No. 127854

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- RYAN HEINEMAN, Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 2-19-0689. There on appeal from the Circuit Court of the Twenty-Second Judicial Circuit, McHenry County, Illinois, No. 16 CF 629. Honorable Michael E. Coppedge, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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ORAL ARGUMENT REQUESTED

ARGUMENT

Where the only evidence the State introduced from which the jury could determine the defendant's whole blood alcohol concentration on the morning of the incident was incompetent hearsay from a lay witness, the State failed to prove the defendant guilty beyond a reasonable doubt of one count of aggravated driving under the influence of alcohol and deprived him of a fair trial on the other count.

At issue in this case is whether the State was properly allowed to establish a conversion factor between the defendant's measured serum alcohol concentration and his whole blood alcohol concentration by having Officer Fisher, a lay witness, testify to the factor provided by Section 1286.40 of the Administrative Code [20 IL Adm. Code § 1286.40 (2016)]. (Def.'s br. at 12-19; State's br. at 15-28) In his opening brief, the defendant argued that the conversion factor at issue was a scientific fact that could not be proved by lay witness testimony concerning the existence of an Administrative Code provision. (Def.'s br. at 12-19) The defendant argued that Fisher's testimony concerning the existence of Section 1286.40 was incompetent evidence that failed to prove him guilty beyond a reasonable doubt of driving while his whole blood alcohol concentration was greater than .08 g/dl (Count I of the indictment). (Def.'s br. at 19-22) Finally, the defendant argued that the erroneous admission of Fisher's testimony deprived him of a fair trial for driving while under the influence of alcohol (Count II). (Def.'s br. at 22-24)

In response, the State does not explicitly state whether it thinks the conversion factor between serum alcohol concentration and whole blood alcohol concentration is a scientific fact or a matter of law (State's br. at 14-35) However, the State's argument appears to be premised on the assumption that the conversion factor is a matter of law that can be defined by a statute or regulation. *See, e.g.,*

State's br. at 27-28, *quoting Auburt v. Elijah,* 2013 WL 5921859,[1] at * 7 ("Laws are not hearsay, because they are not assertions of anything. Therefore, State Regulations are not inadmissible as hearsay.") Based on that presumption, the State argues that Fisher, as a lay witness who worked within a "regulated industry" could testify to the contents of Section 1286.40 because it "governed his investigation of the defendant's conduct." (State's br. at 23) The State claims that the conversion factor could not be a scientific fact requiring expert testimony because if it was, then judges would not be able to take judicial notice of Section 1286.40 and, in the State's inaccurate reading of the defendant's brief, the defendant allegedly "concede[d]" that the section could be judicially noticed. (State's br. at 25) The State argues that with Fisher's testimony, it proved the defendant guilty of both counts. (State's br. at 28-30, 31-34) Alternatively, the State asks this Court to remand both counts for new trials under *People v. Drake,* 2019 IL 123734.

None of the State's arguments should persuade this Court. Throughout its brief, the State misstates the defendant's arguments and relies authority that does not support its arguments. Most fundamentally, the State's arguments must fail due to the unavoidable truth that the conversion between serum alcohol concentration and whole blood concentration is a scientific fact. Because that is so, and all of the State's arguments are premised on the assumption that it is not so, all of the State's arguments must fail.

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[1] For *Aubert* and another unpublished federal district court opinion, *Beck v. Shinseki,* 2015 WL 120196, the State provides only LEXIS citations. As the defendant does not have access to the LEXIS website, he will provide Westlaw citations to those cases.

A. The State should not be allowed prove a scientific fact by calling a lay witness to testify that he read a section of the Administrative Code that concerned that fact.

