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IN THE
APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

JOSHUA D. MEYERS, Plaintiff-Appellant, v. LEO P. SCHMITZ, Director of the Illinois State Police, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court for the Seventh Judicial Circuit, Sangamon County, Illinois No. 15 MR 1066 The Honorable RUDOLPH M. BRAUD, Judge Presiding.

BRIEF OF DEFENDANT-APPELLEE

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

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NATURE OF THE CASE

In February 2014, Plaintiff-Appellant Joshua Meyers obtained a license to carry a concealed firearm under the Firearm Concealed Carry Act ("Act"), 430 ILCS 66/1 *et seq.*, as an Illinois resident. Four months later, he moved to the State of Florida. When the Illinois Department of State Police ("Department"), the agency that issued the resident concealed carry license to Meyers, learned of this move, it "canceled" the license. Meyers protested unsuccessfully by email, arguing that the license should have been "revoked" rather than "canceled" and that, in any event, it should not have been withdrawn but instead converted to a non-resident license. He requested a hearing on these issues and tried to apply independently for a non-resident license. But the Department denied his request for hearing and he was not able to independently apply for a non-resident license because the Department did not consider Florida's firearms laws to be substantially similar to the Act. Meyers then brought an action in the circuit court against the Department's Director, seeking a declaratory judgment that the cancellation of his resident license was void and that the Department's rules on cancellation and the non-resident application process were invalid. The circuit court granted the Director's motion for summary judgment, and Meyers appealed.

ISSUES PRESENTED FOR REVIEW

(1) Whether Meyers has no right to relief based on his claim that the Department improperly "canceled" his resident concealed carry license on learning of his move to Florida.

(2) Whether the Department did not violate the Act or the Illinois Administrative Procedure Act ("APA") by refusing Meyers's request for a hearing on his claim that he was entitled to a non-resident license.

(3) Whether the Department validly determined that Florida's firearms laws were not substantially similar to the Act because it properly relied on a survey response from the State of Florida that interpreted its laws and because neither the Act nor the APA required the Department to promulgate a regulation announcing its determination.

(4) Whether Meyers's challenge to the Department's substantially similar determination fails because he did not show that Florida's firearms laws satisfy the criteria established by the Department's regulations.

STATEMENT OF JURISDICTION

This Court has jurisdiction over Meyers's appeal under Illinois Supreme Court Rule 301. The circuit court granted the Director's motion for summary judgment on April 28, 2017. (C 532-37).[1] Meyers filed his notice of appeal on May 24, 2017 (A 78), which was timely under Illinois Supreme Court Rule 303.[2]

[1] The one-volume record on appeal is cited as "C __." Meyers's opening brief on appeal is cited as "AT Br. __." The appendix attached to his opening brief is cited as "A __."

[2] The notice of appeal does not appear in the record, but there is a copy in the appendix to Meyers's opening brief. (*See* A 78).

STATUTES AND REGULATIONS INVOLVED

Firearm Concealed Carry Act

§ 87. Administrative and judicial review.

(a) Whenever an application for a concealed carry license is denied, whenever the Department fails to act on an application within 90 days of its receipt, or whenever a license is revoked or suspended as provided in this Act, the aggrieved party may appeal to the Director for a hearing upon the denial, revocation, suspension, or failure to act on the application, unless the denial was made by the Concealed Carry Licensing Review Board, in which case the aggrieved party may petition the circuit court in writing in the county of his or her residence for a hearing upon the denial.

(b) All final administrative decisions of the Department or the Concealed Carry Licensing Review Board under this Act shall be subject to judicial review under the provisions of the Administrative Review Law. The term "administrative decision" is defined as in Section 3-101 of the Code of Civil Procedure.

430 ILCS 66/87 (2016).

§ 40. Non-resident license applications.

(a) For the purposes of this Section, "non-resident" means a person who has not resided within this State for more than 30 days and resides in another state or territory.

(b) The Department shall by rule allow for non-resident license applications from any state or territory of the United States with laws related to firearm ownership, possession, and carrying, that are substantially similar to the requirements to obtain a license under this Act.

(c) A resident of a state or territory approved by the Department under subsection (b) of this Section may apply for a non-resident license. The applicant shall apply to the Department and must meet all of the qualifications established in Section 25 of this Act, except for the Illinois residency requirement in item (xiv) of paragraph (2) of subsection (a) of Section 4 of the Firearm Owners Identification Card Act.

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430 ILCS 66/40 (2016).

Illinois Administrative Code
Part 1231. Firearm Concealed Carry Act Procedures

§ 1231.10. Definitions

"Substantially Similar" means the comparable state regulates who may carry firearms, concealed or otherwise, in public; prohibits all who have involuntary mental health admissions, and those with voluntary admissions within the past 5 years, from carrying firearms, concealed or otherwise, in public; reports denied persons to NICS; and participates in reporting persons authorized to carry firearms, concealed or otherwise, in public through NLETs.

"NICS" means the National Instant Criminal Background Check System maintained by the Federal Bureau of Investigation.

"NLETS" means the National Law Enforcement Telecommunications System.

20 Ill. Admin. Code § 1231.10.

§ 1231.110. Non-Resident Application

a) Pursuant to Section 40(b) of the Act, non-resident FCCL applications will only be accepted from persons licensed or permitted to carry firearms, concealed or otherwise, in public, in a substantially similar state.

b) The Department shall post on its website a list of all states determined to be substantially similar.

c) The Department shall determine which states are substantially similar, as defined in Section 1231.10, to Illinois in their manner of regulating concealed carry of firearms by surveying all other states.

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20 Ill. Admin. Code § 1231.110.

STATEMENT OF FACTS

The Department issued Meyers an Illinois Firearm Owner's Identification Card ("FOID card") in February 2013 (C 24, 419), which is a prerequisite for obtaining a resident concealed carry license under the Act, *see* 430 ILCS 66/25(2). The Department issued Meyers a resident concealed carry license in February 2014. (C 24, 50, 264, 419). Four months later, in June 2014, Meyers moved to Florida, where he established a primary domicile, although he continued to spend a substantial amount of time in Illinois. (C 359, 363-66). The following January, he surrendered his Illinois driver's license to the State of Florida in order to obtain a Florida driver's license. (C 12, 366).

I. The Cancellation of Meyers's Resident Concealed Carry License

Subsequently, while conducting its routine quarterly background checks on all concealed carry license holders, the Department discovered that Meyers had become a resident of Florida. (C 30, 264). In May 2015, it mailed to his Florida address a letter informing him that his resident license was "canceled" because he did not have a valid Illinois driver's license or state identification card. (C 252, 419). Meyers claimed that he never received the letter (C 379) but, the following month, he noticed that the Department's website reflected that his license had been "canceled" (C 367-68).

Meyers emailed the Department for an explanation, using an email address dedicated to questions about its concealed carry licensing program.

(C 25, 29). An unidentified administrator responded that Meyers was ineligible for a resident license because he was no longer a resident of Illinois. (C 25). The administrator added that if Meyers had moved to a state with substantially similar concealed carry laws, which Florida was not, he could have reapplied for a license as a non-resident. (*Id.*).

