/e 56, exh. 4, pp. 223–25.

The Day Care Home License renewal application that Ms. Miller filled out and signed in 2019 included a "Firearms Agreement," which restated in full the day care home licensing requirements related to firearms and required Ms. Miller to affirm that she had "no handguns on the premises" and that her non-handgun firearms were stored in compliance with the Day Care

Home Rule. D/e 58, p. 16. Ms. Miller filled out and signed the Firearms Agreement. The instant action, however, was filed in April 2018, and Plaintiffs' original Complaint challenged the constitutionality of the Day Care Home Rule. See d/e 1. Moreover, nothing in the Firearms Agreement indicates that, by signing the agreement, Ms. Miller agreed to abandon her ongoing lawsuit challenging the constitutionality of the Day Care Home Rule. In context, the most reasonable interpretation of the Firearms Agreement is that Ms. Miller agreed to abide by DCFS's firearms regulations so long as they remained in effect but did not waive the Second Amendment rights implicated in her ongoing lawsuit against DCFS. See Lewis X. Cohen Ins. Tr. v. Stern, 696 N.E.2d 743, 751 (Ill. App. 1998) ("The primary objective in contract construction is to give effect to the intention of the parties and that intention is to be ascertained from the language of the contract.").

With respect to the Foster Care Home Rule, a genuine dispute exists regarding whether the Millers understood themselves to be waiving their rights under the Second Amendment when they applied to be foster parents in 2016. The evidence presented by

Defendants to show that the Millers' purported waiver was knowing consists of two documents, an "Acknowledgement of Compliance" and a "Foster Family Firearms Agreement," which were signed by the Millers in 2016. See d/e 56, ¶¶ 38–43. The Millers were not represented by counsel when they signed the relevant documents, and the documents were offered to them on a take-it-or-leave-it basis, without any negotiation of terms. Nor was there bargaining equality between the parties; DCFS is a large and sophisticated government agency that can draw on decades of legal and bureaucratic expertise, while the Millers are individuals with no legal education or training. Furthermore, Defendants have not presented any testimony of the Millers indicating that they knew themselves to be waiving their rights to later challenge the Foster Home Rule when they applied to be foster caregivers. Under these circumstances, the issue of whether the Millers' waiver was knowing and voluntary is genuinely disputed and, therefore, inappropriate for resolution at the summary judgment stage. See Scott, 343 F. Supp. At 1278 (holding that the issue of whether a contractual waiver of constitutional rights was knowing and

voluntary depends on "the factual circumstances of each individual case"); Fuentes, 407 U.S. at 95 (finding no waiver of due process rights by individual plaintiffs who entered into conditional purchase agreements for household goods where there "was no bargaining over contractual terms," parties were "far from equal in bargaining power," and "appellees made no showing whatever that the appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights").

Because Defendants have not carried their burden of overcoming every reasonable presumption against waiver, the Court finds that the Millers have not waived their Second Amendment challenge to the Day Care Home Rule and that a genuine factual dispute exists as to whether the Millers waived their challenge to the Foster Home Rule. But, while Defendants have not shown that any waivers executed by the Millers were knowingly and voluntarily executed, the Millers' decision to become foster caregivers and Jennifer Miller's decision to apply for a Day Care Home license were undisputedly voluntary. D/e 56, ¶¶ 44, 65. Both decisions were motivated in part by the promise of valuable consideration from

DCFS, in the form of direct money payments or licensure. See id., ¶¶ 52, 66. Moreover, the Millers could, at any time, have recovered the full measure of their Second Amendment rights had they been willing to give up their DCFS licenses and cease serving as foster caregivers and operating a Day Care Home. There is, therefore, an element of voluntariness in the Millers' assumption of the burdens associated with DCFS licensure. The Court will consider this element of voluntariness in the Court's analysis of the constitutionality of the DCFS Rules as applied to the Millers.

C. The Court Will Analyze Plaintiffs' As-Applied Challenges to the DCFS Rules Before Considering Whether to Address Plaintiffs' Facial Challenges.