The starting point of any analysis of this issue must be to determine whether the conversion factor between serum alcohol concentration and whole blood alcohol concentration is a scientific fact or a law. As the defendant discussed in his opening brief, it is undeniably a scientific fact. (Def.'s br. at 12-13) The conversion factor is a thing that exists independently from any legislation or regulation. It existed in Illinois before the Illinois State Police promulgated Section 1286.40. *See People v. Menssen,* 263 Ill.App.3d 946, 953 (4th Dist. 1994) (experts testified to conversion factor; Section 1286.40 did not yet exist). It also exists in states where no analogue to Section 1286.40 exist. *See State v. Mac Cardwell,* 133 N.C. App. 496, 506-07 (N.C. App. 1999) (court determined conversion factor based on expert testimony). The conversion factor was determined by scientists using scientific analysis. *See* Roehrenbeck Carol A., Russell Raymond W., *Blood Is Thicker Than Water,* 1993, 8 Fall Crim. Just. 14, at 15 (explaining process behind determining conversion factor); *Mac Cardwell,* 133 N.C. App. at 499-500 (recounting experts' descriptions of how conversion factor was derived). As a thing that was derived by scientists using scientific procedures that exists in the real world, the conversion factor can be categorized as nothing other than a scientific fact.

None of the State's arguments are persuasive because none of them take into account the unavoidable truth that the conversion factor is a scientific fact. The State cites the appellate court's statement in *People v. Olsen,* 388 Ill.App.3d 704, 715 (2nd Dist. 2009), that it was within the Illinois State Police's delegated powers to promulgate Section 1.18. (State's br. at 18) However, the issue here

is not whether the Illinois State Police had delegated power to promulgate Section 1286.40. The issue is whether the Illinois State Police's promulgation of Section 1286.40 made it any more or less likely that the defendant's serum alcohol content was 18% greater than his whole blood alcohol content on June 26, 2016. Clearly, it did not. The only evidence that would have made that proposition more likely was expert testimony.

The State claims that it is not unusual for states to use regulations as evidence of a conversion factor between serum alcohol concentration and whole blood alcohol concentration. (State's br. at 19) However, it can only muster authority from three states to support that proposition. (State's br. at 19) *citing Mac Cardwell,* 133 N.C. App. at 499; W. Va. CSR § 64-10-8.2.4 (2022); 17 Cal. Code Regs. § 1220.4(e) (2022). Worse, the authority the State cites does not even support its claim.

In *Mac Cardwell,* the trial judge determined a conversion factor of 1.18 after hearing testimony from two expert witnesses. 133 N.C. App. at 499-500, 506-07. In fact, *Mac Cardwell* demonstrates how the State should go about proving a scientific fact such as a conversion factor. The State should call an expert witness and have them explain the scientific basis for the conversion factor to the jury. *Mac Cardwell* does not support the State's argument that a conversion factor can be proved by a lay witness testifying about an Administrative Code provision.

The defendant discussed the West Virginia provision in his opening brief. (Def.'s br. at 16) W. Va. CSR § 64-10-8.2.4. As he noted there, while West Virginia appears to be the only state other than Illinois to attempt to use legislation or a regulation to declare a single conversion factor between serum alcohol concentration and whole blood alcohol concentration, it chose a different factor

than did Illinois. *See* W. Va. Code St. R. § 64-10-8.2(d) (2021) (providing a conversion factor of 1.16). The fact that two states that sought to legislatively or administratively determine a single conversion factor between serum alcohol concentration and whole blood alcohol concentration chose different factors demonstrates that there simply is not a single conversion factor. Additionally, the State does not cite, and the defendant's research has not revealed, a single case in which a criminal court in West Virginia used lay witness testimony regarding the content of that provision as evidence of a conversion factor.[2]

The California provision cited by the State does not involve converting serum alcohol concentration to whole blood alcohol concentration. 17 Cal. CCR § 1220.4(e) (2022). Rather, that provision involves a converting a defendant's urine alcohol concentration to blood alcohol concentration. 17 Cal. CCR § 1220.4(e). Additionally, as was the case with the West Virginia provision above, the State does not cite and the defendant cannot locate any case in which a court in California used judicial notice of or lay witness testimony regarding that provision as proof of the conversion factor.[3]

Like the appellate majority below, the State argues that the defendant did

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[2] The closest the defendant can find is *Frazier v. Corley,* 2020 WL 1493971, an unpublished civil case in which the court approved of the West Virginia Office of Administrative Proceedings taking judicial notice of the provision when revoking the respondent's driver's license.