Meyers asked the administrator to clarify why Florida law did not meet the Department's criteria, asserting that, in his view, the relevant Florida and Illinois provisions were nearly identical. (C 29). The administrator answered that the Department did not consider Florida law to be substantially similar because its licensing scheme did not exclude persons who had been voluntarily admitted to a mental health facility. (*Id.*).

Meyers submitted a couple of excerpts from Florida statutes that he believed showed the administrator to be mistaken, but the administrator declined to "debate" the issue with him. (C 30-32). The administrator explained that the determination of which states were substantially similar was based on a survey of the other 49 states. (C 32).

Shortly after this exchange of emails, Meyers wrote a letter to the Director asking for an administrative hearing on the cancellation of his license and for its "reinstatement" based on his claim that Florida's firearms laws were substantially similar to Illinois's. (C 34-35, 370). Meyers also completed the Department's paper application form for "administrative review" of a "revocation." (C 36-37). The same day, he requested by email an

acknowledgment of the Department's receipt of his request for a hearing. (C 38, 371). In response to the email, an unidentified administrator informed him that this request would be added to his application but that he was not eligible for administrative review. (C 38). The administrator explained that Meyers was not entitled to a hearing under section 87(a) of the Act, 430 ILCS 66/87(a), because his license was "not denied, revoked, or suspended." (*Id.*). In a later email, the administrator explained that an incomplete application was canceled out, and that he viewed Meyers's application as incomplete after his Illinois driver's license was surrendered. (C 40).

Meyers then tried to apply for a non-resident license independently of the cancellation. (C 372-73). But he was unable to get past the first page of the online application because the Department's website would not allow him to select Florida as his state of residence because it already had been deemed to have firearms laws that were not substantially similar to the Act. (*Id.*).

II. The Initial Proceedings in the Circuit Court

In November 2015, Meyers filed a complaint against the Director in the circuit court (C 11-22), seeking a declaratory judgment that the cancellation of his resident license was void because the Department's "policy" of canceling the license without a hearing violated the Act and the APA (C 21-22). In addition, he sought a declaration that the Department's policies governing the determination whether an applicant lived in a substantially similar state for non-resident license purposes violated the APA. (C 22). He sought reasonable

attorney's fees and costs. (*Id.*). Meyers attached to his complaint copies of: his FOID and concealed carry cards (C 24); all of his correspondence with the Department (C 25, 29-41); and the October 2013 concealed carry survey that the Department sent to Florida and the response that it received in May 2014 (C 26-28), both of which Meyers obtained through a request under the Illinois Freedom of Information Act (C 369).

The Director thereafter moved to remand the case to the Department for further proceedings, noting that Meyers's resident license should have been deemed to be "revoked" instead of "canceled" for purposes of section 87 of the Act, thereby entitling him to an administrative hearing on that revocation. (C 50-51). Meyers objected (C 55-60), contending that he did not bring his complaint under the Administrative Review Law ("ARL") (C 57), and that any hearing before the Department would be "meaningless" because it had "already concluded that any resident of Florida would be prohibited" from eligibility for a non-resident license (C 58-59).

The circuit court ordered a remand (C 70-75), explaining that revocation decisions were subject to judicial review under the ARL and thus Meyers's request for declaratory relief amounted to an improper collateral attack on the final administrative decision (C 71-72). The court construed the complaint as a request for administrative review and remanded the case so that he could receive an administrative hearing on the revocation of his resident license. (C 73). The court also concluded that the Department's actions did not violate

the APA. (C 73-74). Although there is nothing in the record suggesting that Meyers had previously made any such claim (*see* C 11-23, 62-67), the court found that he "asserted that revocation of his concealed carry license prior to a hearing on the matter violated his right to due process" (C 71) but rejected the argument (C 73-75).

Meyers next moved for a default judgment, arguing that the Director filed no responsive pleading (C 76-78), and moved the circuit court to reconsider the remand (C 82-85, 87-90). He again asserted that the hearing on remand would be meaningless because he wanted to argue for reinstatement of his license on the ground that Florida's laws were substantially similar, and the Department had already determined that no Florida resident could hold a concealed carry license. (C 82-83). The circuit court denied both motions. (C 98).

Less than two months later, Meyers obtained, from a different circuit court judge, an order to show cause why the Director should not be held in indirect civil contempt for not scheduling an administrative hearing in compliance with the remand order. (*See* C 99, 100-03, 111-14, 117-19). The Director moved to vacate the order, arguing that it was improper because the petition for the rule to show cause was presented *ex parte*, without notice to his counsel, and he had not refused to participate in the case. (C 111-14, 117-19). Shortly afterward, the original circuit court judge vacated that order. (C 126).

III. The Administrative Proceedings on Remand

In September 2016, an administrative law judge ("ALJ") for the Department held a hearing (C 354-99) at which both Meyers and the Director were represented by counsel (C 355). Meyers presented his own testimony, together with documentary evidence to support his claims on the propriety of the revocation of his license and whether it should be reinstated on the ground that Florida's firearms laws were substantially similar to Illinois's. (C 355-56). Relevant here, Meyers testified that while he "currently live[d]" in both Illinois and Florida, he lived "primarily" in Florida. (C 363-64). Further, he admitted that he had a Florida driver's license (C 366) and provided a copy of it (*see* C 24, 449).

During closing arguments, Meyers clarified that he did not contest that the Act allowed the Department to revoke a resident license when the licensee became a "properly identified resident" of a different state, but he wanted a chance to prove that he was entitled to a non-resident license. (C 385-86). He argued that he had a right to a hearing on the revocation under Illinois law, and that if he had been given one, he would have received his non-resident license because the evidence of record showed that Florida's firearms laws were in fact substantially similar to Illinois's. (C 386-89).

The Director argued that because there was no dispute that Meyers's resident concealed carry license was no longer valid as a result of his move to Florida, he could not establish by a preponderance of the evidence that the

revocation of his license was erroneous. (C 389-90). In addition, the question of his eligibility for a non-resident license was "beyond the scope" of the hearing because the Act did not contemplate a hearing on an application for a non-resident license that was never submitted to it or that it had never received. (C 390-91).

The ALJ agreed that the evidence showed that Meyers was ineligible for a resident license (C 412-16), because, as a resident of a state other than Illinois, he was ineligible for a FOID card, and as a person ineligible for a FOID card, he did not meet the Act's qualifications for a resident license (C 415). In addition, the ALJ concluded that the issue whether Florida had firearms laws that were substantially similar to Illinois's Act for purposes of Meyers's eligibility for a non-resident license was "beyond the scope of this hearing." (*Id.*). The Director adopted the ALJ's recommendations and denied Meyers's "request for Issuance of a Concealed Carry License." (C 411).

IV. The Resumption of Proceedings in the Circuit Court

After the final administrative decision was issued, Meyers resumed his litigation in the circuit court. (*See* C 128-30, 131-40, 143-46, 150-54, 166-67).