Plaintiffs assert both as-applied and facial challenges to each of the challenged DCFS Rules. An as-applied challenge asserts that a law or regulation "is unconstitutional as applied to a plaintiff's specific activities even though it may be capable of valid application to others." Surita v. Hyde, 665 F.3d 860, 875 (7th Cir. 2011). A facial challenge, by contrast, asserts that the challenged law or regulation "is wholly invalid," in all of its applications, and "cannot be applied to anyone." Ezell v. City of Chicago, 651 F.3d 684, 698

(7th Cir. 2011). For reasons of judicial efficiency, as well as considerations relating "to the proper functioning of the courts," the appropriate response to a dual challenge like Plaintiffs' is to consider the as-applied challenge first, and then, if the as-applied challenge succeeds, to address the facial challenge if doing so is appropriate. Bd. of Trustees of State Univ. of New York v. Fox, 492 U.S. 469, 485 (1989); see also Berron v. Illinois Concealed Carry Licensing Rev. Bd., 825 F.3d 843, 846 (7th Cir. 2016) ("[T]he Supreme Court insists that, with few exceptions, statutes and regulations be evaluated in operation ('as applied') rather than peremptorily."). Because the DCFS Rules, as applied to the Millers, do not violate the Second Amendment, the Court rejects the Millers' as-applied challenge. As Plaintiffs have not offered any reason why the DCFS Rules are unconstitutional as applied to any broad swath of affected persons other than the Millers, the Court also rejects Plaintiffs' facial challenge.

D. The Day Care Home Rule Survives Constitutional Scrutiny.

Plaintiffs request a declaration that the Day Care Home Rule imposes an unconstitutional restraint on the Millers' Second

Amendment right to keep and bear arms. Plaintiffs additionally request the issuance of an injunction prohibiting Defendants from enforcing the Day Care Home Rule against the Millers and any other day care home licensees in the state of Illinois.

The Second Amendment to the U.S. Constitution states: "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." U.S. CONST. amend. II. In District of Columbia v. Heller, 554 U.S. 570 (2008), the Supreme Court ruled that a District of Columbia law that amounted to an "absolute prohibition of handguns held and used for self-defense in the home" violated the Second Amendment. Id. at 636. Subsequently, in McDonald v. City of Chicago, 561 U.S. 742 (2010), the Supreme Court struck down a Chicago law "effectively banning handgun possession by almost all private citizens" and held that the right recognized in Heller is incorporated against the states through the Due Process Clause of the Fourteenth Amendment. Id. at 750.

Shortly after McDonald, the Seventh Circuit set forth in Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011) ("Ezell I"), a two-

step inquiry used to determine the constitutionality of state and local laws and regulations challenged on Second Amendment grounds. At the first step, the Court undertakes a "textual and historical inquiry into original meaning" to determine whether the restricted activity is "categorically unprotected" by the Second Amendment. Id. at 701, 703. At the second step, the Court applies "some level of 'means-ends' scrutiny to establish whether the regulation passes constitutional muster." Williams, 616 F.3d at 691.

Ezell I's two-step inquiry is sometimes complicated by what has come to be known as the "sensitive places" doctrine. See United States v. Masciandaro, 638 F.3d 458, 472 (4th Cir. 2011). In dicta which several Circuit courts have treated as binding, see, e.g., Bonidy v. U.S. Postal Serv., 790 F.3d 1121, 1125 (10th Cir. 2015), the Supreme Court in Heller announced that

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 554 U.S. at 626–27. This passage was accompanied by a footnote stating "[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." Id. at 627 n.26. Subsequently, in McDonald, the Supreme Court repeated its "assurances" regarding the presumptive lawfulness of prohibitions on firearms in sensitive places and noted that "incorporation does not imperil every law regulating firearms." Id. at 786.

Some federal appeals courts have treated areas that are like the "sensitive places" mentioned in Heller as categorically outside the scope of the Second Amendment. See United States v. Marzzarella, 614 F.3d 85, 92 (3d Cir. 2010) ("[T]he Second Amendment affords no protection for . . . the carrying of weapons in certain sensitive places."); Bonidy, 790 F.3d at 1125 (finding Heller's sensitive places dicta binding and holding that "the Second Amendment right to carry firearms does not apply to federal buildings, such as post offices"). The Seventh Circuit, however, has expressed uncertainty as to whether laws regulating firearms in "sensitive places" are entirely immune from Second Amendment

scrutiny. See Ezell v. City of Chicago, 846 F.3d 888, 894–95 (7th Cir. 2017) ("Ezell II") ("We're not sure that's the correct way to understand the Court's 'sensitive places' passage"); see also United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010) ("Heller referred to felon disarmament bans only as 'presumptively lawful,' which, by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge."); United States v. Skoien, 614 F.3d 638, 639 (7th Cir. 2010) (cautioning against reading Heller as a "comprehensive code" and treating the passage on presumptively lawful regulatory measures as "informative" but not "dispositive"). Therefore, the Court will not substitute "sensitive places" analysis for the two-step inquiry prescribed by the Seventh Circuit in Ezell I.