[3] Indeed, California appears to have eliminated the need for the conversion factors set forth in 17 Cal. CCR § 1220.4 by providing equivalent breath alcohol concentrations in its driving while under the influence statute. *See People v. Ireland,* 33 Cal.App.4th 680, 689-90 (Cal. App. 1995) (discussing the California legislature's amendment of the driving under the influence statute after "[t]he conversion requirement produced attacks on the reliability of the partition ratio.")

not present any evidence of an alternative conversion factor. (State's br. at 19-20); *People v. Heineman,* 2021 IL App (2d) 190689, §§ 71-72. This argument fails to account for the burden of proof in criminal cases. The State bore the burden to prove a conversion factor with competent evidence. *People v. Thoman,* 328 Ill.App.3d 1216, 1218 (3rd Dist. 2002). When the State failed to do that, the defendant was under no obligation to present any evidence establishing a conversion factor whatsoever.

In the same paragraph, the State references expert testimony that was recounted in a previous appellate court opinion to suggest that the defendant in this case's whole blood alcohol concentration would have been above .08 g/dl regardless of the conversion factor that was used. (State's br. at 19-20, *citing People v. Luth,* 335 Ill.App.3d 175, 177 (4th Dist. 2002)). This argument is irrelevant. The expert testimony taken in that previous case is not evidence in this case. *See Thoman,* 328 Ill.App.3d at 1220 (rejecting State's argument that any error in failing to prove a conversion factor harmless because defendant's serum alcohol concentration of .306 g/dl would have converted to a whole blood alcohol concentration greater than ,08 g/l using any conversion factor testified to in previous cases). The State cannot rely on evidence recounted in other appellate court cases to prove the defendant guilty of the offenses charged in this case. *Thoman,* 328 Ill.App.3d at 1220.

The State next accuses the defendant of arguing that Section1286.40 creates an unconstitutional mandatory presumption. (State's br. at 20-21) The State does not express an opinion on whether Section 1286.40 creates a presumption or not, but argues that if it does, it creates a discretionary presumption. (State's br. at

20-21) The State misstates the defendant's position. (Def.'s br. at 16-19)

The relevant portion of the defendant's argument was written in response to the appellate court majority's holding that Section 1286.40 had the "force and effect of the law." (Def.'s br. at 16) *quoting Heineman,* 2021 IL App (2d) 190689, ¶ 76. The defendant argued that *if* Section 1286.40 had the "force and effect of the law," then "that 'law' must be a discretionary presumption." (Def.'s br. at 19) He pointed out that a discretionary presumption should be communicated to the jury through a jury instruction, and not judicial notice or lay witness testimony. (Def.'s br. at 19)

Because the State misinterprets the defendant's argument, its response is meaningless. The question is not whether Section 1286.40 created a mandatory or discretionary presumption. The question is: *if* 1286.40 created a discretionary presumption, should the judge communicate that presumption through lay witness testimony by a State's witness? As the defendant explained in his opening brief, the answer is no. As the State spends its time arguing that any presumption created by Section 1286.40 would be discretionary, it offers no argument in response. (State's br. at 21).

The State next argues that Fisher's lay testimony concerning Section 1286.40 was properly admitted as evidence of a "public regulation that governed his investigation of defendant's conduct." (State's br. at 23) Here, the State attempts to obfuscate the reason it introduced Fisher's testimony. In every case the State cites, there was an issue concerning whether a party or witness had complied with a regulation. *See People v. Ebert,* 401 Ill.App.3d 958, 961 (2nd Dist. 2010) (issue was whether officer had administered breathalyzer in accordance with regulation;

testimony was taken at hearing on motion in limine); *People v. Hall,* 2011 IL App (2d) 100262, ¶ 7 (issue was whether officer had drawn defendant's blood in accordance with regulation; testimony was taken at hearing on pre-trial motion to bar blood analysis results); *Langenbau v. Med-Trans Corp.* 167 F.Supp. 3d 983, 1006 (N.D. Iowa 2016) (trial judge's evidentiary ruling in a federal civil case concerning whether party complied with relevant regulations); *Houston Acquarium, Inc. v. OSHRC,* 965 F.3d 433, 438-39 (5th Cir. 2020) (regulatory compliance officer can testify during regulatory commission hearing that certain practices he observed violated relevant regulations).