Ultimately, Meyers moved for summary judgment (C 170-87, 191-98), arguing that the Department violated the Act and the APA through its policy of denying him a hearing on the question of his non-resident eligibility (C 172-76, 182-85) and its policies for determining whether other states had substantially similar firearms laws (C 174, 177-82). Meyers claimed that he

was entitled to a hearing under both enactments (C 175-77), and that the policy of denying him a hearing was an "unwritten" rule within the meaning of the APA (C 183-84) and violated his right to due process (C 184-85).

Meyers also argued that the regulations that the Department had adopted violated the Act because they failed to define the standards by which its substantially similar determinations would be made (C 173-74), and were "overly restrictive" in that they did not focus on the applicant's qualifications but rather on "mental health reporting systems that are beyond the ability of the applicant to control" (C 182). Finally, Meyers argued that the Department's regulations were invalid because their reliance on surveys as the basis of the substantially similar determinations violated both the APA's prohibition on *ex parte* communications and the prohibition on use of hearsay in the Illinois Rules of Evidence. (C 177-78).

The Director filed a cross-motion for summary judgment (C 474-90, 492-94), arguing that: (1) Meyers demonstrated no clear right to a concealed carry license because the survey response from Florida expressly denied that the state's laws were similar, and the Florida statute that Meyers relied on to establish the purported similarity regulated only *some* voluntary admissions, those allowed as an alternative to involuntary placement (C 481-83); (2) the surveys were not *ex parte* communications because they were not conducted in an adjudicatory context and the APA's *ex parte* provision did not apply to actions authorized by law (C 483-84); (3) the surveys were not inadmissible

hearsay because the Department's regulations expressly authorized it to base its determinations on state surveys and recent precedent had confirmed that use of hearsay evidence was permissible in determining whether a concealed carry license should issue (C 484-85); (4) the Act contained intelligible standards for the Department to follow in making its substantially similar determinations because both the Act and the FOID Card Act, which the Act incorporated, contained specific eligibility requirements (C 485-86), and the Department's regulatory definition of "substantially similar" did not exceed its statutory authority because each of its components was derived directly from provisions of the Act or the FOID Card Act (C 486-88); (5) the Department's policy of not accepting applications from residents of states it deemed dissimilar was not "unwritten" because it was dictated by subsections 40(b) and 40(c) of the Act, 430 ILCS 66/40(b), (c) (C 488); (6) the APA was not violated because its licensing provisions did not apply where the law did not require a hearing prior to licensing (C 489); and (7) Meyers was not "denied" a hearing on the issue of his non-resident eligibility because he was never entitled to one (C 489-90).

Meyers responded (C 496-507), arguing, among other things, that the fact that the Department gave him an administrative hearing more than a year after the revocation of his resident license did not change the fact that his rights were violated (C 497). In any event, judgment had to be entered against the Department because his right to a hearing on his eligibility for a non-

resident license was defeated by the Department's unwritten policy that prevented him from completing an application. (C 499-500). He also argued that the Department had refused to review its interpretation of Florida law and asked the circuit court to do so instead. (C 504-05). In sum, he urged the court to declare "the entire administrative application and administrative hearing process" unlawful and enjoin the Department from processing non-resident applications "in any manner that does not include the right to complete a full application and obtain a fair and meaningful opportunity for administrative hearing for any application that is not approved." (C 507).

V. The Circuit Court's Judgment

In April 2017, the circuit court issued a final judgment that characterized Meyers's claims as giving rise to two separate actions: an action for administrative review of the Department's decision to cancel/revoke his resident concealed carry license and an action for declaratory judgment challenging the Department's refusal to accept his application for a non-resident license and its determination that Florida's firearms laws were not substantially similar to Illinois's. (C 532-37). The court affirmed the Department's final administrative decision upholding the revocation of Meyers's resident license. (C 532-33, 537). With respect to the declaratory judgment action, it granted the Director's motion for summary judgment and denied Meyers's motion for summary judgment. (C 533-37).

The court first explained that the Director's decision upholding the revocation of Meyers's resident license was neither against the manifest weight of the evidence nor clearly erroneous. (C 532-33). In addition, Meyers had shown no clear right to apply for a non-resident license for several reasons. (C 533-35). The plain language of section 40 of the Act, 430 ILCS 66/40, stated that the Department could accept non-resident applications only from persons who resided in states with firearms laws that it had already determined to be substantially similar to Illinois's laws. (C 533-34). And that was not the case here. (C 534). Also, there was no provision of the APA that required the Department to accept his application. (C 535). The court further found that Meyers's claim that Florida's law was in fact substantially similar to Illinois's law failed because he identified no provision of Florida's law that prohibited the carrying of firearms based on voluntary admission to a mental health facility. (*Id.*). Finally, the court rejected Meyers's arguments that the Department's regulations were invalid because they relied on *ex parte* communications consisting of hearsay and exceeded their statutory authority. (C 535-36).

Meyers appealed. (A 78).

ARGUMENT

I. Introduction

To begin, there are two issues that this Court need not address. First, while Meyers alluded to "due process" in various circuit court filings (*see, e.g.*, C 84-85, 89, 184-85, 497, 503-04), he has preserved no such argument for appeal. He never fully developed a due process argument in the circuit court. (*See id.*). Moreover, he developed no such argument in his opening brief on appeal, focusing instead on the application of the Act and the APA. (*See* AT Br. 11-35). Thus, he has forfeited any due process argument and cannot belatedly assert one in his reply brief, at oral argument, or at any later time. *See* Ill. Sup. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) ("[p]oints not argued are waived and shall not be raised in the reply brief"); *see also Jankovich v. Ill. State Police*, 2017 IL App (1st) 160706, ¶¶ 96-97 (plaintiff's half-page argument claiming violation of his "constitutional" rights without citation to authority "merit[ed] no discussion on appeal"); *Perez v. Ill. Concealed Carry Licensing Review Bd.*, 2016 IL App (1st) 152087, ¶ 29 (issue whether plaintiff received procedural due process forfeited because he developed no argument addressing factors that guide due process analysis under *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

Second, this Court need not decide whether the circuit court had authority to remand this case for an administrative hearing or whether Meyers's challenge to the cancellation of his resident license was governed by

the ARL. Again, Meyers has developed no such arguments on appeal (*see* AT Br. 11-14), resulting in their forfeiture. And any error by the circuit court would be harmless because there is no serious dispute about the underlying question — whether the Department could revoke Meyers's resident license in light of his Florida residency. *See Am. Serv. Ins. v. Miller*, 2014 IL App (5th) 130582, ¶ 21 (applying harmless error standard in declaratory judgment action).

Meyers suggests in his opening brief that if he had been given a hearing on the revocation of his resident license when he first requested one, then the Department might have "agree[d]" that he was an Illinois resident because of the "substantial presence" that he maintained in the state at that time (AT Br. 12), but he has made no attempt to justify that position. His opening brief challenges only the *way* in which his license was revoked and the policies that prevented him from applying for a non-resident license. (*See id.* at 11-35). These are the only issues that should be addressed by this Court on appeal.