However, a determination as to whether day care homes are "sensitive places" will inform the Court's means-ends analysis under step two of the Ezell I framework. This approach is consistent with that taken by other district courts in the Seventh Circuit in recent years. See Solomon v. Cook Cty. Bd. of Commissioners, No. 17-CV-6144, 2021 WL 4147167, at *16 (N.D.

Ill. Sept. 13, 2021); United States v. Redwood, No. 16-CR-80, 2016 WL 4398082, at *4 (N.D. Ill. Aug. 18, 2016).

A number of courts have held or implied that the presence of children militates in favor of a given place being "sensitive." See Masciandaro, 638 F.3d at 473 (upholding conviction for carrying a loaded gun in a vehicle in a national park area "where large numbers of people, including children, congregate for recreation"); Ezell II, 846 F.3d at 905–07 (Rovner, J., concurring in part) (suggesting that states have a "wide latitude" to restrict firearms to protect the safety of children and may even "interfere fairly significantly" with the rights of parents and employ resources "to protect children from harm even where the risk of harm is slight or negligible"); Solomon, 2021 WL 4147167, at *21 (striking down overbroad regulation that banned firearms in all Forest Preserve District sites, rather than only in those sites at which children were frequently present); Redwood, 2016 WL 4398082, at *4 (upholding ban on firearms in school zones and observing that "[i]t is evident beyond need for elaboration" that protecting children is an

important government interest) (quoting New York v. Ferber, 458 U.S. 747, 756 (1982)).

The fact that day cares are designated spaces for the care of young children is a powerful indicator that they may be "sensitive places." Moreover, a ban on firearms in day cares is closely analogous to a ban on firearms in schools, which is one of the core "presumptively lawful" measures referenced in Heller. For these reasons, the Court finds that licensed day cares are "sensitive places" in which unusually restrictive firearms prohibitions may be permissible. As discussed above, however, this finding does not eliminate the need to analyze the Day Care Home Rule under the two-step Ezell I framework.

The Court begins with step two, because step one's historical analysis is unnecessary if the challenged law or regulation survives step two's "means-ends" scrutiny. See Redwood, 2016 WL 4398092, at *3 ("Here, the Court need not address whether the prohibition of guns in school zones falls outside of the historical ambit of the Second Amendment, as § 922(q)(2)(A) passes constitutional muster under the appropriate standard of

review."); Williams, 616 F.3d at 692 (skipping step one where challenged statute survived step two scrutiny). At step two, the Government bears the burden of "justifying its action[s] under some heightened standard of judicial review." Ezell I, 651 F.3d at 706. The applicable standard of review is "akin to intermediate scrutiny" but can be more or less strict depending on "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right." Kanter v. Barr, 919 F.3d 437, 441 (7th Cir. 2019). Severe burdens that affect the core of the Second Amendment's guarantee "require a very strong public-interest justification and a close means-end fit," while "lesser burdens, and burdens on activity lying closer to the margins of the right, are more easily justified." Id. at 441–42 (quoting Ezell II, 846 F.3d at 892).

The Day Care Home Rule affects day care facilities, which are among the "sensitive places" in which restrictions on firearms are presumptively lawful. However, the affected day cares are also homes, and Heller's central holding is that "whatever else [the Second Amendment] leaves to future evaluation, it surely elevates

above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." Heller, 544 U.S. at 635. Possession of a handgun in the home for self-defense is "the core Second Amendment right." Ezell II, 846 F.3d at 895. Plaintiffs' challenge to the Day Care Home Rule, therefore, pits the core Second Amendment right against the core exception to that right.