There was no issue in this case regarding whether Fisher complied with Section 1286.40. Indeed, it is not clear at all how anything Fisher did or did not do in his investigation could possibly comply with or violate that Section. The State did not introduce Fisher's testimony concerning the content of 1286.40 to prove Fisher complied with it. The State introduced that testimony to prove to the jury that 1.18 was the correct conversion factor between serum alcohol concentration and whole blood alcohol concentration. The State does not, and cannot, argue that the existence of Section 1.18 made it any more or less likely that this defendant's serum alcohol concentration was 18% greater than his whole blood alcohol concentration. Fisher's testimony was incompetent.

The State next attempts to analogize Fisher's testimony to previous cases in which courts took judicial notice of certain scientific principles. (State's br. at 24-25) The cases on which the State relies show the proper way for a court to take judicial notice of a scientific fact, and, by contrast, the ways in which Fisher's testimony fell short. Of particular note is *People v. Abdallah,* 82 Ill.App.3d 312

(1st Dist. 1967). *Abdallah* held that a court could take judicial notice of the fact that the Doppler principle was a universally accepted concept in the scientific community. 82 Ill.App.2d at 315-16. To reach that holding, the court relied on a law review article and three cases from other jurisdictions. 82 Ill.App.2d at 315-16. The cases from other jurisdictions, in turn, discussed the then-100-year-history of human observation and use of the Doppler effect, first to determine "the speed of stars," and later, of terrestrial objects, citing even more learned treatises and out-of-state authority. *City of East Cleveland v. Ferell,* 154 N.E.2d 630 (Ohio 1958); *State v. Dantonio,* 115 A.2d. 35 (NJ 1955); *People v. Magri,* 147 N.E.2d 728 (N.Y. App. 1958). Importantly, the fact of which *Abdallah,* all of the cases cited therein, and all of the cases cited in those cases, took judicial notice was that the accuracy of the Doppler effect in measuring the speed of objects was *generally accepted by the scientific community*. 82 Ill.App.2d at 315-16. The court in *Abdallah* did not take judicial notice that a statute or regulation had decreed the Doppler effect to be accurate, nor did it hear lay witness testimony that any such statute or regulation existed.

The remaining cases cited in the paragraph with *Abdallah* add nothing relevant to its analysis. *People v. Donoho,* 54 Ill.App.3d 375, 377-78 (5th Dist. 1977), simply applied *Abdallah*'s holding to an updated speed measuring device that used the Doppler effect. *People v. Harrison,* 26 Ill.2d 377, 380 (1962), *People v. Vasquez,* 180 Ill.App.3d 270, 277 (1st Dist. 1989), and *People v. $1,002.00 U.S. Currency,* 213 Ill.App.3d 899, 902-04 (4th Dist. 1991), all held that chemical field tests for narcotics were admissible, without any analysis relevant to the issue in this case. Finally, *People v. Buening,* 229 Ill.App.3d 538 (5th Dist. 1992), was

overruled by this Court in *People v. McKown,* 226 Ill.2d 245, 259 (2007), which held that the Horizontal Gaze Nystagmus test at issue there was a novel scientific methodology that could not be admitted without a hearing pursuant to *Frye v. United States,* 293 F.3d 1013 (D.C. Cir. 1923).

Taken together the State's cases, to the extent that they provide any relevant analysis at all, stand only for the proposition that a trial judge can take judicial notice of a scientific fact that enjoys general acceptance within the scientific community. The judge in this case did not take judicial notice that any conversion factor between serum alcohol content and whole blood alcohol content was generally accepted by the scientific community. In fact, the judge in this case did not take judicial notice of anything. Instead, the State elected to try to prove the conversion factor by introducing lay witness testimony concerning the content of an Administrative Code provision. (R. 1030-35) None of the cases cited in the State's argument support that process.