II. The Standard of Review is *De Novo*.

This action is before this Court as a result of an order of the circuit court granting summary judgment to the Director. Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (2016); *Vill. of Bartonville v. Lopez*, 2017 IL 120643, ¶ 34.

Where, as here, the parties filed cross-motions for summary judgment, they agreed that only questions of law were involved, and invited the court to decide the issues based on the record. *Bremer v. City of Rockford*, 2016 IL 119889, ¶ 20, *as modified on denial of reh'g* (Apr. 7, 2017).

This Court reviews rulings on motions for summary judgment *de novo*. *Vill. of Bartonville*, 2017 IL 120643, ¶ 34. On *de novo* review, it may affirm a grant of summary judgment on any ground supported by the record and law regardless whether the circuit court relied on that ground. *Id.* Independently, an interpretation of the Act is reviewed *de novo* because it presents a question of law, *Jankovich*, 2017 IL App (1st) 160706, ¶ 39, as does an interpretation of the APA, *Reddy v. Ill. Dep't of Prof'l Regulation*, 336 Ill. App. 3d 350, 353 (4th Dist. 2002). Despite the *de novo* standard, this Court gives substantial deference to an agency's construction of statutes that it is charged with administering and the regulations through which it implements those statutes, as the Department administers the Act and regulations at issue here. *See, e.g., Provena Covenant Med. Ctr. v. Dep't of Revenue,* 236 Ill. 2d 368, 387 n.9 (2010); *Illini Envtl., Inc. v. Envtl. Prot. Agency*, 2014 IL App (5th) 130244, ¶ 50.

III. Meyers Has No Right to Relief Based on His Claims That the Department Improperly "Canceled" His Resident Concealed Carry License.

Meyers contends that the Department had no authority to "cancel" his resident license and failed to properly revoke it, and that he was harmed by the denial of an administrative hearing and other procedural rights that he

should have enjoyed upon revocation of that license. (AT Br. 11-14). Even if that were so, no relief would be available to Meyers on these claims.

To the extent that Meyers sought declaratory and injunctive relief to address the loss of his license, his claims are moot. An issue on appeal is moot when it presents no actual controversy or where it has ceased to exist because intervening events have rendered it impossible for the appellate court to grant effectual relief. *Koshinski v. Trame*, 2017 IL App (5th) 150398, ¶ 18. Here, the Department conceded in the circuit court that Meyers's resident license should have been "revoke[d]" for purposes of the Act rather than "cancel[ed]" and that he was entitled to an administrative hearing (C 50-51, 389), which he ultimately received (C 354-99). This Court, therefore, cannot grant him meaningful relief by ruling that the Act provides no basis for "cancellation" of a license or that it requires a hearing on revocation. Further, the Department is unlikely to "cancel" a license again, having formally conceded in the circuit court that the licenses of persons who move out of state should be "revoked" (C 50-51, 389) and that, upon revocation, such persons are entitled to a hearing under section 87 of the Act, 430 ILCS 66/87 (2016) (C 50-51).

Meyers asserts that he was harmed by being denied a hearing until the remand because he lost certain "protections" to which the "contested case" provisions of the APA entitled him, including the right to keep his existing license until a final administrative decision on the revocation was issued. (AT Br. 13-14). But the contested case provisions do not apply in this case, *see*

infra p. 29-30, and even if they did, proof of harm would not avail Meyers. He sought declaratory and injunctive relief, not damages. And compensatory damages would be improper in any event because Meyers's resident license would have been revoked had he been given a timely hearing. *See Carey v. Piphus*, 435 U.S. 247, 260 (1978) (awarding damages for student suspensions ordered without proper hearing, where suspensions were justified, "would constitute a windfall, rather than compensation"); *Superdawg Drive-In, Inc. v. City of Chi.*, 162 Ill. App. 3d 860, 865 (1st Dist. 1987) ("Damages awarded solely because a defendant committed an error in procedure are improper and constitute a windfall.").

To the extent that Meyers seeks relief on the theory that the Department's action in canceling his license reflected an unwritten rule in violation of the APA's rulemaking provisions, his claim may escape mootness but faces two additional obstacles. First, while he raised this claim in his complaint (C 21-22), Meyers develops no argument concerning it in his opening brief on appeal (*see* AT Br. 11-14). The point has been forfeited. *See Perez*, 2016 IL App (1st) 152087, ¶ 29. Second, regardless, the argument would fail because Meyers did not present sufficient evidence at summary judgment to show that the Department's initially deeming his license "canceled" constituted the adoption of a rule for purposes of the APA.

The APA defines a "rule" broadly as an "agency statement of general applicability that implements, applies, interprets, or prescribes law or policy"

and "affect[s] private rights or procedures available to persons or entities outside the agency." 5 ILCS 100/1-70 (2016); *see Alternate Fuels, Inc. v. Dir. of Ill. E.P.A.*, 215 Ill. 2d 219, 247-48 (2004), *as modified on denial of reh'g* (June 16, 2005); *Senn Park Nursing Ctr. v. Miller*, 104 Ill. 2d 169, 178 (1984). But not every agency action requires promulgation of a rule. *Homeward Bound Servs., Inc. v. Ill. Dep't of Ins.*, 365 Ill. App. 3d 267, 273 (3d Dist. 2006); *Ogden Chrysler Plymouth, Inc. v. Bower*, 348 Ill. App. 3d 944, 957-58 (2d Dist. 2004).

Where the agency simply applies the law to the facts of a particular case, as it did here, there is no rule. *Alternate Fuels, Inc.*, 215 Ill. 2d at 246-48; *Homeward Bound Servs., Inc.*, 365 Ill. App. 3d at 273-74; *Nat'l Sch. Bus Serv., Inc. v. Dep't of Revenue*, 302 Ill. App. 3d 820, 825 (1st Dist. 1998). To be sure, the Department misapplied the law in this instance, as it later admitted. (*See* C 389). But an agency does not create a rule when an employee misinterprets or misapplies a statute. *See Alternate Fuels, Inc.*, 215 Ill. 2d at 246-48 (while agency's interpretation was "ultimately incorrect, no statutory provision prevent[ed it] from making a mere interpretation"); *Sparks & Wiewel Constr. Co. v. Martin,* 250 Ill. App. 3d 955, 968 (4th Dist. 1993) (mere fact that agency "construed the statute more broadly than the language allows" did not indicate that agency engaged in rulemaking).

Indeed, the Department's action in "canceling" Meyers's license could not have established a rule because the cancellation occurred in the context of a one-time correspondence that related only to the status of Meyers's resident

license as a result of his move to Florida. A single action that lasts for only a brief period or affects only a few people is not a rule within the meaning of the APA. *See Navarro v. Edgar*, 145 Ill. App. 3d 413, 417 (1st Dist. 1986) (finding no rule where record "provide[d] no evidence that the practice complained of was an established one, or that it had achieved any degree of general application"); *Ekco, Inc. v. Edgar*, 135 Ill. App. 3d 557, 562 (4th Dist. 1985) (holding that "[a] single use [of tape recorders] cannot be considered a statement of general applicability"); *Gonzales-Blanco v. Clayton*, 120 Ill. App. 3d 848, 850-51 (1st Dist. 1983) (holding that misapplication of rule to eight applicants for temporary medical licenses was not "agency statement of general application"). At summary judgment, Meyers presented no evidence that anyone else was ever denied a hearing as a result of having a concealed carry license canceled rather than revoked in similar circumstances.