An absolute prohibition on keeping handguns in the home during day care hours is a relatively severe burden on the core Second Amendment right. However, relatively few people are affected by the Day Care Home Rule. In fact, the institutional Plaintiffs have not been able to name any members other than the Millers who would be affected. See d/e 63, exh. 1, ¶¶ 93–95. Moreover, the only households affected are those that have chosen to apply for a Day Care Home License and accept the various burdens and requirements associated with licensure. See id., ¶¶ 65–72 (listing various burdens placed on day care home licensees, including installation of cabinet locks and outlet covers,

CPR and first aid certifications for the licensee, and presence of age-appropriate toys).

In Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012), the Seventh Circuit observed that "when a state bans guns merely in particular places, such as public schools, a person can preserve an undiminished right of self-defense by not entering those places." Id. at 940. The Moore court called such a restriction a "lesser burden" and stated that the state "doesn't need to prove so strong a need" as it would in the case of a more general prohibition. Id.; see also Illinois Ass'n of Firearms Retailers v. City of Chicago, 961 F. Supp. 2d 928, 936 ("Moore ultimately looked to two factors on the sliding scale to fashion the level of scrutiny: how much activity was regulated . . . and who was regulated . . . ."). Here, the Millers can preserve their undiminished Second Amendment rights simply by ceasing to operate a day care. Because the Day Care Home Rule restricts the Second Amendment rights of relatively few individuals, and because affected individuals can preserve their Second Amendment rights by ceasing to operate a home day care, the Court finds that intermediate scrutiny is appropriate. See Williams, 616

F.3d at 692 (applying intermediate scrutiny to an as-applied challenge to a "presumptively lawful" regulation banning felons from possessing firearms, including in the home for self defense).

"To pass constitutional muster under intermediate scrutiny, the government has the burden of demonstrating that its objective is an important one and that its objective is advanced by means substantially related to that objective." Id. It is "evident beyond the need for elaboration" that Illinois' objective of protecting children from injury and death is extremely important. New York v. Ferber, 458 U.S. 747, 756 (1982). The Supreme Court has "sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." Id. at 757. The determinative question, therefore, is whether the State has presented sufficient evidence to demonstrate that the Day Care Home Rule bears a substantial relation to the advancement of that objective.

The Court finds that the State has carried its burden. According to the report of Defendants' experts, Drs. Miller and

Azrael (the "Miller-Azrael Report"), the Day Care Home Rule likely reduces the risk to children in Day Care Homes of death or injury from gunfire. D/e 56, exh. 16, p. 13. Admittedly, Defendants have not produced direct evidence specifically addressing the issue of whether children in day care homes benefit from the removal of handguns or the storage of other firearms disassembled in locked containers separate from ammunition. The Miller-Azrael Report concedes that "studies have focused on the risk posed by household firearm ownership," rather than the risk posed by firearms stored in Day Care facilities. Id. But any regulation aimed at reducing the risk of an already unlikely event will be difficult to support with hard data, given the difficulty of producing a large enough sample size to support a given conclusion. And the more narrowly tailored the regulation, the more difficult this sample size problem is to overcome. Furthermore, since firearms have already been prohibited in day cares in Illinois and many other states for several decades, there is very little recent data available addressing the issue of what would happen if such a prohibition were removed. See d/e 56, exh. 3 (reviewing the history of precursors to the Day

Care Home Rule in Illinois). Nevertheless, some unlikely events, such as accidental death or injury to a young child from gunfire in a day care setting, are so devastating on the rare occasions when they do occur that regulations aimed at reducing their likelihood may be justified with data from suitably analogous situations.

Accordingly, the Court accepts the Miller-Azrael Report's finding that there exists "strong link between children's exposure to firearms and the risk of injury and mortality from firearms" and that "the findings of the studies [Miller and Azrael] cite apply equally to households in which children live and households in which children spend time." D/e 56, exh. 16, p. 13. More specifically, the Court accepts that removing handguns from day care premises during day care hours and requiring firearms other than handguns to be stored disassembled and unloaded in a locked container with ammunition stored in a separate locked container will reduce the risk of accidental injury or death from gunfire to young children in day care homes. See id., pp. 10–11, 13–14.

Additionally, the Day Care Home Rule is narrowly tailored to serve the government's compelling interest in protecting children.