The State next claims that the defendant "concedes" that the trial judge could have taken judicial notice of Section 1286.40. (State's br. at 25) This is a baffling claim. The defendant absolutely does not concede that the State could have proved the conversion factor by having the judge take judicial notice of Section 1286.40. (*See* Def.'s br. at 19) ("Taking judicial notice of the fact that Section 1286.40 exists is not the proper method of informing the jury of the law.")

The State follows its false assertion with more citations to cases in which courts took judicial notice of scientific facts that enjoyed general acceptance in the scientific community. *See People v. Luna,* 2013 IL App (1st) 07253, ¶ 68 (taking judicial notice that ACE-V fingerprint matching methodology is generally accepted,

based on previous court decisions from numerous jurisdictions and noting the complete absence of contrary precedent); *People v. Cash,* 103 Ill.App.2d 20, 22 (5th Dist. 1968) (following *Abdallah*'s holding with respect to Doppler-based devices). None of those cases support the use of judicial notice of an Administrative Code provision, much less lay witness testimony concerning an Administrative Code provision, as proof of a scientific fact.

The State next argues that Fisher's testimony was not hearsay, but instead was admissible as evidence of his lay opinion concerning the conversion factor. (State's br. at 26-27) Again, the State attempts to obfuscate the reason it introduced Fisher's testimony. The State did not introduce Fisher's testimony to prove that he believed Section 1286.40 said the conversion factor between serum alcohol concentration and whole blood alcohol concentration was 1.18. It introduced Fisher's testimony to prove that the conversion factor *was* 1.18. The State was trying to use Section 1286.40's statement that the conversion factor was 1.18 as proof that the conversion factor was 1.18. In other words, the State admitted Section 1286.40's statement as proof of the matter asserted - that the conversion factor was 1.18. It admitted that statement through Fisher, who was not a drafter of Section 1.18. Fisher's testimony concerned an out-of-court statement by a third party, and it was admitted to prove the truth of the matter asserted by that third party. It was hearsay. IL ST Evid. Rule 801(c) (2016); *People v. Carpenter,* 28 Ill.2d 116, 121 (1963).

The State cites the appellate court majority's opinion in this case and two unpublished federal trial court orders for the proposition that statutes and regulations "are not hearsay." (State's br. at 28) There is nothing inherent in a

statute or regulation that makes it not hearsay. The reason statutes and regulations usually are not hearsay is that parties usually do not try to use the text of statutes or regulations to prove real world facts. In this case, the State attempted to prove the existence of a real world fact - the conversion factor between serum alcohol concentration and whole blood alcohol concentration - by having Fisher testify to the text of Section 1286.40. (R. 1030-35) That is hearsay, regardless of whether statutes or regulations are hearsay in other contexts.

In sum, Fisher's testimony was incompetent. Section 1286.40 saying that the conversion factor was 1.18 was not proof that the conversion factor was 1.18. Fisher believing that Section 1.18 said the conversion factor was 1.18 did not prove it either. The State failed to introduce any competent evidence from which the jury could find a conversion factor.

B. The State failed to prove the defendant guilty beyond a reasonable doubt of aggravated driving under the influence as charged in Count I.

As the defendant discussed in his opening brief, the State's failure to introduce any competent evidence of a conversion factor led to its failure to prove the defendant guilty of driving while his blood alcohol concentration was greater than .08 g/dl (Count I). (Def.'s br. at 19-22) Most of the State's response is premised on the notion that Fisher's testimony proved such a conversion factor. (State's br. at 28-30) The defendant rests on the discussions in his opening brief and above with respect to that point.

The State also argues that under *People v. Drake,* 2019 IL 123724, ¶ 21, this Court should consider Fisher's testimony when deciding whether the defendant was proved guilty beyond a reasonable doubt, even if it finds the testimony to

be incompetent. (State's br. at 34-35) As the defendant explained in his opening brief, the problem with that argument is that Fisher's testimony was incompetent. (Def.'s br. at 22) It did not prove the existence of a conversion factor. This Court can consider Fisher's testimony, but it must conclude that the testimony was insufficient to sustain the defendant's conviction of driving while his blood alcohol content was greater than .08 g/dl. This Court should reverse the defendant's conviction of Count I outright.