In sum, Meyers's claims addressing the loss of his resident license are moot, and his allegations of harm add nothing to the case. Further, he failed to present sufficient evidence at summary judgment that the "cancellation" of his license constituted the adoption of an unwritten rule in violation of the APA. Therefore, Meyers had no right to relief based on his claim that the Department improperly "canceled" his resident concealed carry license.

IV. The Department Did Not Violate the Act or the APA By Refusing Meyers's Request for a Hearing on His Claim That He Was Entitled to a Non-Resident License.

A. The Act Does Not Require That Meyers Be Given a Hearing.

Contrary to Meyers's view (*see, e.g.,* AT Br. 19-23), the Department properly declined to order an administrative hearing to allow Meyers to argue that he should be given a non-resident license. The Act does not provide for a hearing in this context. Instead, it provides that persons from a state that does not have substantially similar laws, as in Meyers's situation, are not eligible to apply for such a license.

Section 87 of the Act, 430 ILCS 66/87 (2016), provides for a hearing, upon request, in four particular circumstances: "[w]henever an application for a concealed carry license is denied, whenever the Department fails to act on an application within 90 days of its receipt, or whenever a license is revoked or suspended as provided in this Act." But none of these circumstances occurred in connection with Meyers's inquiry into a non-resident license. Meyers could not even apply for a non-resident license because he was not from a "substantially similar" state. *See* 430 ILCS 66/40(b), (c) (2016). Thus, the plain language of section 87 of the Act did not entitle him to a hearing on the issue of his eligibility for a license.

More specifically, section 40 of the Act establishes the conditions for eligibility for a concealed carry license for non-residents. It indicates twice in subsections (b) and (c) that *applications* for a license will not be permitted

unless the non-resident is from a state with firearms laws that are "substantially similar" to the Act's requirements, *see* 430 ILCS 66/40(b), (c) (2016), which implies that no hearings will be granted to persons who are not from such states.

This Court looks to the language of the statute as the most reliable indicator of the legislative intent. *See Merritt v. Dep't of State Police*, 2016 IL App (4th) 150661, ¶ 20 (construing section 87). That language must be "given its plain, ordinary, and popularly understood meaning and afforded its fullest meaning," *id.* (citing *In re Detention of Lieberman,* 201 Ill. 2d 300, 308 (2002)), and the statutory provisions must be read in concert and harmonized, to avoid rendering part of the statute superfluous, *id.* (citing *Hartney Fuel Oil Co. v. Hamer,* 2013 IL 115130, ¶ 25).

Here, section 40's plain language does not just limit the Department's power to issue *licenses* if the applicant's state of residence is not substantially similar, it prevents the Department from accepting *applications* in those circumstances. Indeed, subsection (c) states that "[a] resident of a state or territory approved by the Department under subsection (b) of this Section *may apply* for a non-resident license." 430 ILCS 66/40(c) (2016) (emphasis added). The condition of the Department's approval comes first, and only if the state is approved may an application follow. And subsection (b) provides that the Department "shall by rule allow for non-resident license applications" from substantially similar states; that is, the Department shall create a procedure

for determining which states are substantially similar and provide an application process for persons from those states. 430 ILCS 66/40(b) (2016).

When the provisions of section 40 are harmonized with section 87 of the Act, it is clear that non-residents from unapproved states have no right to a hearing. Because such persons cannot even *apply* for a license under the statute, the Department cannot be said to have "denied" their applications or to have "failed to act" on them in such a way as to trigger any obligation to hold a hearing under section 87. *See also infra* p. 27 (*Burrell* discussion).

Further, the Department's regulations reflect what sections 40 and 87 of the Act require. Its regulations provide that "[p]ursuant to Section 40(b) of the Act, non-resident [concealed carry] applications *will only be accepted* from persons licensed or permitted to carry firearms, concealed or otherwise, in public, in a substantially similar state." 20 Ill. Admin. Code § 1231.110(a) (emphasis added). The Department's construction of the Act and its corresponding regulations reflect the plain meaning of those provisions and thus should be afforded deference. *See Illini Envtl., Inc.*, 2014 IL App (5th) 130244, ¶ 50.

Nevertheless, Meyers sees a right to a hearing under section 87 of the Act. (AT Br. 19-21, 23). He reads this section as "mandat[ing] that any adverse action by the Department affecting a concealed carry license or application is accompanied by a right to appeal to the Director of State Police for an administrative hearing," (*id.* at 23), and adds that the Department's

refusal to accept his application must be construed as a denial of it, citing *Willie Pearl Burrell Tr. v. City of Kankakee*, 2016 IL App (3d) 150655, ¶ 18 (AT Br. 24-25). He is wrong in both respects.

Section 87 does not cover "any adverse action" that may be taken with respect to a concealed carry license. Again, the section's plain language specifies only four instances in which a person may request a hearing: when an application is denied, when the Department fails to act on an application, when a license is suspended, and when a license is revoked. Plainly, a hearing under section 87 is extended only to those eligible to apply and not to those not eligible to apply.

And *Burrell* does not suggest that not *accepting* an application is the same as a denial. The court in that case agreed with the plaintiff that the defendant's "'refusal to process rental license applications [wa]s tantamount to a denial of said permits.'" *Burrell*, 2016 IL App (3d) 150655, ¶ 18. But it was not, when it used those words, interpreting statutory language similar to that at issue here. And it did not hold that refusal to accept an application would be tantamount to a denial even where the applicant was not even eligible to apply.

The Act identifies in section 40 the conditions under which a non-resident may apply for a license. And it provides separately in section 87 for the consequences when a valid application filed by an eligible applicant is denied. Because the General Assembly was aware that some persons would be

unable to even apply for a license, it could have provided in section 87 for a right to a request a hearing if someone could not apply for a license because he was not from a "substantially similar" state. The General Assembly clearly did not intend to require hearings for non-residents who may not apply and so there is no authority under the Act for a hearing to challenge a determination as to whether another state's laws are substantially similar.

Meyers also claims that the Department agreed with him in the circuit court that a hearing was required when it requested the remand, and then reversed course at his administrative hearing. (AT Br. 21). That, too, is wrong. The Department only conceded that a hearing on the revocation of his resident license was necessary. (C 50-51). It never suggested that he was entitled to a hearing as a non-resident who could not even apply for a license.

B. The APA Also Does Not Require That Meyers Be Given a Hearing.

Meyers next argues that the APA guaranteed him a hearing in this context (*see* AT Br. 21-28), but this argument fares no better. He points to section 10-65(b) of the APA (*id.* at 23-24), which provides that, unless a court has ordered otherwise, when a licensee has timely applied "for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license shall continue in full force and effect until the final agency decision on the application has been made," 5 ILCS 100/10-65(b) (2016). But this provision says nothing about a hearing. And it is inapplicable to Meyers's situation. This is not a case involving the renewal of a concealed carry license.