As applied to the Millers, the Day Care Home Rule applies only during the daytime hours when their home most closely resembles a school or other "sensitive place" where restrictions on firearms are presumptively lawful. The Rule places no restrictions on the Millers' Second Amendment rights at night, when the need to defend the home may be greatest. Having considered the evidence presented, the Court concludes that Illinois has carried its burden of demonstrating that the Day Care Home Rule is substantially related to an important governmental interest.

E. The Foster Home Rule Survives Constitutional Scrutiny.

The Foster Home Rule provides in relevant part that "[a]ny and all firearms and ammunition shall be stored and locked up separately at all times and kept in places inaccessible to children" and that "[l]oaded guns shall not be kept in a foster home," subject to certain exceptions not at issue in this case. D/e 56, ¶ 15.

Foster homes, like day cares and schools, are characterized by the presence of children. However, Defendants do not argue that foster homes are "sensitive places" like schools and day cares. Moreover, a foster home does not have defined hours in which

children are present, but rather functions simultaneously as a home and a child care service at all times when a foster child is present. Accordingly, while the Court does not find that foster care homes are among Heller's "sensitive places," the Court will consider the unique and sensitive domestic nature of the foster home when the Court analyzes the Foster Home Rule under the two-step Ezell I framework. Like the Day Care Home Rule, the Foster Home Rule survives means-ends scrutiny, so it is not necessary to analyze whether the Foster Home Rule lies outside the historical scope of the Second Amendment.

Like the Day Care Home Rule, the Foster Home Rule burdens the core Second Amendment right, the right to use a handgun in self-defense in the home. Additionally, the Foster Home Rule is significantly broader in its application than the Day Care Home Rule. Where the Day Care Home Rule applies only to day care businesses that operate out of homes and applies only during day care hours, the Foster Home Rule applies twenty-four hours a day, seven days a week, to every foster caregiver who is not a law enforcement officer.

However, the Foster Home Rule imposes a much less substantial burden on the Second Amendment rights of affected individuals than the Day Care Home Rule. While the Day Care Home Rule prohibits handguns entirely and requires that all firearms besides handguns be stored disassembled and in a locked storage facility separate from the locked storage facility in which ammunition is kept, the Foster Home Rule, as applied to the Millers, requires only that firearms and ammunition be "stored and locked up separately at all times and kept in places inaccessible to children." 89 Ill. Admin. Code § 402.8(o). Given the relatively light burden placed on the Second Amendment rights of foster caregivers, the Court finds that intermediate scrutiny is the appropriate standard of review.

The Foster Home Rule, like the Day Care Home Rule, restricts the rights of persons who can regain their undiminished Second Amendment rights by ceasing to provide the child care services for which licensure is required. But while a Day Care Home License allows private individuals to provide child care services for other private individuals, a foster caregiver license allows private

individuals to provide child care services for the State of Illinois itself. DCFS, not the foster parent, is typically the legal guardian of children placed into foster homes, and DCFS has a continuing obligation to act in the best interests of foster children. See 705 ILCS 405/1-3(8); 89 Ill. Admin. Code § 327.2–327.4. The State's interest in ensuring the safety of foster children, therefore, is still more compelling than the State's interest in ensuring the safety of children generally.

Moreover, the Millers, as foster caregivers, are government contractors. See Fulton v. City of Philadelphia, Pennsylvania, 141 S. Ct. 1868, 1878 (2021) (recognizing foster care agency as government contractor and, nevertheless, holding licensing requirement for foster care agency unconstitutional under the Free Exercise Clause of the First Amendment because requirement discriminated on the basis of religion and did not survive strict scrutiny). DCFS's existing licensing standards place a number of fairly onerous burdens designed to ensure the safety of foster children on foster parents, including storing tools and other dangerous household supplies away from children, refraining from

smoking, and agreeing that the foster home will be subject to inspection by DCFS to ensure compliance with all of the licensing requirements. 89 Ill. Admin. Code §§ 402.8(i), (m), 402.27. Licensed foster caregivers also agree to partially relinquish their Fourth Amendment right to be free from unreasonable searches and seizures in exchange for licensure. See Van Dyke v. Fultz, No. 13-CV-5971, 2018 WL 1535141, at *4 (N.D. Ill. Mar. 29, 2018) (finding that social worker could reasonably have believed that foster parent had consented to allow social workers to enter the home without warning and without a warrant to retrieve the foster child). The Millers accepted these burdens and restrictions in exchange for the benefits of licensure, including the payments DCFS provides to defray the expenses associated with caring for the foster child. See d/e 56, ¶¶ 44, 52. While the question of whether the Millers voluntarily waived their Second Amendment rights by applying for a Foster Home License is disputed, Plaintiffs concede that the Millers became foster caregivers "voluntarily" and in part because of the financial assistance offered to foster caregivers by DCFS. Id.; see d/e 63, exh. 1, ¶¶ 44, 52. Furthermore, the Millers can, at any

time, escape the application of the Foster Home Rule by giving up their foster caregivers' license.