C. The erroneous introduction of Fisher's incompetent hearsay testimony requires a new trial on Count II.

The defendant argued in his opening brief that the erroneous admission of Fisher's incompetent testimony warranted a new trial on his charge of driving while under the influence of alcohol (Count II), because the evidence of his being under the influence was closely balanced and because the judge instructed the jury pursuant to IPI Criminal 23.30 that it could presume the defendant was intoxicated based on his blood alcohol concentration being over .08 g/dl. (Def.'s br. at 22-24) Concerning the weight of the evidence, the State recites the same evidence the defendant argued was closely balanced and argues that it was overwhelming. (State's br. at 30-34) The defendant rests on the discussion in his opening brief on that point.

Concerning the presumption contained in IPI 23.30, the State claims in a footnote that "this Court can infer the presumption played no role in the jury's finding of guilt on Count II," because the defendant's "blood serum alcohol concentration was nearly double the legal limit." (State's br. at 33 fn. 3) This argument makes no sense. The defendant's serum alcohol concentration cannot be "nearly double the legal limit" because there is no legal limit on serum alcohol

concentration. *Thoman,* 329 Ill.App.3d at 1218. The defendant's serum alcohol concentration was meaningless without competent evidence of a conversion factor.

In fact, what the State asks this Court to do in its footnote is exactly what the defendant argued the jury might do as a result of hearing Fisher's incompetent testimony and being instructed pursuant to IPI 23.30. The State asks this Court to presume the defendant was intoxicated based on his serum alcohol concentration after it failed to present any competent evidence of the defendant's whole blood alcohol concentration. That is the prejudice caused by the erroneous admission of Fisher's incompetent testimony.

Worse, IPI 23.30 does not distinguish between serum alcohol content and while blood alcohol content. (C. 363) The instruction tells the jury it can presume intoxication if the "amount of alcohol concentration in the defendant's blood or breath was .08 or more." (C. 363) Thus, even if the jury in this case understood that Fisher's testimony was incompetent and it had heard no real evidence of the defendant's whole blood alcohol content, the plain language of IPI 23.30 still allowed the jury to presume the defendant's intoxication based on his serum alcohol content.

The judge instructed the jury pursuant to IPI 23.30 because she allowed Fisher's incompetent testimony. Any confusion or inappropriate presumptions that followed was part of the prejudice caused by the incompetent testimony. The admission of Fisher's testimony was not harmless error with respect to Count II. This Court should remand Count II for a new trial.

D. In the event that this Court affirms the defendant's convictions, it should also affirm the appellate court's order vacating the defendant's sentence and remanding the cause for new post-trial proceedings.

Though the appellate court majority affirmed the defendant's convictions,

it also held that the trial judge abused her discretion when she denied the defendant's post-trial motion to substitute counsel. *Heineman,* 2021 IL App (2d) 190689, ¶ 84. The court vacated the defendant's sentence and remanded the cause for new post-trial proceedings. 2021 IL App (2d) ¶ 95. Neither party has asked this Court to review that holding. In the event that this Court affirms the defendant's convictions, it should also affirm the rest of the appellate court's holding, and should remand the cause for new post-trial proceedings.

CONCLUSION

The State failed to prove the defendant guilty of Count I and deprived him of a fair trial on Count II when it relied on incompetent hearsay evidence to establish a conversion factor between his serum alcohol concentration and whole blood alcohol concentration. The defendant respectfully requests that this Honorable Court reverse his convictions of both counts and remand the cause for a new trial on Count II. However, in the event that this Court affirms the defendant's convictions, it should also affirm the appellate court's order vacating the defendant's sentence and remanding the cause for new post-trial proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service, is 15 pages.

/s/Fletcher P. Hamill
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IN THE

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NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On July 20, 2022, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Elgin, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

/s/Kimberly Maloney
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