Nor has Meyers cited any authority suggesting that he had any "continuing" rights in one as a non-resident, as opposed to one who had a resident license but lost it upon his move out of state. Discrete events occurred here: he lost his resident license when the Department learned that he moved out of state and, as a result, he was required to meet the requirements first to apply for a non-resident license, a different kind of license, and then show that he met the requirements for that type of license.

Meyers further contends that he is entitled to a hearing under the "contested case requirements" of the APA. (*See* AT Br. 27). He identifies no specific provision of the APA, but to the extent that he is referring to section 10-65(a), 5 ILCS 100/10-65(a) (2016), which he cited earlier in his brief (*see id.* at 13), that section did not require a hearing in this context. That section provides that "[w]hen any licensing is required by law to be preceded by notice and an opportunity for a hearing, the provisions of this Act concerning contested cases shall apply." 5 ILCS 100/10-65(a) (2016).

However, under this provision, the statutory right to a hearing is a precondition for application of the contested case rules and not itself an entitlement that results from their application. Thus, this provision "creates no rights to a hearing by its own terms." *Borg-Warner Corp. v. Mauzy*, 100 Ill. App. 3d 862, 865-66, 872 (3d Dist. 1981) (construing earlier version of statute containing same language). Moreover, it does not apply when the legislature provides that a hearing should *follow* some specific administrative action. *See*

C.Capp's LLC v. Jaffe, 2014 IL App (1st) 132696, ¶ 29 (denial of terminal operator's license was not governed by section 10-65(a) because applicant could only seek hearing after denial of application); *Munoz v. Dep't of Registration & Educ.*, 101 Ill. App. 3d 827, 829-30 (1st Dist. 1981) (declining to apply earlier version of statute because Medical Practice Act did not require hearing before agency could determine whether applicant passed requisite medical examination).

Even when an applicant or licensee is entitled to a hearing under section 87 of the Act, that hearing does not take place until after the administrative decision — the denial or revocation — is issued. Accordingly, section 10-65(a) does not apply to those cases. It would make even less sense to apply it in the context of non-residents living in states that the Department does not deem to be substantially similar because those persons have no right to apply for a license or to a hearing at all. *See supra* pp. 24-30.

There is no provision of the Act or the APA that requires all persons *desirous* of a non-resident concealed carry license to be given a hearing on their claims. The Department did not violate those statutes by refusing Meyers's request for a hearing on his claim that he was entitled to a non-resident license, where he was not eligible to even apply for one. Rather, the Department adhered to the plain language of those provisions.

V. The Department's Substantially Similar Determinations Are Valid Because Its Reliance on State Survey Responses Is Proper and Neither the Act nor the APA Requires It to Promulgate Regulations Announcing Its Determinations.

Meyers also contends that the Department's substantially similar determinations are invalid, and thus its determination that Florida's laws were not substantially similar to Illinois's cannot be invoked against him. (AT Br. 15-19). He argues that the Department's reliance on state survey responses is "problematic" for several reasons (*id.* at 16-17, 25-27), and that in any event the substantially similar determinations are unenforceable because they are "rules" that the Department was required to promulgate in accordance with the APA's rulemaking procedures (*id.* at 17-19). But, as explained below, he fails to support either argument.

And even if he were correct on either argument, that would not entitle him to a license. At most, the Department would have to redetermine which states are substantially similar to Illinois and/or promulgate a regulation. *See Windy City Promotions, LLC v. Ill. Gaming Bd.*, 2017 IL App (3d) 150434, ¶ 28 ("The appropriate remedy is for the court simply to strike down the attempted rule.").

A. Meyers Has Demonstrated No Systemic Problem With the Department's Reliance on State Survey Responses.

Meyers challenges the Department's reliance on state survey responses on four principal grounds. All four arguments should be deemed forfeited because Meyers did not raise them in the circuit court. *See In re Estate of*

Chaney, 2013 IL App (3d) 120565, ¶ 8. He objected to the Department's use of surveys in the circuit court, but did so on the theory that the surveys represented *ex parte* communications that met the definition of hearsay. (*See, e.g.*, C 19-20, 177-78). Meyers also has cited no authority in arguing these issues in his opening brief on appeal, which is an additional basis for finding forfeiture. *See Jankovich*, 2017 IL App (1st) 160706, ¶ 97. In any event, each argument fails on its merits.

First, Meyers complains that the survey questions at issue here "go beyond" the regulatory definition of "substantially similar" because they asked whether other states prohibited the "use or possession of firearms" and whether they had mechanisms for reporting voluntary mental health admissions. (AT Br. 16). To be sure, section 1231.10 of the Department's regulations does not contain those requirements in those exact words. *See* 20 Ill. Admin. Code § 1231.10. But those words in the survey are entirely consistent with the Department's regulation.

In the survey, the Department asked not only about use (or carrying) of firearms but also about possession because important criteria could be contained in statutes other than a state's designated concealed carry statute. Other states' concealed carry statutes could incorporate provisions of possession statutes, just as the Act incorporates the requirements of the FOID Card Act. *See* 430 ILCS 66/25(2) (2016) (stating that concealed carry licensee must have currently valid FOID card and meet requirements for issuance of

FOID card). Phrasing the question more narrowly, therefore, could result in errors in the Department's substantially similar determination.

As for the requirement about reporting voluntary mental health admissions, the regulation does require participation by other states in national reporting systems, and it specifically prohibits licensing of persons with voluntary mental health admissions in the last five years. *See* 20 Ill. Admin. Code § 1231.10. One way to give that prohibition effect is to ask whether the state has a corresponding reporting requirement.

Second, Meyers argues that the Department's use of surveys was not authorized as part of its legislative grant of authority. (AT Br. 26-27). But it is well established that the General Assembly may invest administrative agencies with discretion to implement legislation, *Chicagoland Chamber of Commerce v. Pappas*, 378 Ill. App. 3d 334, 348-49 (1st Dist. 2007), and that it need not articulate in the statute every detail that will be necessary for its enforcement, as long as it provides intelligible standards to guide the agency's use of discretion, *E. St. Louis Fed'n of Teachers, Local 1220, Am. Fed'n of Teachers, AFL-CIO v. E. St. Louis Sch. Dist. No. 189 Fin. Oversight Panel*, 178 Ill. 2d 399, 423 (1997); *Pappas*, 378 Ill. App. 3d at 349. An administrative agency "'may validly exercise discretion to accomplish in detail what is legislatively authorized in general terms,'" and it also has power to do what is reasonably necessary to fulfill its duties. *See R.L. Polk & Co. v. Ryan*, 296 Ill.

App. 3d 132, 140-41 (4th Dist. 1998) (quoting *Lake Cty. Bd. of Review v. Prop. Tax App. Bd.,* 119 Ill. 2d 419, 428 (1988)).