Few courts have considered the question of when government contractors can be contractually required to relinquish their Second Amendment rights. Accordingly, the Court looks to analogous precedents in the more developed area of First Amendment law. See Ezell I, 651 F.3d at 697, 702–03 (modeling framework for analyzing Second Amendment claims on analogous framework used for First Amendment claims); see also Marzzarella, 614 F.3d at 89 n.4 (relying on First Amendment precedents for guidance while interpreting the Second Amendment and reasoning that "Heller itself repeatedly invokes the First Amendment in establishing principles governing the Second Amendment"). Supreme Court precedents establish that statements made by government employees pursuant to their professional duties are categorically unprotected by the First Amendment. Garcetti v. Ceballos, 547 U.S. 410, 426 (2006). Government contractors also "accept certain restrictions on their freedom as part of the deal." Fulton, 141 S. Ct. at 1878. Considerations of managerial efficiency

require that governments be allowed considerable freedom in the management of their contractual relationships. See Comsys, Inc. v. Pacetti, 893 F.3d 468, 471 (7th Cir. 2018) (holding, in part because of the need to allow governments to flexibly manage their internal affairs, that the First Amendment does not protect public contractors from retaliation for job-related speech). The principle behind these First Amendment decisions applies with equal force in this case. Like any other parent or guardian, Illinois must be afforded considerable latitude to make its own reasonable decisions regarding how best to ensure the physical safety of the children in its custody.

Based on its consideration of analogous First Amendment precedents, as well as the evidence presented by Defendants, the Court concludes that the safe storage requirements imposed by the Foster Home Rule survive intermediate scrutiny. The Miller-Azrael Report uses reliable data to demonstrate that "risk of firearm injury and mortality is significantly reduced, but not eliminated, by storing guns and ammunition in a way that makes them less accessible to children (that is, locking, unloading, storing separately from

ammunition)." D/e 56, exh. 16, p. 12. This is sufficient to establish that the Foster Home Rule is substantially related to Illinois's compelling interest in safeguarding foster children from injury and death. This conclusion is bolstered by precedents from outside of the Seventh Circuit. The Ninth Circuit, for example, found in 2014 that a law imposing comparable safe storage requirements on an entire city survived intermediate scrutiny, in part because "a modern gun safe may be opened quickly." Jackson v. City & Cty. of San Francisco, 746 F.3d 953, 964 (9th Cir. 2014).

Because the Court's conclusion that both of the DCFS Rules survive intermediate scrutiny would be the same regardless of whether or not the Court considered Plaintiffs' challenged evidence, the Court does not reach the issue of the admissibility of the testimony and expert report of Mr. Marty Hayes or the other sources referenced in Plaintiffs' Response. See d/e 43, 62–64.

V. CONCLUSION

For the reasons stated above, Defendants' Motion for Summary Judgment (d/e 55) is GRANTED. The Clerk is DIRECTED to enter final judgment in favor of Defendants Marc D. Smith and

Kwame Raoul and against the Plaintiffs. Any pending motions are DENIED as MOOT, any pending deadlines are TERMINATED, and any scheduled settings are VACATED. This case is CLOSED.

ENTERED: March 14, 2022

FOR THE COURT:

/s/ Sue E. Myerscough
SUE E. MYERSCOUGH
UNITED STATES DISTRICT JUDGE

STATEMENT PURSUANT TO CIRCUIT RULE 30(d)

I certify that all of the materials required by Circuit Rule 30(a) are included in the Required Short Appendix and that there are no materials within the scope of Circuit Rule 30(b).

May 4, 2022

/s/ David H. Thompson
David H. Thompson
Attorney for Plaintiffs-Appellants