Here, the Act did not specifically provide for the Department to make use of surveys. But the Department needed to collect information from the 49 other states and United States territories to make its substantially similar determinations, and under the foregoing authority the General Assembly could allow it the discretion to identify the best means for accomplishing that charge. There were intelligible standards to guide the Department's use of its discretion because it was instructed to look for substantial similarity between the firearms laws of other states and the specific requirements of the Act and FOID Card Act. And the survey process did nothing that fell outside the scope of the Department's duty to determine whether the laws of the other states were substantially similar.

In addition, in implementing the Act, the Department complied with the APA's provision on "[i]mplementing discretionary powers," which states that a "rule that implements a discretionary power to be exercised by an agency shall include the standards by which the agency shall exercise the power . . . stated as precisely and clearly as practicable under the conditions to inform fully those persons affected." 5 ILCS 100/5-20 (2016). The Department satisfied this requirement because it promulgated regulations stating that:
(1) applications for a license "will only be accepted" from persons living in states that it deems to be substantially similar, 20 Ill. Admin. Code

§ 1231.110(a); (2) defining the five criteria that the Department will use in determining whether states are "substantially similar," 20 Ill. Admin. Code § 1231.10; (3) and further stating that the Department will render its determinations based on surveys of the other states, 20 Ill. Admin. Code § 1231.110(c); and (4) will inform the public of its determinations through its website, 20 Ill. Admin. Code § 1231.110(b). Given that the Department must account for constantly changing firearms laws in dozens of states and territories, it would be impracticable for its regulations to be more specific, and making them so might compromise the flexibility to protect the citizens of Illinois from persons unqualified to hold concealed carry licenses. *Cf. Escalona v. Bd. of Trs., State Emps. Ret. Sys.*, 127 Ill. App. 3d 357, 362 (1st Dist. 1984) (rejecting challenge to specificity of standards required for agency's disability determinations due to need for flexibility).

Third, Meyers contends that it is unreasonable for the Department to rely on survey responses from government officials of unverified authority, instead of analyzing the other states' laws itself. (AT Br. 25-27). But there is no reason for concern about the "authority" of the responses. Meyers notes that the survey at issue in this case was sent to Florida's "Department of Agriculture" (AT Br. 25), which may seem random at first glance, but actually makes sense. In Florida, the Department of Agriculture and Consumer Services is charged with issuing concealed carry licenses. *See* Fla. Stat. § 790.06(1). And the Department does not expect the officials to which it

sends the surveys to undertake a complicated analysis. The survey merely asks specific questions about the laws of the target state. (*See* C 27).

Meyers cites no authority suggesting that the Department cannot rely on statements of officials of other states, and given the difficulties for Department officials in having to master the intricacies of the laws of 50 states and other territories, it is entirely reasonable for it to proceed in this fashion. Moreover, as Meyers ultimately concedes (AT Br. 16-17), the Department does not blindly rely on the survey responses but interprets them in light of the relevant statutes.

Finally, Meyers appears to criticize the Department for failing to take a "mechanical approach" to interpreting the survey responses. (*See* AT Br. 16-17). It is not clear what he means by this, which affords another basis for finding forfeiture. *See Perez*, 2016 IL App (1st) 152087, ¶ 29 ("issue not clearly defined and sufficiently presented" is "waived"). Further, there is no reason to think a "mechanical approach" would produce more accurate results, or that there is any way to avoid all interpretive difficulties in this context. After all, the question is whether another state's firearms laws are "*substantially*" similar. That word choice itself suggests that the analysis is not mechanical but involves a level of interpretation and discretion.

In sum, Meyers has failed to show any incongruence between the Department's survey questions and the regulatory definition of the term "substantially similar," or between its survey method and its legislative

authority, and he has failed to show that the survey procedures are otherwise unreasonable. Therefore, he has failed to demonstrate any systemic problem with the Department's reliance on state survey responses.

B. The Department Does Not Have to Promulgate Regulations Containing Its Substantially Similar Determinations.

Meyers next asserts that the Department must promulgate its substantially similar determinations as regulations in order to comply with the APA. (AT Br. 17-19, 28). Because it does not do so, he contends, it decides these non-resident license cases based on unpromulgated rules, which renders the determinations invalid. He roots this theory in the Act and APA. (*Id.*). But both bases are untenable.

Section 40(b) of the Act provides that "[t]he Department shall by rule allow for non-resident license applications from any state or territory of the United States" with firearms laws "that are substantially similar to the requirements to obtain a license under this Act." 430 ILCS 66/40(b) (2016). Meyers construes that section as a mandate for the Department to "approve states" "'by rule,'" that is, to promulgate regulations containing its determinations on the particular states found to have substantially similar laws. (*See* AT Br. 28).

But the plain language of the statute indicates that the rules that the legislature wanted promulgated were procedural. Subsection 40(c) provides that the approved states or territories will be "approved by the Department

under subsection (b) of this Section." 430 ILCS 66/40(c) (2016). And the Department fulfilled this directive in procedural terms. It promulgated regulations that thoroughly prescribe the procedures through which it makes its substantially similar determinations. *See supra* pp. 34-35.

In the alternative, Meyers contends that the substantially similar determinations must be promulgated as regulations because they qualify as "rules" that trigger the APA's rulemaking requirements, *see* 5 ILCS 100/1-70 (2016) (defining "rule"). (AT Br. 17-18). Again, the argument is forfeited because Meyers raises it for the first time on appeal. *See Chaney*, 2013 IL App (3d) 120565, ¶ 8. He did argue in the circuit court that the cancellation of his resident license reflected an unpromulgated rule within the meaning of the APA (C 20-21) and that the policy of preventing non-resident applicants from completing the application form did too (C 184, 186, 197), but he did not argue that the determinations themselves should have been promulgated.

Regardless, Meyers has not demonstrated that the Department's substantially similar determinations qualify as rules within the meaning of the APA. The APA defines a rule as relevant here as an "agency statement of general applicability that implements, applies, interprets, or prescribes law or policy." 5 ILCS 100/1-70 (2016). But a rule does not include an agency statement concerning its internal management that does not affect private rights and procedures available to persons or entities outside the agency. *See*

Alternate Fuels, Inc., 215 Ill. 2d at 247; *Senn Park Nursing Ctr.*, 104 Ill. 2d at 178.

As explained, the Department uses the substantially similar criteria to determine from which states nonresidents may apply for an Illinois concealed carry license. The substantially similar determination, therefore, is merely a guide for the Department to ascertain who may apply for a license. *See Donnelly v. Edgar*, 117 Ill. 2d 59, 65 (1987) (document not rule because merely prescribed internal method for maintaining consistency in agency's decisions); *Walk v. Ill. Dep't of Children & Family Servs.*, 399 Ill. App. 3d 1174, 1185-86 (4th Dist. 2010) (policy guide was not rule for purpose of APA because it merely guided agency employees in how to assess cases and did not expand agency's authority); *Manor Healthcare Corp. v. Nw. Cmty. Hosp.*, 129 Ill. App. 3d 291, 297 (1st Dist. 1984) (document not rule even though it applied regulation's formula to determine need for hospital beds in each area).

Furthermore, the Department's substantially similar determination does not constitute a rule for purposes of the APA because it is not an independent rule. *See People v. Carpenter*, 385 Ill. App. 3d 156, 165-66 (2d Dist. 2008). Rather, it is an implementation of an existing regulation. *See id.* As such, the APA does not require the Department to promulgate its substantially similar determinations. After all, it already promulgated the criteria for determining whether another state's laws are substantially similar. The results of that determination do not constitute an independent rule that

must be promulgated as well. For these reasons, Meyers's reliance on *Windy City*, 2017 IL App (3d) 150434, is misplaced. (AT Br. 18).

Forfeiture aside then, Meyers has failed to prove either that section 40(b) of the Act directed the Department to publish formal rules each time it made a substantially similar determination or that such determinations qualified as rules under the APA. Therefore, neither the Act nor the APA required the Department to promulgate a regulation announcing its determination that Florida's firearms laws were not substantially similar to the Act.

VI. Meyers Has Failed to Show That Florida's Firearms Laws Satisfy the Substantially Similar Criteria Established in the Department's Regulations.

Finally, as part of his request for declaratory and injunctive relief, Meyers argues that Florida's laws "are in fact" substantially similar to Illinois's. (AT Br. 28-34). The Department found that Florida's firearms laws were dissimilar because they allowed persons who had voluntarily submitted to mental health treatment to be licensed. (C 29). Meyers has failed to refute that conclusion, and so this Court should not grant him the requested relief.

The survey response that the Department received from Florida indicated that, in the view of its officials, the state did not "prohibit the use or possession of firearms based on a voluntary mental health admission within the last five years." (C 27). Meyers contends that the Florida official was misled into giving a wrong answer to this question because the survey asked

whether the state prohibited "use or possession." (AT Br. 29-31). In Meyers's view, the official was unable to answer yes, even though persons with voluntary admissions were prohibited from *use or carrying* of firearms, because Florida law did not prohibit *possession* of a firearm by such persons. *Id.* But the Florida official was clearly aware that issuance of concealed carry licenses was ultimately at stake, because the cover letter that the Director sent with the survey explained its purpose. (C 26). And the Florida official was unconstrained by the preformatted survey response sheet because he or she took the trouble to insert a footnote in an open space on the form to indicate one circumstance in which voluntary admission would result in a bar on possession of a firearm — where voluntary admission was allowed in lieu of involuntary placement. (C 27). If Meyers were correct and voluntary admissions always resulted in a bar in concealed carry cases, the official surely would not have omitted to provide that clarification.

Meyers contends that Florida's concealed carry statute indicates that persons who have voluntary mental health admissions are excluded from licensing to carry a concealed firearm because it specifically excludes persons who have been "committed to a mental institution under chapter 394, or similar laws of any other state," Fla. Stat. § 790.06(2)(j), and chapter 394 (Florida's Mental Health Act) includes a statute on "voluntary admissions," Fla. Stat. § 394.4625. (AT Br. 29-30). Meyers adds that his view of the statute

is supported by the Florida appellate decision in *Critchlow v. Critchlow*, 347 So. 2d 453 (Fl. Dist. Ct. App. 1977). (AT Br. 30).

But these authorities fail to support his claims. It is true that chapter 394 contains a statute addressing "voluntary admissions," but nothing in that statute, the rest of the chapter, or the Florida case law suggests that a "commitment" under chapter 394 necessarily includes such admissions. *Critchlow* does not suggest it. The court's decision in that case uses the phrase "voluntary commitment" twice, but it does so in recounting facts. *See Critchlow*, 347 So. 2d at 454-55. The court was not interpreting the concealed carry or any other statute, and the context was far removed from this case. *Critchlow* is about a child custody contest.

On the other hand, the Florida statute on "Sale and delivery of firearms" contains language very similar to the language that Meyers is relying on here. *See* Fla. Stat. § 790.065(2)(a)4. It provides for exclusion of a purchaser or transferee who "[h]as been adjudicated mentally defective or has been committed to a mental institution by a court . . . and as a result is prohibited by state or federal law from purchasing a firearm." *Id.* And the statute specifically defines the phrase "committed to a mental institution" as not including "a person in a mental institution for observation or discharged from a mental institution based upon the initial review by the physician *or a voluntary admission* to a mental institution." Fla. Stat. § 790.065(2)(a)4.b.(I) (emphasis added).

To be sure, that section defines the phrase "[a]s used in this subparagraph," and there is no definition of the phrase in section 790.06. But in 2017, section 790.06 was amended in a manner that sheds light on its interpretation, and amendments to the statute should be considered on appeal of a declaratory judgment action, *see Bartlow v. Costigan*, 2014 IL 115152, ¶¶ 30-31, *as modified on denial of reh'g* (May 27, 2014). As amended, section 790.06(2)(j) adds the sentence: "An applicant who has been granted relief from firearms disabilities pursuant to s.790.065(2)(a)4.d. . . . is deemed not to have been committed in a mental institution under this paragraph." The provision this section refers to, section 790.065(2)(a)4.d., provides a means of obtaining relief from firearms disabilities for persons who have been "adjudicated mentally defective or committed to a mental institution, as those terms are defined in this paragraph." Fla. Stat. § 790.065(2)(a)4.d. Thus, if the definition of "committed to a mental institution" in section 790.06 were as broad as Meyers suggests, it would create the absurdity that the only persons who may not obtain relief from firearms disabilities based on commitment to a mental institution are those with voluntary admissions.

Under the circumstances, it cannot be said that Florida's laws are substantially similar. At best, Meyers has identified an ambiguity in the statutes, and that ambiguity is not sufficient to require that he be issued a license, where the Department is authorized to allow applications only to persons from states that *are* — not *may possibly be* — substantially similar.

Meyers attempts to identify other similarities between the Florida and Illinois statutes (AT Br. 32-34), but these need not be discussed because without a prohibition on persons with voluntary admissions, the Florida statutes cannot be substantially similar to the Act within the criteria of the Department's regulation.

Meyers's interpretations of the Florida concealed carry statute and the survey response from Florida officials do not persuasively show that Florida bars persons with voluntary admissions to a mental institution within the last five years from being licensed to carry a concealed firearm. Accordingly, he has failed to prove that Florida's firearms laws satisfy the criteria established in the Department's regulations.

CONCLUSION

For the foregoing reasons, Defendant-Appellee Leo P. Schmitz, Director of the Department of the Illinois State Police, requests that the circuit court's judgment be affirmed.

March 29, 2018

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h) statement of points and authorities, the Rule 314(c) certificate of compliance, the certificate of filing and service, and those matters to be appended to the brief under Rule 342(a) is 45 pages.

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CERTIFICATE OF FILING AND SERVICE

I certify that on March 29, 2018, I electronically filed the foregoing **Brief of Defendant-Appellee**, with the Clerk of the Court for the Illinois Appellate Court, Fourth Judicial District, by using the Odyssey eFileIL system.

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

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